Minnesota Section 404 Assumption Feasibility Study

Plan of Study

Final: 5-23-2016

A law was enacted in 2015 requiring the Board of Water and Soil Resources (BWSR) and the Department of Natural Resources (DNR) to study the feasibility of the state assuming the federal Clean Water Act (CWA) Section 404 permitting program (Minnesota Laws 2015 1st Special Session, Chapter 4, Article 4, Section 137). The feasibility study law clearly identifies the elements to be included in the study and also directs the BWSR and the DNR to involve stakeholders in developing the Plan of Study. The Minnesota Pollution Control Agency (MPCA) is being included as a partner in the feasibility study because it has significant regulatory authority over the state's waters. The state agencies have consulted with stakeholders, as well as with the U.S. Environmental Protection Agency (USEPA) and the U.S. Army Corps of Engineers (COE) to develop this Plan of Study and will continue consultation throughout the assumption feasibility study. This Plan of Study elaborates on the study topics identified in the feasibility study law and describes how they will be addressed in the final assumption feasibility study report.

Section 404 Assumption Feasibility Study Elements (Target date for review draft)

A. Introduction and Background (May 2016)

The study report will describe the general concept of state assumption of the Section 404 Program, whereby state water/wetland regulatory programs operate in-lieu-of the federal regulations and federal agency administration of those regulations. In Minnesota's case, the applicable state regulatory programs are the Minnesota Wetland Conservation Act administered by the BWSR, the Public Waters Permit Program administered by the DNR, and to some extent, state water quality rules administered by the MPCA. The report will include information on previous Minnesota evaluations of Section 404 assumption and will describe factors leading to the current feasibility study, along with the interests, goals and concerns expressed by stakeholders.

B. Study elements required by the feasibility study law:

(1) the federal requirements for state assumption of the 404 program; (June 2016, except for discussion of treatment of Indian lands – August 2016)

The federal requirements for state assumption are described in the Code of Federal Regulations (CFR), Part 233, which will be included as an appendix to the study report. The study report will highlight certain federal requirements that are of particular significance to potential Minnesota assumption. These include:

- Comprehensive jurisdiction and regulation – States assuming the Section 404 Program must have regulatory jurisdiction over all waters that would be regulated under the CWA, must regulate all activities that fall under CWA Section 404 regulation (i.e., "partial assumption" is not allowed), and the state regulatory program must be at least as "stringent" as the federal program.

- State agency administration – The federal requirements for state assumption are based on administration of the state regulations by state-level agencies. This has implications for Minnesota because the Wetland Conservation Act is administered by local governments with BWSR oversight (see study element 5).
- Indian lands – States do not assume Section 404 administration on Indian lands. Also, Tribes that qualify for "Treatment as a State" under the CWA have certain authorities and consultation rights regarding off-reservation projects. The report will address the extent of Indian lands in Minnesota that would not be covered if the Section 404 Program is assumed and will also address State - Tribal consultation procedures that may need to be implemented. It will also address the impact of 404 assumption on the current notification/comment process under CWA Section 401(a)(2) whereby Tribes (or downstream States) work with USEPA and the Corps of Engineers to ensure that proposed projects do not violate their water quality standards.
- Application process for state assumption – The report will describe process for applying to the USEPA for assumption, the required components of the application and the parties responsible for compiling the information.
- Changes to Minnesota laws and rules – Once a state has been approved to assume the Section 404 program, any subsequent revisions to applicable state statutes and rules require re-evaluation by the USEPA.
- Federal review of state permits – Under state assumption, the USEPA has responsibility for reviewing permit applications submitted under the applicable state programs and coordinating with other federal agencies (USEPA may waive their review requirement for certain categories of permit applications). The time frame for this federal review has implications for existing state permit time frames (see study element 5).
- Enforcement – States assuming the Section 404 Program must have enforcement procedures and penalties sufficient to ensure compliance with the regulations.

<u>(2) 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; (September 2016)</u>

The study report may not be able to fully address this element in the time frame stipulated by the feasibility study law (January 15, 2017). Federal law and regulations regarding what waters must remain under federal jurisdiction are ambiguous and there currently is no clear guidance from the federal agencies to states. Minnesota currently has over 13 million acres of wetlands, lakes and streams, all of which are potentially regulated under one or more state regulations. Under some interpretations of the federal regulations, the extent of waters in Minnesota that must remain under federal jurisdiction (not eligible for state assumption) is considerable, raising questions about the advantage of state assumption.

To address this issue, the U.S. Environmental Protection Agency (USEPA) has convened an "Assumable Waters Subcommittee" under their standing National Advisory Council for Environmental Policy and

Technology (NACEPT). The NACEPT is a federal advisory committee chartered under the Federal Advisory Committee Act (FACA), Public Law 92–463. Les Lemm, the BWSR Wetlands Section Manager is a member of the Assumable Waters Subcommittee and can help ensure that issues pertinent to Minnesota are considered and that the Subcommittee's recommendations are rapidly communicated. Currently, the Subcommittee expects to have a draft report and recommendations completed by September 2016, after which the USEPA will require time to develop guidance or rules, or possibly seek statutory clarification. It's important to note that the Subcommittee's recommendations are simply that; the USEPA is not obligated to adopt them. The Minnesota assumption feasibility study report will address this topic to the extent possible within the study time frame, recognizing that any uncertainty may also constrain a thorough analysis of study elements 6, 7 and 8.

(3) 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; (June 2016)

The extent of waters subject federal jurisdiction under the CWA is not precisely defined in the law and has been subject to debate since enactment. Responding to two Supreme Court decisions (in 2001 and 2006) pertaining to the Act's jurisdictional reach, the USEPA and the Corps of Engineers jointly released a final regulation in May 2015 to more clearly define "waters of the U.S." covered by the CWA. The regulation generated significant controversy and numerous lawsuits, resulting in a stay in implementation until the legal issues are settled, which will not happen during the assumption feasibility study period. The study report will address this study element based on CWA jurisdiction as implemented by the federal agencies during the study period.

Regardless of the outcome of the federal jurisdiction controversy, the extent of waters regulated under Minnesota law will almost certainly be more extensive than federal jurisdiction in Minnesota. (Although there may be exceptions; e.g., headwater stream areas not covered under the Minnesota Public Waters Permit Program.) Since nearly all waters in the state are already regulated under state laws, the extent of federal jurisdiction is not likely to be a critical factor in the addressing the feasibility of assuming the Section 404 program. Nonetheless, the study will examine any potential delays, costs, or complications that may affect the feasibility for state assumption related to the ongoing uncertainty over federal jurisdiction. The study will address the likelihood that state assumption will either require the state to make jurisdictional determinations that are currently made by the Corps or may cover more waters, resulting in 404 authorizations being issued for waters that currently do not receive or require such authorization and the implications for which permit applications will require coordination with USEPA if the state were to assume the program.

(4) 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; (June 2016)

The federal regulations for state assumption of the Section 404 program require that the state regulatory program(s) be at least as "stringent" as federal requirements. The study report will address those aspects of Minnesota state laws and rules relating to protection of aquatic resources, compared to federal requirements. This will include permit sequencing requirements (avoid, minimize, replace impacts), compensatory mitigation requirements (timing, location, amount and characteristics relative to permitted impacts), mitigation performance standards and monitoring, and protection of special natural resource elements such as threatened and endangered species, high quality native plant communities, cultural resources and others. The study report will also describe the findings of published studies on the relative effectiveness of state wetland regulatory programs, the Section 404 program and combined state-federal regulation on protecting aquatic resources.

(5) 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; (July 2016)

The study report will clearly identify any changes in Minnesota state law or rule known to be needed to obtain USEPA approval of state assumption. Discussion with USEPA staff has already identified a few aspects of current state programs that are inconsistent with federal requirements for assumption. This includes the regulatory structure of the Wetland Conservation Act (permit decisions made by local governments rather than a state agency), permit application noticing and decision time frames, and certain Wetland Conservation Act exemptions. The study report will elaborate on these and other topics, and will, at minimum identify all corrective actions that are likely to be needed to successfully pursue Section 404 program assumption. The report may also identify additional modifications to the state regulatory framework that may be more efficient under a Section 404 assumption scenario, including addressing aspects of existing coordination between the Corps and the Natural Resources Conservation Service on agricultural wetlands that may fall under both the Section 404 Program and Swampbuster provisions of the farm bill.

(6) 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; (August 2016)

This element will be addressed based on a thorough analysis of the federal requirements for assumption and taking into account any identified changes needed to Minnesota state programs (study element no. 5). We will also consult with staff from other states that have assumed the Section 404 program (Michigan and New Jersey) for their experiences in this regard.

(7) the estimated costs and savings that would accrue to affected units of government; (September 2016)

The BWSR has contracted with an economist (Steve Taff) to assist with analyzing the financial consequences of state assumption. This analysis will take into account any changes to Minnesota state programs necessary to assume the Section 404 program and associated changes or shifts in staffing

(study elements nos. 5 and 6). The study report may also address the financial consequences of assumption to permit applicants related to potentially fewer separate regulatory approvals needed and potential changes in permit approval time frames (study element no. 8).

(8) the effect on application review and approval processes and time frames; (July 2016)

Under state assumption of the Section 404 program, permit applications must be forwarded to the USEPA for review and coordination with other federal agencies, unless USEPA waives review. It's certain that USEPA will retain their ability to review certain categories of permit applications (to be determined via a State of Minnesota/USEPA Memorandum of Agreement), as they have done in other states that have assumed the program. It's known that the timeframes for permit review and decisions under the Wetland Conservation Act conflict with the federally-prescribed timeframes for EPA review. The study report will 1) describe the existing laws, rules, guidelines and goals governing state (WCA/Public Waters Program) and federal permitting timeframes; 2) collect and analyze data on actual state and federal permitting timeframes in Minnesota, and 3) address the potential effect of assumption on application review/approval processes and time frames compared to current conditions, including permit categories where USEPA retains review authority and permit categories for which they waive their review. The report will also address implications of assumption for existing Corps general permits and letters of permission categories, as well as the procedures and coordination processes for state-issued general permits under an assumption scenario.

(9) alternatives to assumption that would also achieve the goals of regulatory simplification, efficiency, and reduced permitting times; (July 2016)

Stakeholders for the assumption feasibility study have clearly communicated their desired goals of improving permitting efficiency and reducing permitting times while achieving the environmental protection objectives of the respective regulatory programs. The feasibility study will identify and describe alternatives to state assumption that would help achieve those goals. These include:

- Programmatic general permits that could be issued by the St. Paul District, Corps of Engineers, where Section 404 authorization is granted based on issuance of a state permit;
- Additional streamlined Section 404 authorizations through Nationwide Permits and/or Regional General Permits;
- Further application of the Wetland Conservation Act federal approvals exemption, where projects would be exempt from WCA if they obtain a Section 404 authorization;
- Developing Special Area Management Plans (SAMP) for specified areas under Section 404 or Local Comprehensive Wetland Protection and Management Plans under the WCA. Under these types of plans, categories of allowable and restricted wetland impacts, consistent with state and federal requirements, can be identified in advance of actual projects, allowing for streamlined approvals at the time of permitting;

- Better federal-state coordination on permitting procedures, policies and guidance, including improved guidance and pre-application consultation for permit applicants so that submitted applications can be readily processed;
- Hiring additional project managers at the Corps of Engineers having sector-specific responsibilities and expertise (e.g., mining, transportation), including the possibility that the additional positions may be funded by those sectors.

The report will describe previous and ongoing efforts between Minnesota state agencies and the Corps of Engineers to coordinate state-federal permitting.

<u>(10) options for financing any additional costs of implementation; (July 2016)</u>
The study report will investigate and report on options for funding increases that may be required as a result of state assumption, such as permit fees, legislative appropriations and re-allocation of existing regulatory program funding.

<u>(11) other information as determined by the board and commissioner. (September 2016)</u>
Minnesota state agency staff conducting the assumption feasibility study plan to contact the state regulatory agencies and permit applicants from Michigan and New Jersey to evaluate and report on their experiences with state assumption of the Section 404 program. The study report will also report on experiences of other states that have investigated 404 assumption and elected not to pursue it.

The report will also discuss performance measures for permitting timeliness and achieving programmatic environmental objectives and *may* propose ways to objectively measure these parameters

While not required by the authorizing law, the DNR, BWSR and the Minnesota Pollution Control Agency may elect to attach to the study agency recommendations for action, based on the study findings and their considerable experience with state water/wetland permitting and long-running coordination with the Corps of Engineers. The recommendations, if submitted, may be joint recommendations, or provided separately by each agency.