

# State of Minnesota Section 404 Assumption Feasibility Study

Minnesota Laws 2015 Special Session  
Chapter 4, Section 137

“The Board of Water and Soil Resources and the commissioner of natural resources shall study the feasibility of the state assuming administration of the section 404 permit program of the federal Clean Water Act.”



**Minnesota Pollution Control Agency**

# Study Process

- Project management team
- Stakeholders
  - Core Feasibility Study Group
  - General stakeholder contacts
- BWSR Board/DNR Commissioner's Office
- Timeline – Due January 15, 2017

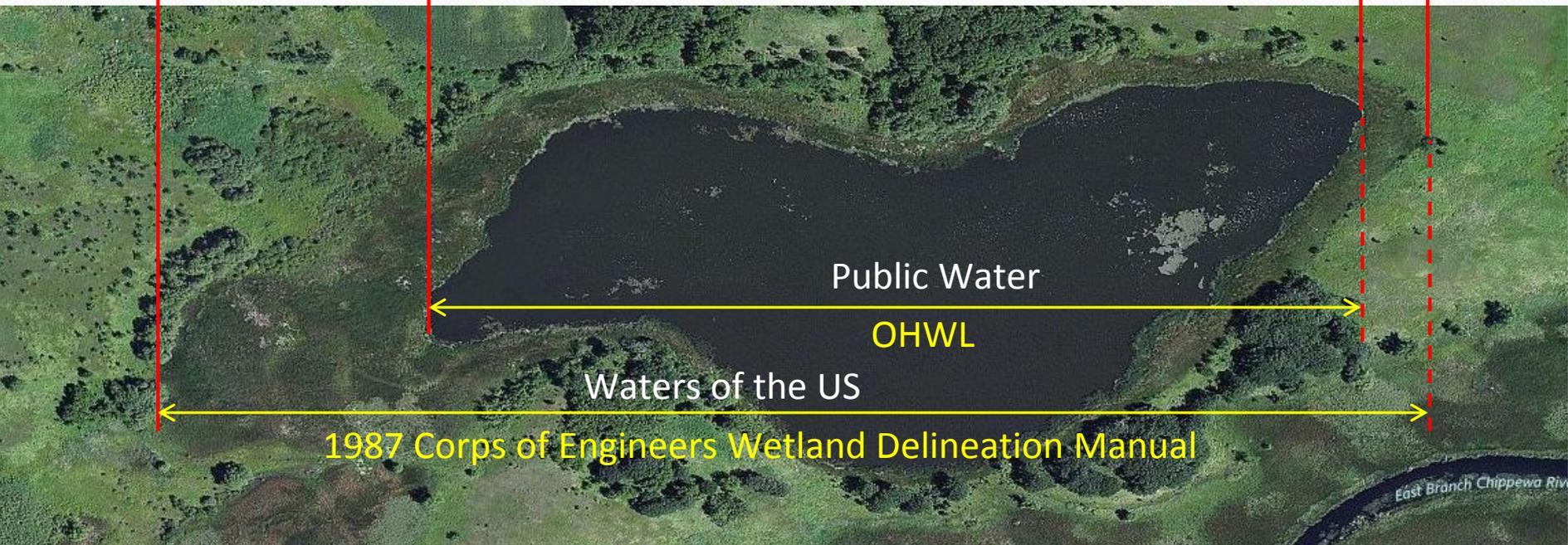
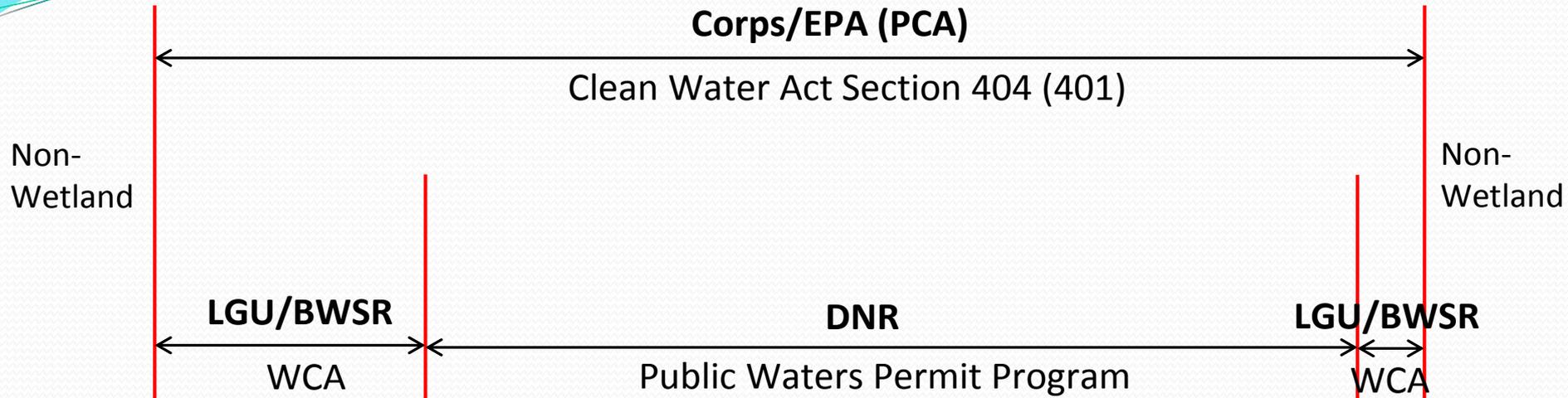


# Today's Program

- Review current program jurisdiction
- Review study requirements per authorizing law
- Present other states' experiences with assumption
- Stakeholder input



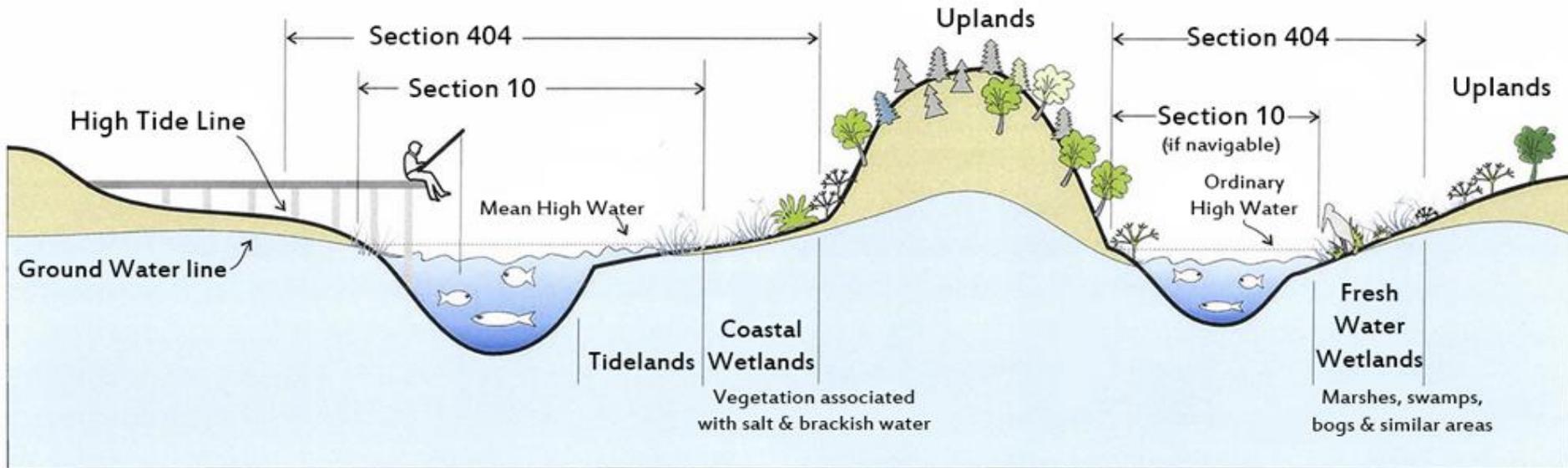
# Current Jurisdiction...



# Corps of Engineers Regulatory Jurisdiction

## Tidal Waters

## Fresh Waters



Typical examples of regulated activities

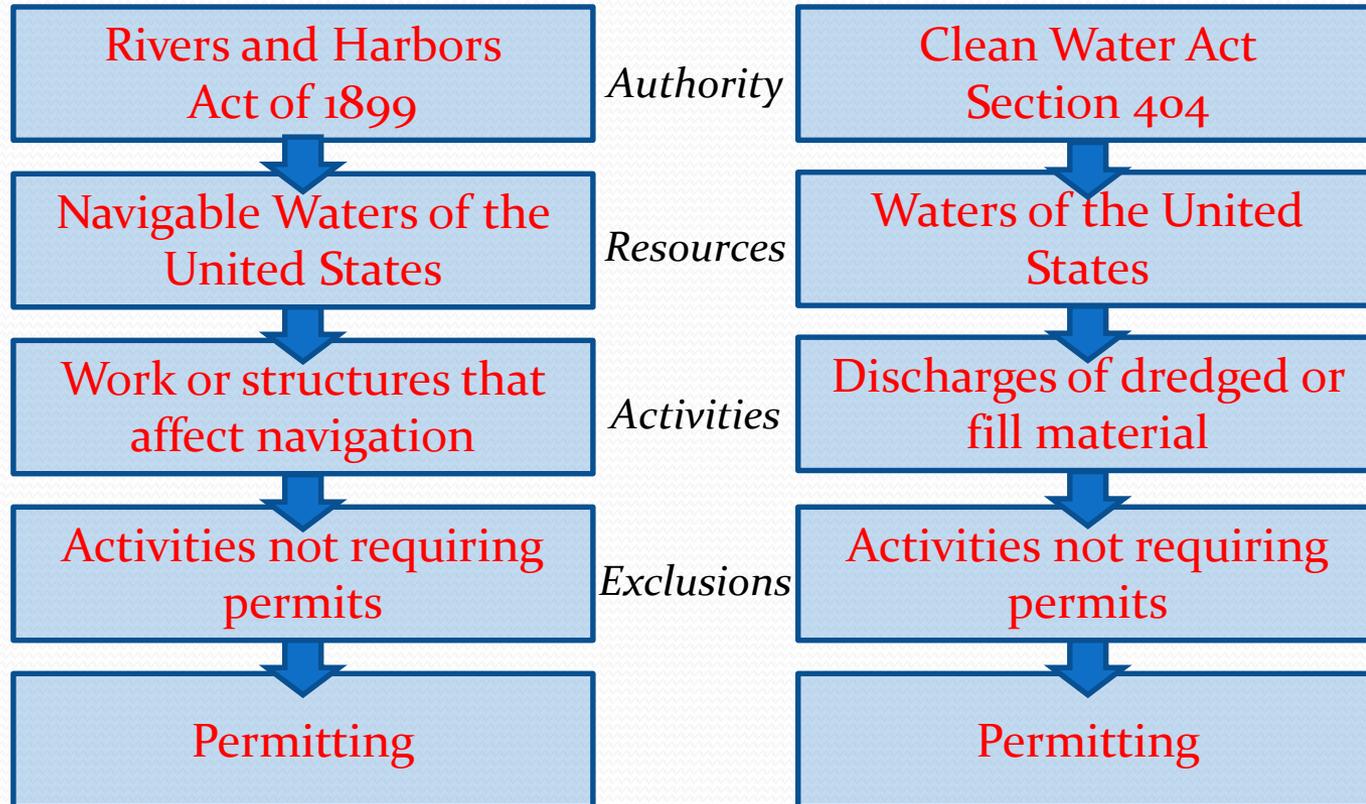
**Section 103**  
 Ocean Discharge of Dredged Material  
 Ocean discharges of dredged material.

**Section 404**  
 Disposal of Dredged or Fill Material  
 All filling activities, utility lines, outfall structures, beach nourishment, riprap, jetties, some excavation activities, etc.

**Section 10**  
 All Structures and Work (navigable waters)  
 Dredging, marinas, piers, wharves, floats, intake/outtake pipes, pilings, bulkheads, ramps, fills, overhead transmission lines, etc.

# The Program Pillars

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NAVIGABLE WATERS  
OF THE UNITED STATES IN  
MINNESOTA

BIG FORK RIVER  
Navigable throughout  
includes:  
Dora Lake (source)

BIG STONE LAKE  
Navigable throughout

BOIS DE SIOUX RIVER  
Navigable throughout

INTERNATIONAL BOUNDARY

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Morms Lake  
Marabou Lake  
Saganaga Lake  
James Bay  
Sea Gull River  
Red Rock Bay  
Red Rock Lake  
Swamp Lake  
Cypress Lake  
Mud Bay  
Knife Lake  
South Arm Knife Lake  
Toe Lake  
Portage Lake  
Knife River  
Seed Lake  
Melon Lake

Carp Lake  
Birch Lake  
Sucker Lake  
Newfound Lake  
Moore Lake  
Inlet Bay  
Basswood Lake  
Rice Bay  
Wind Bay  
Hout Bay  
Back Bay  
Jackfish Bay

Rollick Creek  
Navigable 1 mile  
upstream  
North West Bay  
King Williams Narrows  
Harrison Narrows  
Stages Bay  
Browns Bay  
Swanons Bay  
Namakan Narrows  
Namakan Lake  
Hammer Bay

Complete list available  
at:

[http://www.mvp.usace.army.mil/Portals/57/docs/regulatory/RegulatoryDocs/mn\\_navigable\\_waters.pdf](http://www.mvp.usace.army.mil/Portals/57/docs/regulatory/RegulatoryDocs/mn_navigable_waters.pdf)

Stump Bay  
Sawtooth Bay  
South Lake  
Loon Lake  
East Loon Lake  
Little Loon Lake  
Little Indian Sioux River  
Navigable 2 miles  
upstream  
Loon River  
Little Vermilion Lake  
Little Vermilion Narrows  
Sand Point Lake  
Crane Lake  
Grassy Bay  
East Bay  
Rollick Bay

Bluffs Bay  
Cedar Bay  
Blue Jay Bay  
Lost Bay  
Elk Bay  
Long Slough  
Loon Lake  
Kohler Bay  
Blind Indian Narrows  
Johnson Bay  
Squaw Narrows  
Mica Bay  
Squirrel Narrows  
Kettle Channel  
Rainy Lake  
Anderson Bay  
Finger Bay

“those waters subject to the ebb and flow of the tide and/or are presently used, or have been used in the past, or may be susceptible for use to transport interstate or foreign commerce”



Rivers and Harbors Act of 1899: Navigable Waters of the United States



Section 404 of the Clean Water Act: Waters of the United States

# Study Elements

## (1) Federal requirements for state assumption

### **40 CFR § 233.1 Purpose and scope.**

(a) This part specifies the procedures EPA will follow, and the criteria EPA will apply, in approving, reviewing, and withdrawing approval of State programs under section 404 of the Act.



United States Environmental Protection Agency

# Study Elements - Federal Requirements

- All discharges (fill) must be regulated (partial assumption not allowed)
- State program must be at least as stringent as federal regulations
  - Questions about WCA structure: implemented by LGUs rather than state agencies
  - Changes to fed regs may require changes to state regs
  - Changes to state regs trigger re-evaluation
- Public notices required for permit applications (including adjacent property owners, newspaper)
  - Can request public hearing
- Enforcement authority: sufficient to ensure compliance, having deterrence and punitive effects

# Study Elements -- Federal Requirements

- Federal review of state permits:
  - Public notices sent to EPA, unless waived (some can't be waived)
  - EPA forwards notices to Corps, FWS
  - 90 day comment period
  - May comment, object or require permit conditions
  - All issued permits sent to EPA (can be waived)
- Annual report to EPA required

# Study Elements – Federal Requirements

- Application for state assumption:
  - Letter from governor
  - State program description
  - Attorney General's statement
  - MOAs with EPA and Corps of Engineers
  - Copies of all applicable state laws and regulations
- Public review/input process
- 120 day decision time frame

# Study Elements - Extent of Assumption

(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;

# Extent of Assumption – Federal Law

## **CWA Section 404(g)(1):**

“The Governor of any State desiring to administer its own individual and general permit program for the discharge of dredged or fill material into the navigable waters (other than 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..., including wetlands adjacent thereto),” may apply to the EPA.

## Extent of Assumption: Non-Assumable Waters

**CWA Section 404(g)(1):** “other than 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”

**CWR Paragraph (a)(1):** “All waters which are currently used, were used in the past, or may be susceptible to use in interstate or foreign commerce...”

# Extent of Assumption: Adjacent Wetlands

So essentially, non-assumable navigable waters are some modification of the Section 10 waters list **and** “*wetlands adjacent thereto.*”

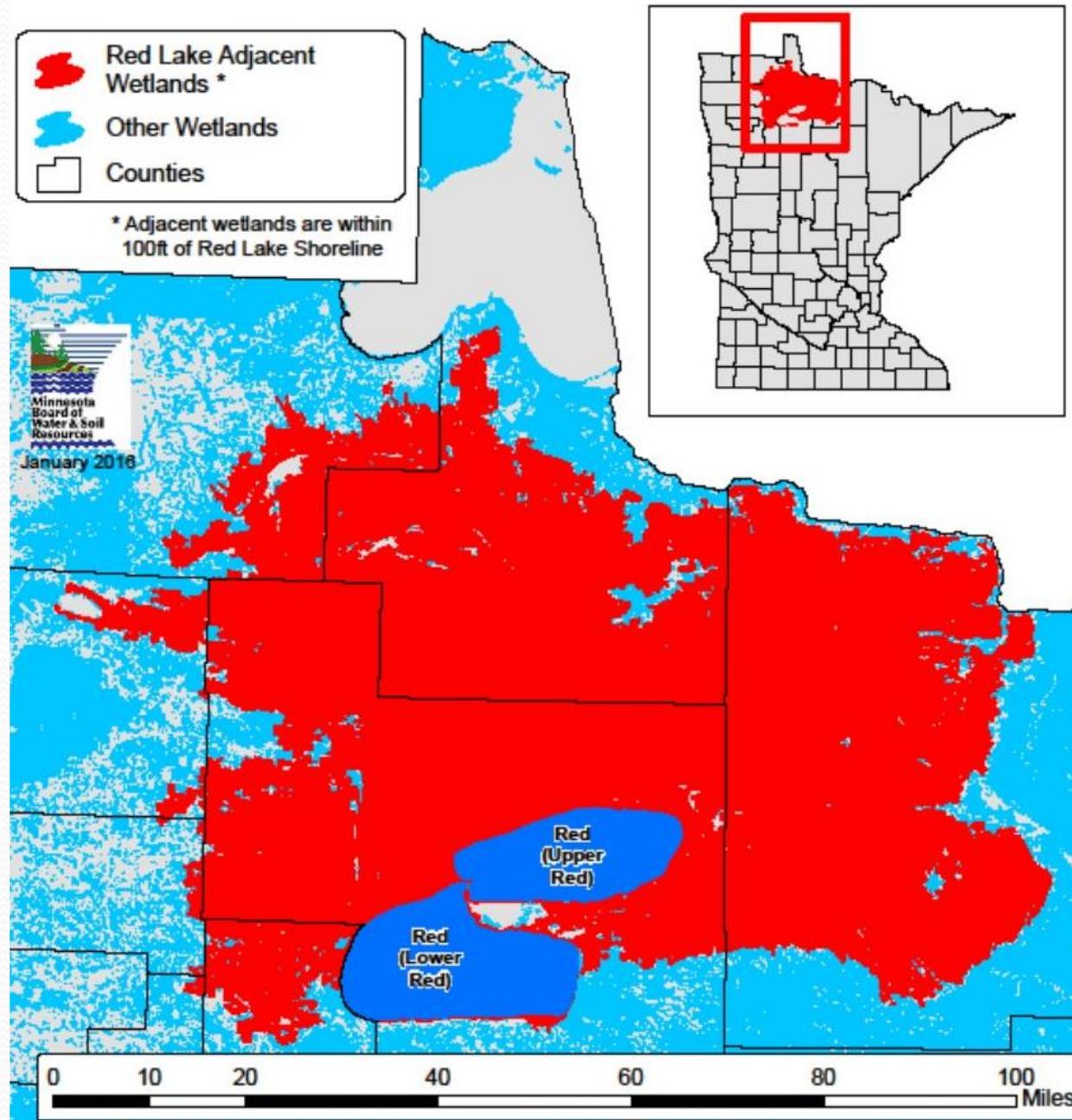
- ❖ What does adjacent mean in the context of program assumption? The same as for determining jurisdiction? Something different?
  - Established through an MOA with the Corps.
  - Inconsistent interpretations between districts.
  - No EPA guidance (yet).

# Upper Red Lake Adjacent Wetlands

## Example of Issues with Adjacency

- Determined by direct connectivity within a 100 foot ring around Red Lake (could have been zero).
- Map show wetlands adjacent to only one non-assumable water.
- Significant implications for states like MN.

*Note: Map based on NWI and may not represent actual Waters of the U.S.*



# Study Elements

## **(3) Differences in waters regulated by state vs. “waters of the U.S.”**

- Minn. Stat. 115.01 defines “waters of the state” very broadly
  - “...all streams, lakes, ponds, marshes, watercourses, waterways, wells, springs, reservoirs, aquifers, irrigation systems, drainage systems and all other bodies or accumulations of water, surface or underground, natural or artificial, public or private, which are contained within, flow through, or border upon the state or any portion thereof”

# Study Elements

## **(4) Measures to ensure protection of aquatic resources**

- “Avoid – minimize – replace” requirements
- Compensatory mitigation requirements
  - Timing, location, quality
- Performance standards and monitoring
- Compliance with state water quality standards?

# Study Elements

## **(5) Changes needed to existing state law (and rules)**

- Current WCA structure? Other models?
- Certain WCA exemptions
- WCA/Public Water Permit notification procedures/timelines
- Water quality standards compliance

# Study Elements

## **(6) New agency responsibilities – staff and resource needs**

- Depends on how much overhaul of existing structure is required

# Study Elements

## **(7) Estimated costs and savings**

- Depends on extent of overhaul
- Considering contracting with economic consultant

# Study Elements

## **(8) Effect on application review process/timelines**

Review existing permitting processes:

- WCA (Les)
- Public Waters (Tom)
- Section 404 (Jill)
- Section 401 (Catherine)

# MN Wetland Conservation Act



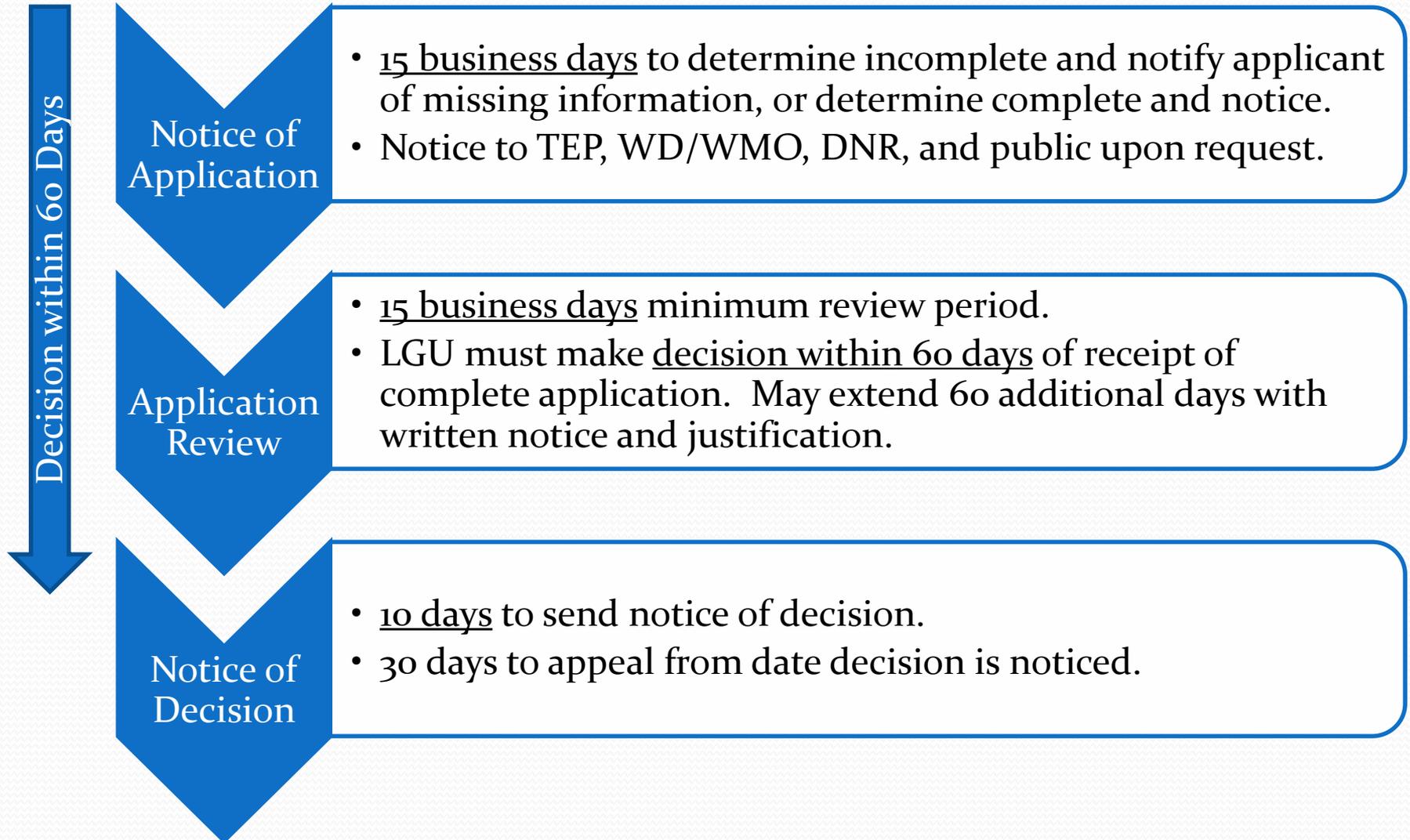
- Les Lemm, BWSR

# WCA Application Process

Application Type	5 Yr. Ave.
Boundary or Type	500
No-Loss	477
Exemption	621
Sequencing	56
Replacement Plan	192
<b>Total:</b>	<b>1,846</b>

- Upward trend (3 yr. average of 2,014).
- Roughly 35 wetland banking applications/yr.
- Numerous:
  - scoping reviews
  - monitoring reports
  - credit deposit requests
  - etc.

# WCA Application Process



# WCA Application Process

## A few misc. points:

- Local Government Unit responsible for noticing and decisions, with input from the Technical Evaluation Panel.
- Noticing/decisions within strict timelines of MN Stat. 15.99.
- Failure to meet timelines can result in default approval.
- Decisions are valid for 5 years.
- LGU must keep records of the decision for 10 years.

# Public Waters Permitting Program

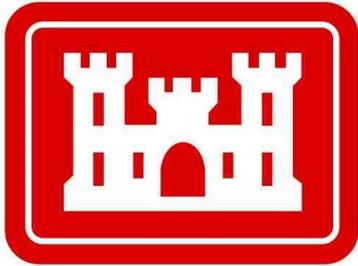


- Tom Hovey, DNR

# Public Waters Permitting

- Determination that public waters are affected
- Application received (typically online)
- 30 day review by commenting agencies
- Decision typically within 45-60 days
- 150 day legislative goal
- If General Permit exists for activity, authorization typically 5 days or less.

# Section 404



**US Army Corps  
of Engineers®**

- Jill Bathke, MN Policy Liaison

# Permit Decisions

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- Every permit we issue follows a statutorily identical evaluation process
  - In some instances it is abbreviated
- The rigor of the analysis is dependent on:
  - the type of project,
  - the type of resource being impacted,
  - the degree and magnitude of the impact,
  - and public interest factors

# Permit Evaluation Components

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**Jurisdictional Determination**

*Are the waters and activities jurisdictional?*

**Application Completeness Review**

*33 CFR § 325.1(d)*

**Permit Area/Scope of Analysis**

*Defines what information/analysis needed*

**Purpose and Need**

*Both must be defined, not always the same*

**Identify Information Needs**

*Info needed to make a decision*

**Alternatives Analysis**

*Least environmentally damaging practicable alternative*

**404(b)(1)**

*Pass/Fail Guidelines that must be satisfied*

# Permit Evaluation Components, continued

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Public Notice and Opportunity for  
Public Hearing

*Notice lengths vary by permit vehicle*

NEPA and Public Interest Review

*Review of beneficial and detrimental impacts*

Mitigation

*Replacement of lost functions and services*

Compliance with Other Laws and  
Regulations

*Historic properties, endangered species, Tribal,  
effects on federal projects*

Corps Permit Decision

*NEPA, 404(b)(1) and Public Interest Review*

MPCA Water Quality Certification

*Must be issued or waived by PCA*

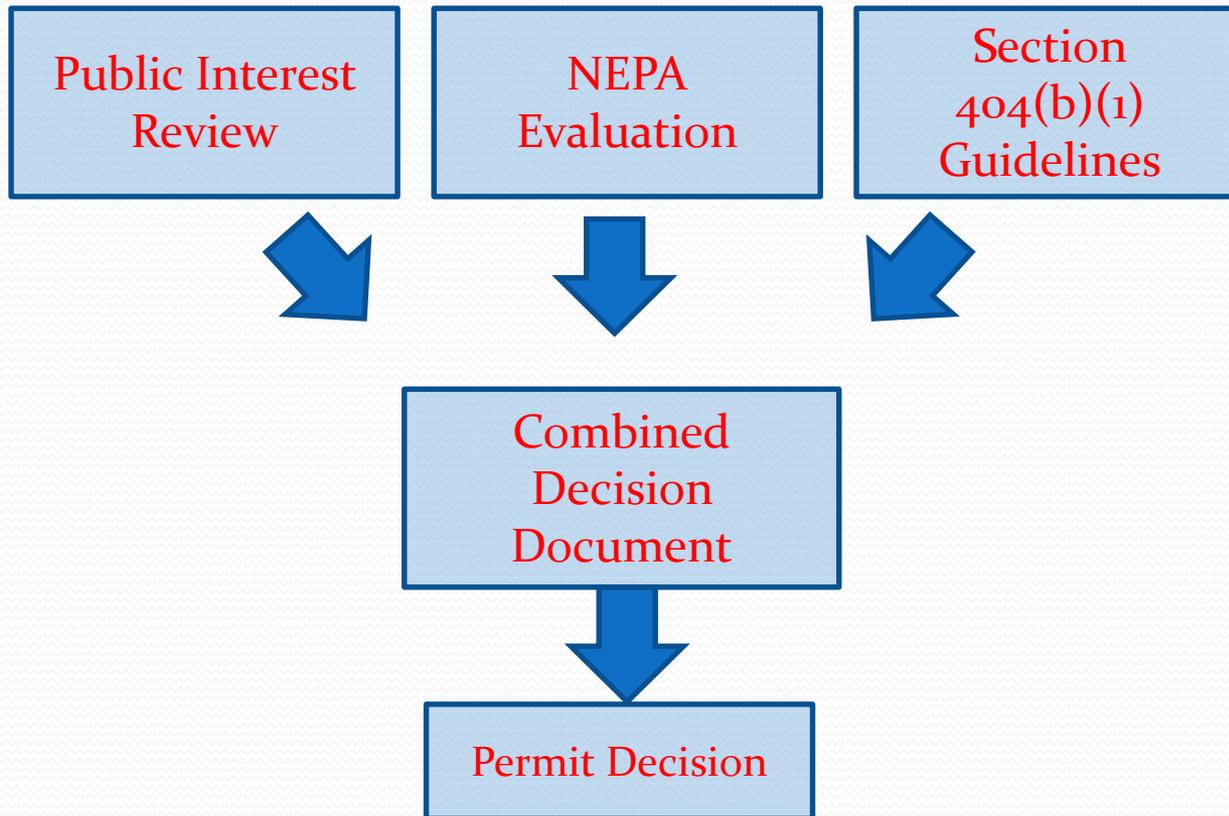
## Associated Laws, Regulations and Policies

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- Endangered Species Act
- Historic Preservation Act
- Tribal Trust Responsibility
- Wild and Scenic Rivers Act
- Civil Works, e.g. Navigation
- Section 14 Rivers and Harbors Act
- Executive Orders

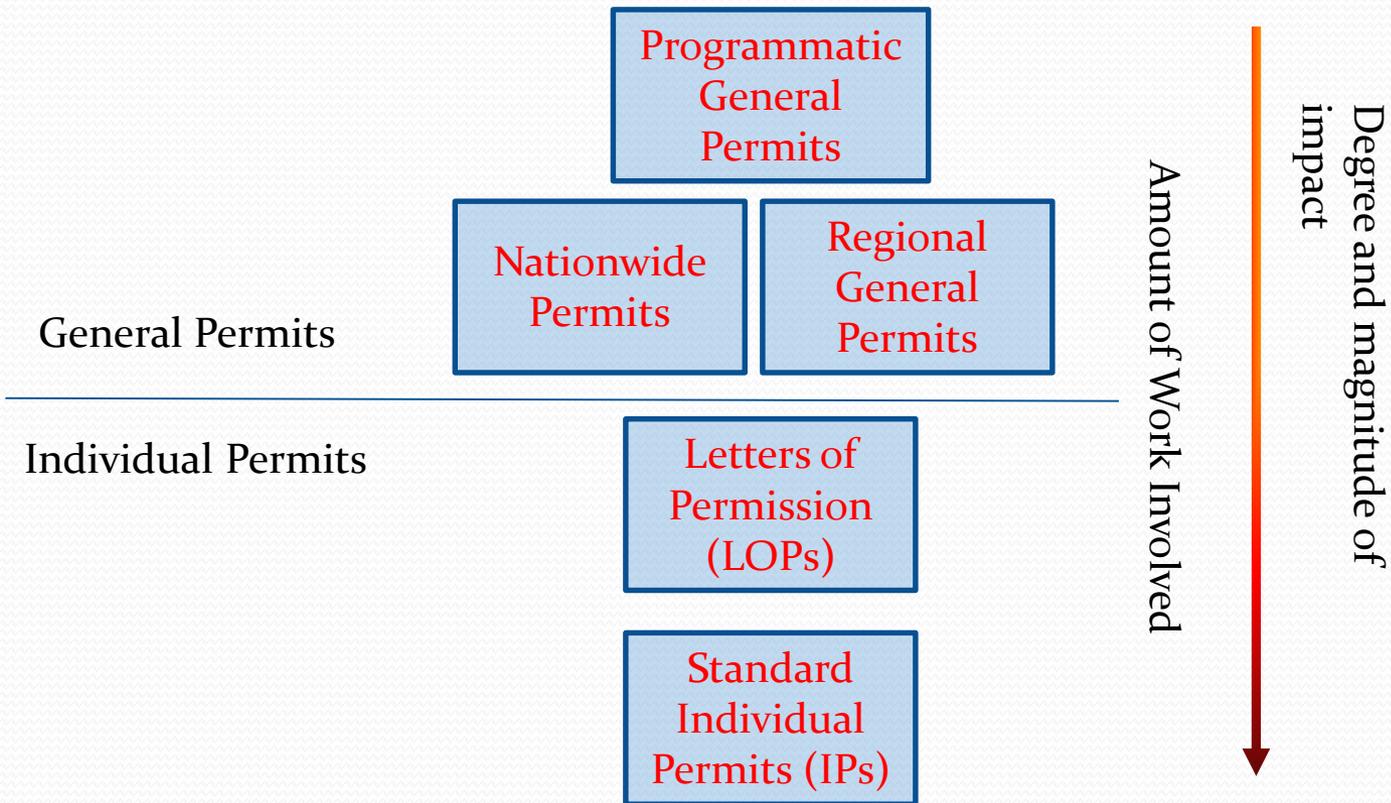
# Making Permit Decisions

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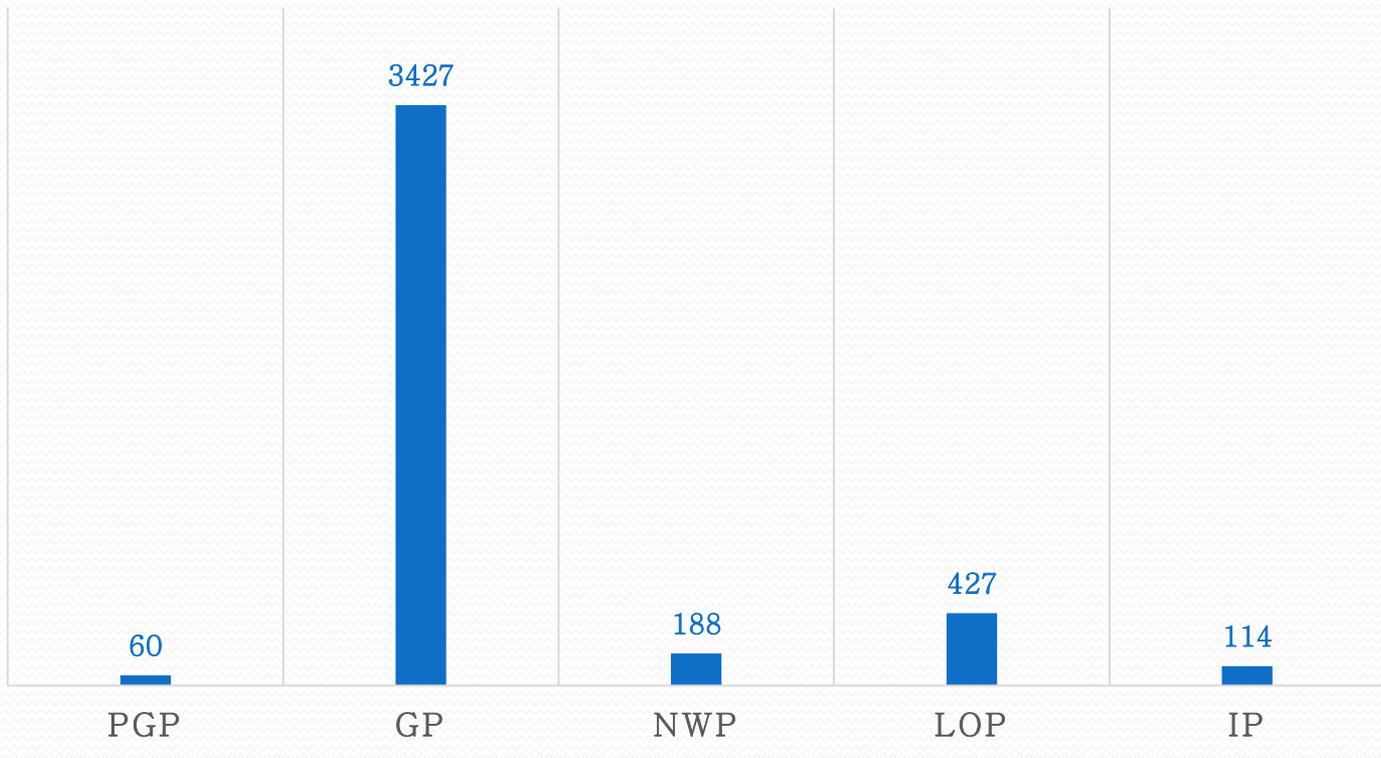


# Permit Types and Forms

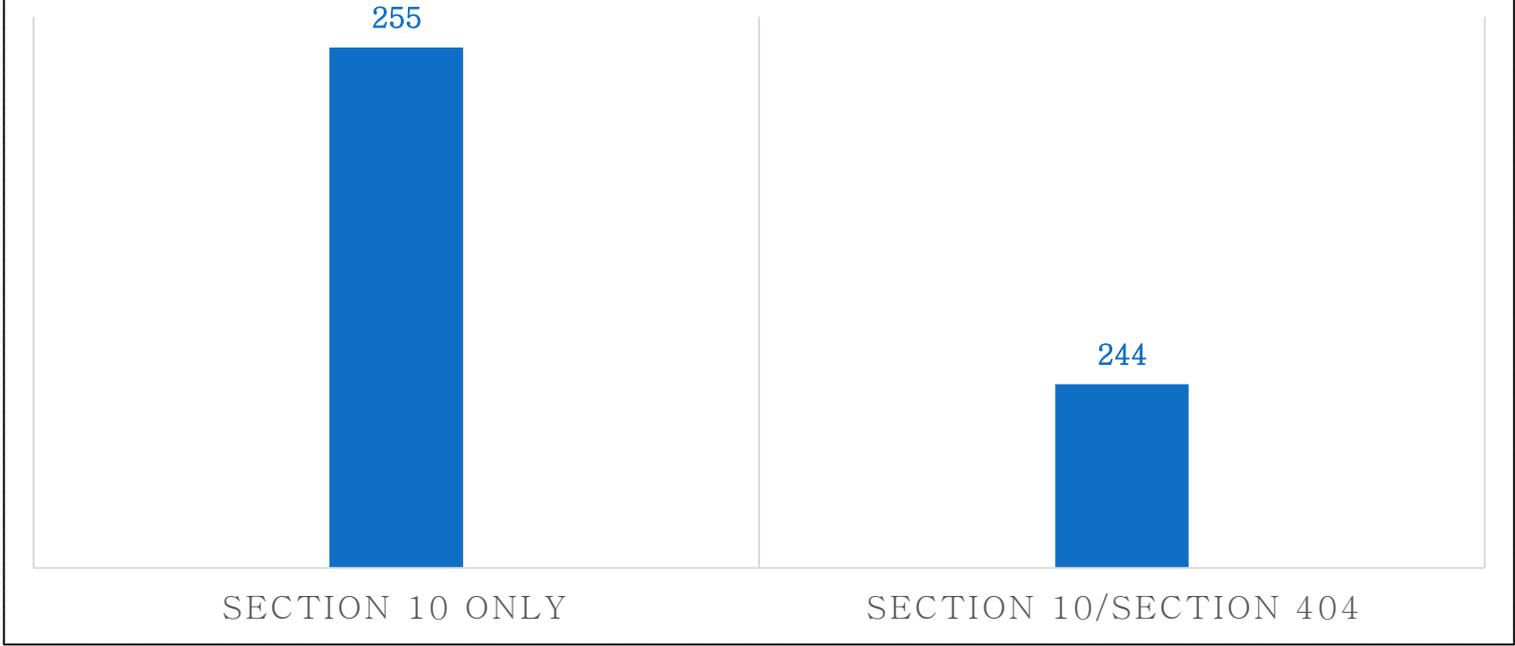
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## St. Paul District Permits Issued 1 Jan 2012- 31 Dec 2014



St. Paul District Section 10 Permits Issued  
1 Jan 2012- 31 Dec 2014



# Take-Aways

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- The Corps has jurisdiction over more than wetlands
  - with state assumption Corps remains responsible for authorizing work in Navigable Waters under Section 10 of the RHA and parts of Section 404 of the CWA
- The permit process requires various environmental and technical evaluations and compliance with other laws, policies and guidance
  - The least environmentally damaging practicable alternative is a pass/fail component of CWA Section 404 (404(b)(1) Guidelines)

# Section 401 Certification

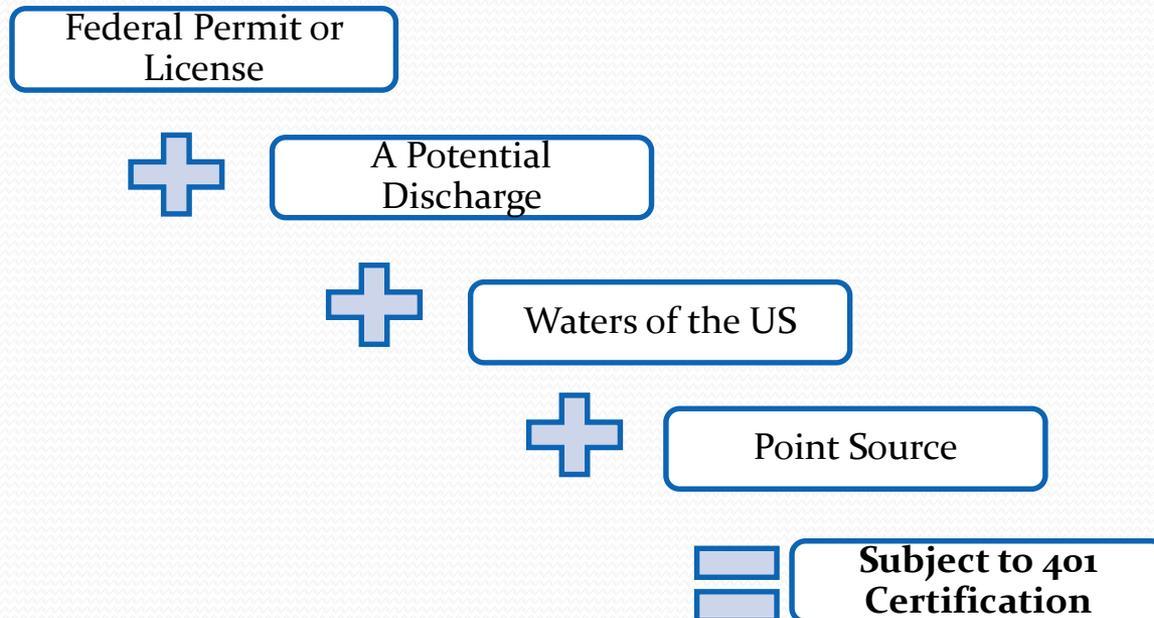


**Minnesota Pollution  
Control Agency**

- Catherine Neuschler, MPCA

# 401 Certification

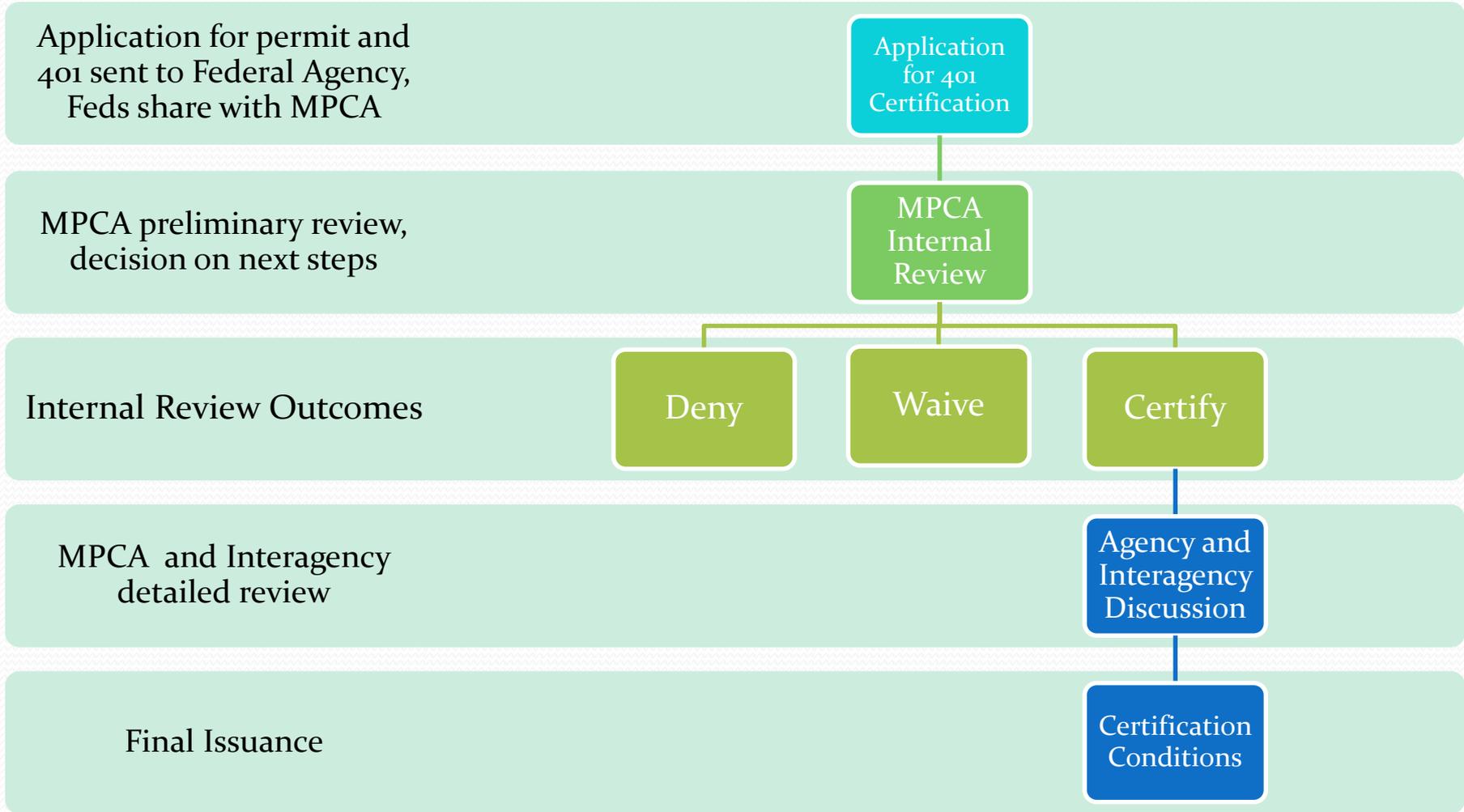
- Specifically a State/Tribal authority
  - To ensure that federally permitted projects meet state water quality standards



# Example Projects

- Individual 404 “dredge and fill” permit from the U.S. Army Corps of Engineers
  - Road maintenance or construction
    - Wetland fill, culvert installation
  - Mining
    - Wetland fill, wetland or other surface water excavation
  - Bridges
    - Construction of support piers, roadways, stormwater ponds
  - General development
    - Wetland fill

# 401 Certification Process



# 401 Actions

- Only act on 401 individual permits (not LOPs)
- 2012 – 2014
  - Certifications: 44
  - Waivers: 48
  - Denials: 5

# Study Elements

## **(8) Effect on application review process/timelines (cont'd)**

Considerations under an assumption scenario:

- Public notice requirements
- EPA notice requirements and timelines
  - Extent of EPA review waivers

# Study Elements

## **(9) Alternatives to assumption**

- Programmatic general permits
- Regional general permits/nationwide permits/letters of permission
- WCA federal approvals exemption
  - Example: Utilities
- Interagency coordination/agreements, etc.

# Study Elements

## **(10) Options for financing additional costs**

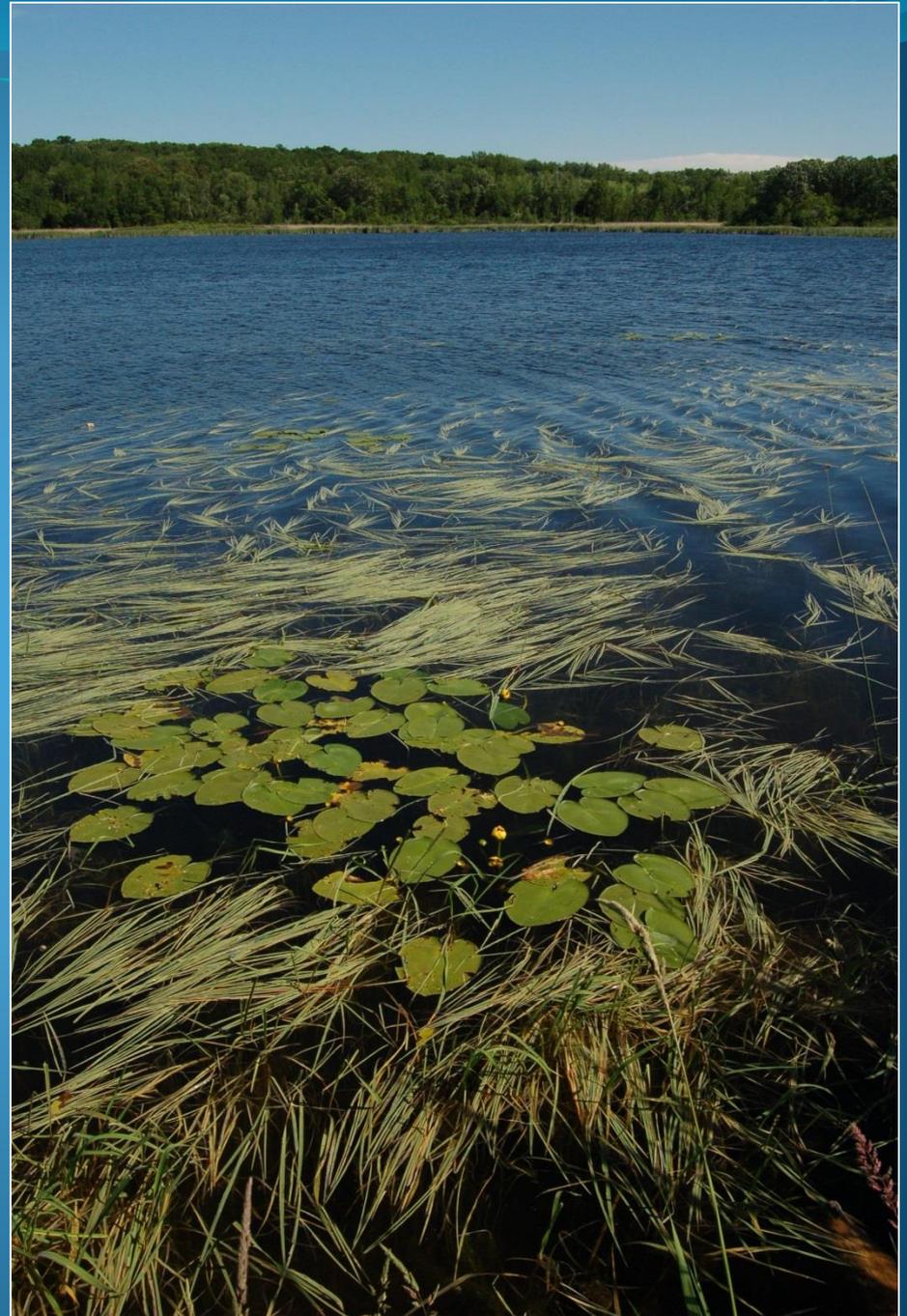
- Permit fees?
- Legislative appropriations?

# Study Elements

## **(11) Other info**

- Recommendations from state agencies ??
- Additional coordination procedures – SHPO, tribal

# Other State Studies



# States and 404 Assumption

- Two States implement 404 permitting
  - Michigan and New Jersey
- Several States have done recent studies/outreach
  - Maryland ? (2015)
  - Montana (2014)
  - Alaska (2013)
  - Virginia (2012)
  - Oregon (2012)
  - Florida (2005)
- States tend to identify common themes in terms of benefits and barriers to assumption

# Benefits to Assumption

- Increased program/permitting efficiency
  - Improved resource allocation
  - Improved state program integration
- Regulatory certainty and program stability
- Ability to implement state-specific policy goals
  - Important resource protection
  - Potentially increased public support

# Barriers to Assumption

- Process/Funding
  - Lack of long-term program funding
  - Lack of clear EPA guidance on assumption
- Jurisdiction and subject waters
  - Some waters (tidal/navigable) & adjacent wetlands are not assumable
  - No option to do “partial” assumption – must be statewide
- Implementation of federal requirements
  - Endangered Species Act
  - Historic Preservation Act