

# Section 404 of the Clean Water Act



## PROBLEM

**Cost:** If Minnesota were to assume Section 404 of the CWA, the federal regulatory authority over wetlands in Waters of the United States would be outsourced to 87 counties for decisions about wetlands destruction and replacement, overseen by state agencies. This additional work will add approximately \$4.8 million annually to the state budget.

**Public access:** Counties do not have the same level of expertise or resources as federal regulators, and public involvement could be limited because access to information and decisions made by county governments will vary depending on the county.

**Uncertain impact:** The U.S. Supreme Court is taking up *Sackett v. EPA*, which will affect which waters are covered by the CWA. Requiring the state to apply for 404 assumption by June 2025 is unwise. Instead, the state should wait for this decision and then make a decision on 404 assumption.

## BACKGROUND

Section 404 of the Clean Water Act (CWA) establishes a program to regulate the discharge of dredged or fill material into waters of the United States, including wetlands. The program aims to limit significant degradation to waters and wetlands and compensate accordingly if no alternatives are available for a proposed permit.

HF 3311 and SF 3509 were introduced early in the 2022 legislative session. These bills would allocate \$740,000 in funding to the Minnesota Board of Water and Soil Resources (BWSR) to prepare materials for the state to assume Section 404 of the Clean Water Act (CWA) and require the state to apply to the federal government to take over enforcement of federal wetlands laws and permitting by June 2025, regardless of the results of this what this study shows. (BWSR Fact Sheet)

Today, only Michigan, New Jersey, and Florida assume this responsibility under Section 404 of the CWA.

404 assumption allows a state to regulate waters and wetlands and assume the jurisdictional responsibility to approve or deny permits rather than the United States Army Corps of Engineers (USACOE)

## How does this impact Minnesota?

Currently, the USACOE maintains authority in issuing permit applications and enforces permit provisions in Minnesota. Under assumption, the federal permit becomes a state or tribal permit.

BWSR would technically be the “permitting” authority under 404 assumption, but would use existing structures with power in local-government units (LGUs) to make permitting decisions.

Approval of this would also require approval by the Governor as well as the Legislature.

### RESOURCES

Association of Wetland Managers:

<https://aswm.org/wetland-programs/s-404-assumption>

Florida 404 Assumption:

<https://www.epa.gov/fl/floridas-clean-water-act-ss404-permit-program>

BWSR:

<http://bwsr.state.mn.us/404-assumption>

BWSR Fact sheet:

<http://bwsr.state.mn.us/sites/default/files/2022-01/404%20Assumption%20Report%20on%20Funding%20Estimates%20-%20Executive%20Summary%201-27-22.pdf>

EPA:

<https://www.epa.gov/cwa-404/permit-program-under-cwa-section-404>

<https://www.epa.gov/cwa-404/state-or-tribal-assumption-cwa-section-404-permit-program>

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