



## Clean Water Act Section 404 “Assumption”

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Section 404 of the Federal Clean Water Act (CWA) regulates the discharge of dredged or fill material into waters of the United States, including wetlands. Regulated activities include, but are not limited to, placement of fill for commercial and private development, water resource projects such as dams and levees, infrastructure development, and mining projects. The regulatory program:

- Requires avoidance and minimization of impacts, and compensation for unavoidable impacts.
- Establishes a permitting process for the authorization of impacts.
- Provides exemptions for certain farming and forestry activities.
- Is administered, implemented and enforced by the US. Army Corps of Engineers, with oversight and additional enforcement by the Environmental Protection Agency (EPA).

### What is “404 Assumption?”

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Under Section 404(g) of the CWA, a state may apply to the EPA to administer a state water and wetland regulatory program that meets Section 404 requirements, eliminating the need for separate, federally issued permits for projects affecting those waters covered by the state’s assumed program.

- States must implement water and wetland protection measures that are at least as protective as those of the federal Clean Water Act.
- The US Army Corps of Engineers (USACE) retains authority over certain navigable waters and a portion of their adjacent wetlands.

Two states, Michigan and New Jersey, are successfully implementing state-assumed programs.

### Reasons for State Pursuit of 404 Assumption

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Factors that may generate interest in 404 Assumption include:

- Improved permitting timelines as a result of decreased regulatory redundancy, streamlined processes, and administration by more responsive regulatory authorities (State\Local vs. Federal).
- Reduced costs for permit applicants resulting from more efficient and timely processes.
- Improved resource management and regulatory consistency through seamless integration with other state programs and availability of local expertise.

### Role of the Federal Government

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Under an assumed program, the primary role of the federal government is to provide oversight.

- EPA will review certain permit applications to ensure consistency with federal standards.
- The state must regularly report on program implementation to the EPA.

- Any substantive changes to state statutes and regulations must be reviewed by EPA for consistency with CWA Section 404 guidelines.
- The U.S. Army Corps of Engineers would no longer have authority over state-assumed waters.

## Is 404 Assumption a Viable Option for Minnesota?

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Minnesota is well equipped to implement federal 404 requirements through its existing, comprehensive, and mature state water/wetland regulatory programs, including the:

- Wetland Conservation Act (WCA), administered by the Board of Water and Soil Resources (BWSR) with implementation through local governments.
- Public Waters Permit Program (PWPP) and Permits to Mine administered by the Department of Natural Resources (DNR).
- State water quality standards administered by the Pollution Control Agency (PCA).

Some regulatory or procedural modifications may be required for an existing state regulatory program to meet the requirements for 404 Assumption. Areas of state law that may require review include possible gaps in regulatory authority, the extent of local government authority in Wetland Conservation Act (WCA) implementation, and procedural considerations.

## Minnesota Progress Toward 404 Assumption

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Progress to date toward potential 404 Assumption includes the following milestones:

- Completion of a comprehensive analysis of 404 assumption, published on January 17, 2017 as the “Minnesota Federal Clean Water Act Section 404 Permit Program Feasibility Study,” an interagency report from BWSR, DNR, and the PCA.
- Completion of the “Analysis of Retained and Assumable Waters in Minnesota” on May 3, 2018.
- 2019 Legislative funding directing the state to pursue 404 Assumption.
- Receipt of a grant from EPA to fund development of the state’s application.
- Hired a program coordinator responsible for developing the state’s 404 Assumption application.
- Ongoing coordination with the EPA for development of the state’s 404 Assumption application.

## What are the Components of a 404 Assumption Application?

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Developing the 404 Assumption application package is a substantial undertaking that requires considerable coordination with the EPA and approximately two years or more to complete. The package must include:

- Complete description of the state’s regulatory program(s).
- A statement from the Attorney General that the laws and regulations of the state provide adequate authority to carry out the program.
- Memorandums of Agreement with the EPA Regional Administrator and Secretary of the Army.
- Copies of all applicable state statutes and regulations.
- Letter from the Governor requesting program approval.

A complete application will allow for an informed decision by agency leadership and elected officials on whether to move forward with 404 Assumption. More info at: <https://bwsr.state.mn.us/404-assumption>