



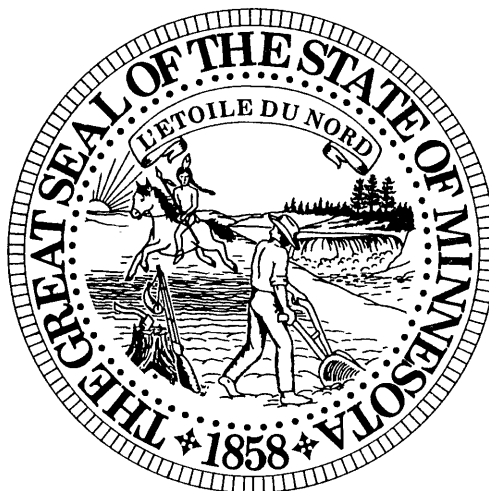
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STATE OF MINNESOTA

FEDERAL SECTION 404

ASSUMPTION FEASIBILITY STUDY

(Pursuant to Laws of Minnesota, 1987, Ch. 239, Sec. 137)



MINNESOTA DEPARTMENT OF NATURAL RESOURCES

DIVISION OF WATERS

OCTOBER 1, 1988

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ACKNOWLEDGEMENT

In 1987 the Minnesota Legislature mandated the Department of Natural Resources to complete a feasibility study concerning the assumption by the State of Minnesota of the Section 404 fill permit program. This study was completed by the Minnesota Department of Natural Resources, Division of Waters, in cooperation with the Minnesota Department of Agriculture, the Minnesota Pollution Control Agency, the Minnesota Association of Watershed Districts, Inc., the Association of Minnesota Counties, the Board of Soil and Water Resources, the League of Minnesota Cities, the Minnesota Association of Townships, and the United States Army Corps of Engineers.

TABLE OF CONTENTS

	<u>Page</u>
INTRODUCTION	i
SUMMARY.	1
TYPES OF ACTIVITIES AND RESOURCES INVOLVED	3
MINNESOTA STATE REGULATED WATERS	4
WORK THAT CAN BE DONE WITHOUT A PROTECTED WATERS PERMIT.	5
FEDERAL SECTION 404 AUTHORITY.	9
FEDERAL CONDITIONS FOR STATE ASSUMPTION.	13
COSTS FOR STATE ADMINISTRATION	25
ASSUMPTION PREPARATION	27
STATE WATER BANK PROGRAM	28
WETLAND TAX EXEMPTION.	28
DIVISION OF FISH AND WILDLIFE.	29
RULE HEARINGS.	30
PUBLIC HEARINGS.	30
INFORMATION MANAGEMENT	31
PERMIT PROCESSING.	31
VIOLATIONS	33
COMPUTER ENTRY	37
PUBLIC NOTICES	37
INTER-AGENCY MAILINGS.	38
ANNUAL REPORT.	39
CERTIFICATION.	39
ALTERNATIVE FUNDING STRATEGIES	40
APPROPRIATE ROLES FOR STATE AGENCIES AND LOCAL UNITS OF GOVERNMENT . .	43
NECESSARY CHANGES IN CURRENT STATE LAW	45
GENERAL AUTHORITY.	46
WATERBANK.	46
DRAINAGE	47
PENALTIES.	47
STATUTORY ALTERNATIVES	48
DISCUSSION	48
APPENDIX	51
APPENDIX A - PUBLIC WATERS STATUTORY SEARCH.	52
APPENDIX B - CORPS OF ENGINEERS JURISDICTION	64
APPENDIX C - FEDERAL/STATE PERMIT COMPARISON	65
APPENDIX D - FEDERAL AGENCY COMMENTS	66
REFERENCES	68

INTRODUCTION

Laws of Minnesota 1987, Chapter 239, Section 137, require the Department of Natural Resources to complete a study and submit a written report concerning the feasibility of the State of Minnesota assuming authority for the Federal Section 404 permit program. This legislation states the following:

The Commissioner of Natural Resources shall, in cooperation with the Minnesota Department of Agriculture, the Minnesota Pollution Control Agency, the Minnesota Association of Watershed District Managers, and the Association of Minnesota Counties, prepare a report relating to State assumption of the Federal permitting program under United States Code, title 33, section 1344. The report must include:

- (1) analysis of what types of activities and resources would be involved;
- (2) Environmental Protection Agency and United States Army Corps of Engineers' conditions for state permitting;
- (3) analysis of the costs for State administration and alternative funding strategies;
- (4) recommendations on the appropriate roles for State agencies and local government in administration of the program; and
- (5) the necessary changes in current legislation to facilitate administration of the program.

The Commissioner of Natural Resources must submit the report to the legislature and Governor by October 1, 1988.

*It should be noted that the legislation authorizing this study incorrectly identifies the Corps of Engineers as a party to conditions for state assumption. Item two above should, instead, be corrected to include only the Environmental Protection Agency (EPA).

SUMMARY

A change in regulatory responsibility is an obvious impact of State Section 404 Program assumption. At present, the State regulates lakes, watercourses, and wetland types 3, 4, and 5. This authority translates into some 3.5 million acres of waters and about 6,564 watercourses. Section 404 assumption requires that the State enlarge this regulatory responsibility over an additional 5.2 million acres of waters or 8.5 million total acres and about 31,000 additional watercourses.

The State may limit the impact of assuming the Section 404 program by creating a new statutory section which might be termed "Other Waters of the United States". This option minimizes the effect of changing the definition of public waters for some 75 State statutes, while providing only that additional permitting authority mandated by the Environmental Protection Agency (EPA). The State would not be required to expand its regulatory responsibility over a host of programs such as the waterbank program, game and fish laws, wild rice and cranberry harvesting, and purple loosestrife and other noxious plant control.

Assumption of the Section 404 program requires the statutory authority to implement the requirements of the Section 404 program. The statutory changes summarized below are the minimum changes believed necessary. Any further changes or more stringent requirements are up to the discretion of the State.

- *Authority to assume operation of the Section 404 program and make agreements to the extent necessary to implement the requirements of the Section 404 program.

- *In all fairness, the wetland no drainage compensation (waterbank program) provisions of M.S. 105.391 subd. 3. should be enlarged to cover wetlands as defined by EPA.

- *Notwithstanding any laws to the contrary, the Commissioner may regulate ditch maintenance under Chapters 106A and 112, which affect waters of United States to the extent necessary for the Section 404 program.

- *The State shall have statutory authority for the imposition of penalties in the amounts of at least \$5000 for each instance of civil violation and \$10,000 for each instance of a criminal violation.

State assumption of the Federal Section 404 program requires a willingness by the State to provide a mechanism for funding the program. The Environmental Protection Agency does not currently provide operational grants for any other state Section 404 programs and has indicated that there is little likelihood such funding would be available in the future. Options available to fund Minnesota's Section 404 program consist of legislative support or partial funding through some combination of revenue from permit fees, fines, or a "fee for services" permit system.

Annual costs for State administration of the Section 404 program range from approximately \$864,743 to \$1,304,743. The smaller figure is a cost estimate developed for a new statutory section with just the authority required to administer the Section 404 program. The figure of \$1,304,743 is a cost estimate for the Department of Natural Resources if the Section 404 program were assumed without any exclusions. Neither figure includes a required two to three year appropriation of \$67,400 for the preparation of EPA mandated assumption documents or any external program costs.

It is the Department's opinion that assumption costs for any other unit of State government would be similar to that of the DNR (contingent upon an agency's existing resources or potential resources). If local units of government were to assume the program, the per unit cost would be less. Yet, the cumulative costs and complexity of coordination for a program consisting of 87 counties would be at least comparable to that of the DNR (any estimate of actual program costs to the State are dependent upon the level and availability of State funding).

A significant benefit of State Section 404 assumption revolves around overlapping permitting authority. State administration of the Section 404 program may help alleviate unavoidable delays resulting from the current situation of both a Federal and State agency evaluating many of the same permits, yet operating on two distinct time schedules. In some cases, applicants discover that permits are required from one of the agencies at a point too late to prevent an irreversible commitment of resources and equipment.

The State and the Department of Natural Resources in particular, are in a position to improve upon this situation. The Department of Natural Resources currently administers a number of programs focusing on the regulation and protection of the State's waters. The staff expertise required to evaluate Section 404 permits already exists within the DNR Division of Waters, as well as equipment, easily accessible regional offices, and monitoring and enforcement programs required for program implementation.

TYPES OF ACTIVITIES AND RESOURCES INVOLVED

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The State of Minnesota currently regulates approximately 3,551,700 acres of public waters and wetlands (excluding Lake Superior and State protected watercourses) or 21,871 water basins (including Lake Superior) and 6,564 watercourses. According to a 1981 University of Minnesota study, there are approximately 8,700,000 total acres of surface waters (excluding Lake Superior and watercourses) in the State. An LCMR project completed by the DNR, Office of Planning used data from the U.S. EPA and determined that there are approximately 37,793 watercourses with approximately 93,000 total miles within the State (University of Minnesota, 1981). If the State of Minnesota assumes the Section 404 program, all waters of the United States, which translates into all waters of the State of Minnesota, will be regulated through a State permit program. Any additional waters of the U.S. will be regulated only for the purpose of fill placement or discharge of dredged or fill materials.

The current resources and activities involved are examined in greater detail for both the State and Federal Governments as follows:

MINNESOTA STATE REGULATED WATERS

Introduction

Since 1937 the State of Minnesota has attempted to conserve our waters and protect the rights of the public to use and enjoy them. Minnesota's waters have been identified as "public waters" or "wetlands" depending on size, physical characteristics and ownership of surrounding lands. Any person, agency or organization proposing to change the course, current, or cross-section of Minnesota's public waters or wetlands, must obtain a permit from the Department of Natural Resources (DNR). The DNR's authority to require such permits is established in Minnesota Statutes Section 105.42.

Public Waters

"Public Waters" include all of the following:

1. All water basins assigned a shoreland management classification, except wetlands less than 80 acres classified as natural environment lakes.
2. All waters which have been determined to be public waters or navigable waters by a court of law.
3. All meandered lakes, except those which have been legally drained. Meandered lakes were identified by the General Land Office Surveys in the late 1800's.
4. All water basins previously designated by the Commissioner of Natural Resources for specific management purposes such as trout lakes or game lakes.

5. All water basins previously designated as scientific and natural areas.
6. All water basins located within and totally surrounded by publicly owned lands.
7. All water basins where the State of Minnesota or the federal government holds title to any of the beds or shores, unless the owner declared that the water is not necessary for the purposes of public ownership.
8. All water basins where there is publicly owned and controlled access which is intended to provide for public access to the water basin.
9. All natural and altered natural watercourses with a total drainage area greater than two square miles and all designated trout streams regardless of their drainage area.

Wetlands

"Wetlands" which are regulated and protected under Minnesota law, include and are limited to, all types 3, 4 and 5 wetlands that have not been designated as public waters, which are 10 or more acres in size in unincorporated areas, or 2½ or more acres in size in incorporated areas. The wetland types are defined in Circular 39, Wetlands of the United States, 1971 Edition, U.S. Department of the Interior.

When is a DNR Permit Needed?

Any work done below the ordinary high water mark (OHW) of public waters and wetlands requires a permit from the Department of Natural Resources (except those projects specified below). Typical examples of projects requiring a permit include: draining, filling, dredging, channelizing, construction of dams, harbors or permanent offshore structures, and placement of bridges and culverts.

WORK THAT CAN BE DONE WITHOUT A PROTECTED WATERS PERMIT

Some projects do not require permits from the Department of Natural Resources if certain conditions are met. However, local units of government and other agencies, such as the U.S. Corps of Engineers, may still require permits for these projects. Projects which change the course, current, or cross-section within the beds of public waters and wetlands not listed here require permits from the Department of Natural Resources.

The projects will not require permits provided all listed conditions are met:

PROJECT RESTRICTIONS

Beach Sand Blankets

- Clean, inorganic sand or gravel free of pollutants and nutrients.
- No more than 6 inches thick, 50 feet wide along the shore or one-half the lot width (whichever is less), and 10 feet waterward of the ordinary high water mark.

- Local watershed district and zoning officials given at least 7 days prior notice.
- Site is not a posted fish spawning area.
- Installation of sand or gravel may only be repeated once at same location, not exceeding same amount and dimensions of the original sand blanket.

Rock Riprap (for shore protection)

- Natural rock only, at least 12 inches diameter or larger.
- No more than 5 feet waterward of the ordinary high water mark.
- Conforms to natural alignment of shore and does not obstruct flow of water.
- Minimum finished slope no steeper than 3:1 (horizontal to vertical).
- Site is not a posted fish spawning area, designated trout stream, nor along the shores of Lake Superior.

Streams with a Watershed less than 5 Square Miles (3,200 acres)

- No permit is required to construct a bridge or culvert, or to fill or excavate the bed of a protected watercourse having a total drainage area, at its mouth, of 5 square miles or less, provided:
 - County zoning officials and local Soil and Water Conservation Districts are given at least 7 days prior notice and determine the project will not result in downstream erosion or sedimentation.
 - The project will not divert the water to a different watershed.
 - The project will not impound water by damming the watercourse.
 - The watercourse is not an officially designated trout stream.

Debris Removal

- No permit is required to remove debris such as trees, logs, stumps and trash as long as the original alignment, slope or cross-section of the lake, marsh, or stream bed is not altered.

Repair of Public Drainage Systems

- No permit is required to repair a lawfully established public drainage system (Judicial Ditch, County Ditch, etc.) provided:
 - The repair complies with the definition set forth in Minnesota Statutes, Section 106A.701, Subdivision 1 (Public Ditch Law).
 - The repair does not affect significant fish and wildlife habitat or protected vegetation (such as state or Federal wildlife management areas, designated scientific and natural areas, etc).

Seasonal Docks and Floating Structures

- Removed from water on a seasonal basis (before winter freeze-up).
- All components removable from lake or stream bed by nonmechanized means.
- Will not be a hazard to navigation or endanger public health and safety.
- Site is not a posted fish spawning area.
- Will not include fuel handling or sewage facilities.
- Is not used or intended to be used for human habitation, as a boathouse or as a marina.
- Allows for free flow of water beneath it.

Permanent Docks (on lakes only)

- Dock is a single linear structures not more than 6 feet wide.
- Does not exceed 50 feet in length, or extend into water that is more than 4 feet deep, whichever is less.
- No more than one dock per waterfront lot.
- Will not obstruct navigation or create a water safety hazard.

- Site is not a posted fish spawning area.
- Will not include fuel handling or sewage facilities.
- Is not used or intended to be used for human habitation, as a boathouse, or as a marina.
- Allows for free flow of water beneath it.
- Lake must be 500 acres or larger if dock is built on wood pilings.
- Lake must be 2,500 acres or larger, and site must preclude the use of a dock on wood pilings if dock is built on rock filled cribs.

Boat Ramps

Privately owned ramps:

- Site can support ramp without pilings, dredging, or other special site preparations.
- Constructed only of gravel, natural rock, concrete, steel matting, or other durable inorganic material.
- No more than 6 inches thick, 12 feet wide along shore, and 10 feet waterward of the ordinary high water mark or into water depth of 4 feet, whichever is less.
- No more than 5 cubic yards of excavation and 5 cubic yards of fill allowed for a stable base.
- Site is not a posted fish spawning area.

Publicly owned ramps:

- Same as above, except ramp can be up to 24 feet wide and 20 feet waterward of the shoreline or into water depth of 4 feet, whichever is less, with up to 30 cubic yards of fill and 60 cubic yards of excavation.

Removal of Existing Structures

- The original lake, marsh or stream bed is restored.
- All parts of the structure, including footings or pilings, are removed.
- The structure is not a water level control device and is not on an officially designed trout stream.

Water Level Control Structures (on streams only)

- Contributing watershed above the structure is 300 acres or less.
- Structure is not considered a "dam" under State Dam Safety rules.
- Structure is not on an officially designated trout stream.

Low Water Ford Crossings (on streams only)

- No special site preparation necessary.
- Normal summer flow does not exceed 2 feet in depth.
- Normal low flow is not restricted or reduced.
- Crossing conforms to the shape of the natural stream channel.
- Original stream bank no higher than 4 feet.
- Constructed only of gravel, natural rock, concrete, steel matting or other durable, inorganic material not more than 1 foot thick.
- Graded finished slope no steeper than 5:1 (horizontal to vertical)
- Graded banks must be seeded or mulched.
- Site is not an officially designated trout stream, wild, scenic or recreational river or officially designated canoe and boating route.

Temporary Bridges (on streams only)

- Stream bank can support bridge without pilings, foundations, culverts, excavation, or other special site preparations.
- Nothing is placed in the bed of the stream.

- Capable of removal for maintenance and flood damage prevention.
- Bridge is firmly anchored at one end and can swing away during flooding.
- Minimum of 3 feet clearance between lowest portion of bridge and normal summer stream flow.
- Consistent with floodplain, shoreland, and wild, scenic or recreational river ordinances.

Maintenance of Storm Sewers, Agricultural Drain Tile and Ditch Outlets

- Outlet must have been maintained and functioning within the last 5 years.
- Maintenance work does not alter the original course, current or cross-section of the lake, marsh or stream bed.

Installation of Agricultural Drain Tile Outlets

- Outlet involves no construction of an open ditch and is not intended to drain a protected water or wetland.
- Bank is restored to the natural slope.
- Installation does not require channelization, dredge or filling.
- Except for the tile, no permanent structure is placed in the lake, marsh or stream bed.

FEDERAL SECTION 404 AUTHORITY

The Chief of Engineers is authorized under Section 404 of the Federal Clean Water Act to issue permits for the disposal of dredged and fill materials into waters of the United States. As such, the Corps of Engineers have responded by developing a system of distinct permit categories to facilitate processing. These categories and their respective attributes are discussed below:

Nationwide Permits

Nationwide is one category of permit established to streamline the permit evaluation process. Applicants are under no obligations to submit formal project plans, provided such proposals comply with all State and local regulations and fall within the Corps' nationwide authority. Any projects meeting these requirements may commence immediately without written authorization. A majority of applicants, however, typically request some type of written determination or recognition.

What follows is a brief summary of activities authorized under the Corps' nationwide permitting authority:

- Repair or rehabilitation of any previously serviceable structure or fill
- Placement of fish and wildlife harvesting or water measurement devices
- Surveying activities
- Placement of out-fall and in-fall structures
- Structures constructed for exploration of oil, gas, and minerals, on the outer continental shelf and leased for such purposes under the U.S. Department of the Interior
- Structures constructed to establish mooring facilities in anchorage and fleeting areas
- Placement of single mooring buoys
- Temporary buoys used for recreational purposes
- Discharge of material used for backfill or the bedding of utility lines
- Minor bank stabilization projects
- Minor road crossing fills
- Return of waters resulting from upland disposal of dredged or spoil material
- Fills associated with small hydropower projects, provided such projects and fills are authorized under the Federal Energy Regulatory Commission
- Structures, work, and discharges for the containment and cleanup of oil and hazardous waste spills
- Structures, work, and discharges associated with surface coal mining activities, provided such authority is granted by the U.S. Department of the Interior, Office of Surface Mining, or states with programs approved under Title V of the 1977 Surface Mining Control and Reclamation Act
- Activities authorized under state administration of the Section 404 program
- Discharge of concrete into tightly sealed forms, where such concrete becomes a structural member
- Discharge of dredged or fill materials into specific categories of headwaters and other non-tidal waters, including wetlands which are not tributaries to interstate or navigable waters

Source: U.S. Department of Defense, St. Paul District of the Army Corps of Engineers "Nationwide Permits in the State of Minnesota".

General Permits

The St. Paul District of the Corps of Engineers also administers what are termed General permits. General permits are specific agreements for abbreviated review procedures between the Corps and respective states. There are two agreements with Minnesota currently maintained under Section 404 and one under Section 10. GP-0012-MNDNR is an agreement authorizing the Minnesota DNR, as sole applicant, to construct specific types of boat launching facilities. GP-001-MN is an agreement or "catch all" category covering some nineteen different activities. Under Section 10 jurisdiction, GP-0006-MN authorizes construction of permanent and temporary docks in navigable waters.

The nineteen activities governed under GP-001-MN are briefly identified as follows:

- Bank stabilization
- Docks, piers, and wharfs
- Boat ramps
- Submerged utility crossings
- Sand blankets
- Fish and wildlife improvement structures
- Fish habitat improvement structures and fills
- Fish barriers
- Cofferdams and caissons
- Dredging
- Channel connections
- Wing dams and deflectors
- Groins
- Breakwaters/jetties
- Fords
- Bridge and culvert improvement or replacement
- Access paths
- Fill for shoreline reclamation and repair
- Water control structures

Source: U.S. Department of Defense, St. Paul District of the Army Corps of Engineers, "General Permit GP-001-MN".

Individual Review Permits

Individual Review permits represent those applications or projects which do not satisfy conditions for either Nationwide or General permits and which are determined to present potentially significant impacts. Applications or projects that satisfy the Individual Review criteria are subject to a full public interest review. This requires that a complete description of the proposed project be mailed to any and all interested parties. Each interested agency or party then has a specified number of days in which to make recommendations or suggest alternatives actions. These comments are then used by the Corps of Engineers in making final permit determinations.

*The definition of waters of the United States, as used in the administration of the Section 404 program, is as follows:

- a. All waters which are used or were used previously, or susceptible to use, in interstate or foreign commerce;
- b. Interstate waters including interstate wetlands;
- c. All other intrastate waters such as:
 - intrastate lakes, rivers, streams, (including intermittent streams), mudflats, playa lakes, sloughs, including any such waters or natural ponds, the use, degradation, or destruction of which would or could affect interstate or foreign commerce;
 - I. Which are or could be used by interstate or foreign travelers for the purposes of recreation or;
 - II. From which fish or shellfish are or could be taken for sale in interstate or foreign commerce (Hauger, 1988);
 - III. Which are or could be used for industrial purposes by industries in interstate commerce;
 - IV. Which are or would be used as habitat by birds protected by migratory bird treaties;
 - V. Which are or would be used as habitat by other migratory birds which cross state lines;
 - VI. Which are or would be used as habitat for endangered species;
 - VII. Which are used to irrigate crops sold in interstate commerce;
- d. All impoundments of waters otherwise defined as waters of the United States;
- e. Tributaries of waters identified in paragraphs a-d above;
- f. Wetlands adjacent to waters (other than waters that are themselves wetlands) identified in paragraphs a-d above.

*The 404 authority transferable to a state is for all waters of the U.S. (state), except for navigable waters and their adjacent wetlands (i.e. Mississippi River, Lake Superior, etc.).

- 2. Waters generally not considered waters of the United States and treated on a case by case basis by the Environmental Protection Agency (EPA) are as follows:
 - a. Waste treatment systems, including the treatment ponds or lagoons;
 - b. Drainage and irrigation ditches excavated on dry land;
 - c. Artificially irrigated areas which would revert to upland if the irrigation ceased;

- d. Artificial ponds or lakes created by excavating or diking dry land to collect and retain water and which are used exclusively for such purposes as stock watering, irrigation, settling basins, or rice growing;
 - e. Artificial reflecting or swimming pools or other small ornamental bodies of water created by excavating and/or diking dry land to retain water for primarily aesthetic purposes;
 - f. Water-filled depressions created in dry land incidental to construction activity and pits excavated in dry land for the purpose of obtaining fill, sand, or gravel, unless and until the construction or excavation operation is abandoned and the resulting body of water meets the definition of waters of the United States.
3. Discharges that may result from the following activities are not prohibited by or otherwise subject to regulation under Section 404 of the CWA (see Section 323.4 for further discussion).
- a. Normal farming, silviculture, (forestry), and ranching activities encompassing plowing, seeding, cultivating, minor drainage and harvesting for food, fiber and forest products (all of which must be an ongoing program or activity);
 - b. Maintenance, including the reconstruction of currently serviceable structures, such as dams, dikes, levees, groins, riprap, breakwaters, causeways, bridge abutments or approaches, and transportation structures;
 - c. Construction or maintenance of farm live-stock ponds or irrigation ditches (not including the construction, but including the maintenance of drainage ditches);
 - d. Construction of temporary sedimentation basins for construction sites which do not involve the placement of fill material into waters of the U.S.;
 - e. Using Best Management Practices (BMP), the construction or maintenance of farm roads, forest roads, or temporary roads used for moving for mining equipment (53 Fed. Reg. p. 20765 (1988)).

FEDERAL CONDITIONS FOR STATE ASSUMPTION

FEDERAL CONDITIONS FOR STATE ASSUMPTION

Section 404(h) of the Federal Clean Water Act Amendments, 1972, allows the Administrator of the Environmental Protection Agency (EPA) to transfer administration of the Section 404 permit program for discharges into certain waters of the United States to qualified states (not including navigable waters or adjacent wetlands). In order for EPA to transfer Section 404 authority to a State, the Governor shall submit to the EPA Administrator a full and complete description of the program it proposes to establish and administer under State law (Section 404 (g) CWA). The State must be able to demonstrate to EPA that it is capable of administering the Section 404 program by meeting the 40 CFR, Chapter 1, Part 233 conditions/requirements as follows:

1. To develop and maintain an informational program designed to guide potential applicants as to the permit program, its requirements, and the steps required in order to obtain a permit for the placement of dredged or fill materials in Section 404 Waters (53 Fed. Reg. p. 20780 (1988)).
2. To develop a Federally approved permit application form, its conditions and required supplemental information, as well as the procedures, terms, and requirements, as specified in (53 Fed. Reg. 20777 (1988)).
3. To develop and submit a program submission to EPA. The submission must contain the following (53 Fed. Reg. p. 20777 (1988)):
 - a. A letter from the Governor requesting program approval.
 - b. A complete program description including the following:
 - 1) A narrative description of the scope, structure, coverage, permit review criteria, and processes relevant to the proposed State program.
 - 2) A description of the agency staff available for program administration.
 - 3) A description of proposed State permitting and administrative and judicial review procedures.
 - 4) A description of the sources and amounts of funding available for the State to use in this program. The Federal Government does not have funds available at this time, nor does it appear likely such funds will be available in the near future. If funds were available, a grant for a percent of the cost could be dedicated to a State assuming the program for the first two years only. The cost to the State of Michigan upon assuming the program was reported to be a little over \$1,000,000 per year. The Federal Government was able to assist Michigan with \$300,000 for the first year only.

- 5) A description of the organization and structure of State agency (agencies) which have responsibility for administering the program. If more than one agency is responsible, the description shall address responsibilities of each agency and how the agencies intend to coordinate administration and evaluation of the program.
 - 6) An estimate of the number of discharges and its impact upon the integrity of the State's waters.
 - 7) A description of the State's compliance evaluation and enforcement procedures, including strategies for coordination with EPA and the Corps.
 - 8) Copies of proposed Section 404 application, permit, and reporting forms.
 - 9) A complete description of the State's regulated waters upon Section 404 program assumption.
 - 10) A description of the specific best management practices (BMP) requirements proposed (§ 232.3, (6)) to satisfy the exemption provisions of Section 404 (f)(1)(E) of the Clean Water Act for construction and maintenance of farm and forest roads or temporary roads for moving mining equipment.
4. To submit a statement from the State Attorney General that the laws of the State provide adequate authority to carry out the program as described under § 233.11 and the requirements of § 233.12. This statement shall cite the specific statutes, administrative regulations (rules) and judicial decisions which demonstrate adequate authority. Also, the statement shall contain an appropriate analysis of the State's autocracy when a State seeks authority on Indian lands (the State of Minnesota does regulate changes in the course, current or cross-section of inventoried waters located on Indian lands for non-Indian people only). In addition, the statement shall contain an analysis of State law regarding the prohibition on taking private property without just compensation and an assessment of the effect such law will have on the successful implementation of the State's regulation of the discharge of dredged or fill materials into Section 404 waters. Finally, if more than one agency has responsibility for administering the State program, the statement shall include certification that each agency has full authority to administer the program within its category of jurisdiction and that the State as a whole has full authority to administer a complete State Section 404 program (53 Fed. Reg. p. 20778 (1988)).
5. To submit a Memorandum of Agreement (MOA) with the Regional Administrator (EPA). Such an agreement shall be executed between the State Director and Regional Administrator. The agreement shall include, but not be limited by the following:
- a. The agreement may include other terms, conditions, or agreements consistent with the administration and enforcement of the State's regulatory program; however, no language which restricts EPA's statutory oversight responsibility will be allowed.

b. The following provisions:

- 1) Provisions specifying the frequency and content of reports, documents (i.e. permit applications and draft general permits) and supplemental information as required by the Regional Administrator. As well as an agreement establishing a submission date for an annual report.
- 2) Provisions for coordination of compliance monitoring by EPA and the State, including routine inspection of State records, reports, and files.
- 3) Provisions for modification of this Memorandum of Agreement by the State and/or EPA.
- 4) Provisions specifying classes and categories of permit applications for which EPA waives right of review.

6. To submit a Memorandum of Agreement with the Secretary of the Army. The MOA shall include the following:

- a. Where more than one agency within a State has responsibility for administering the program, all agencies shall be parties to the Memorandum of Agreement.
- b. A description of State waters where the Secretary retains jurisdiction.
- c. To establish procedures whereby the Secretary will transfer pending Section 404 permit applications and other relevant information to the State (upon program approval).
- d. An identification of those general permits, if any, 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 permits to the State, including procedures for the prompt transmission from the Secretary to the State Director of relevant information not already in the possession of the State Director, including support files for permit issuance, compliance reports, and records of enforcement actions. In many instances states will lack the authority to directly administer permits by the Federal government. However, procedures authorized under State law may be established to transfer responsibility for these permits (53 Fed. Reg. p. 20778 (1988)).

7. To meet Federal requirements for State permitting as follows:

- a. The Director shall assure compliance for each permit with all statutory and regulatory requirements, including the 404 (b)(1) Guidelines, applicable Section 303 water quality standards, and applicable Section 307 effluent standards and prohibitions.
- b. Section 404 permits shall be effective for a fixed term not to exceed five years.

c. Each Section 404 permit shall include conditions meeting or implementing the following requirements:

- 1) A specific identification and complete description of the authorized activity, including the name and address of permittee, location and purpose of discharge, and the type and quantity of material discharged (does not apply to General Permits).
- 2) Only those activities specified in the permit are authorized.
- 3) The permittee shall comply with all requirements of the permit, even if that requires halting or reducing the permitted activity to maintain compliance.
- 4) The permittee shall take all reasonable steps to minimize or prevent any discharge in violation of the approved permit.
- 5) The permittee shall inform the Director of any expected or known instances of non-compliance.
- 6) The permittee shall provide information to the Director to assess compliance status and whether cause exists for permit modification.
- 7) The permittee shall protect the aquatic environment by monitoring, record keeping, and reporting as required. Requirements include reporting of any expected leachates, non-compliance, or expected changes or transfers of the permit.
- 8) The permittee shall allow the Director or an authorized representative, upon identification, at reasonable times to:
 - a) Enter the premises where a regulated activity occurs or where records are kept pursuant to the conditions of the permit.
 - b) Have access to and copy any records which are required as a condition of the permit.
 - c) Inspect operations regulated or required under permit.
 - d) For the purpose of assuring compliance, sample or monitor any substances or parameters at any location.

d. The Director shall assure that discharges are conducted in a manner which minimizes impacts on the physical, biological, and chemical characteristics of waters, including stipulations for restoration and mitigation (53 Fed. Reg. p. 20780 (1988)).

8. To develop procedures and to have statutory authority to meet the following Federal requirements for compliance evaluation programs with regards to violations and enforcement activities:

- a. In order to abate violations of the permit program, State programs shall maintain a system designed to identify persons subject to regulation or who have failed to comply with permit conditions.
- b. The applicable State personnel engaged in compliance evaluation 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 records, inspect, monitor or investigate compliance with the State program, permit conditions or other program requirements (if State law requires a search warrant before entry, then one must be obtained first).
- c. Investigatory inspections shall be conducted, samples shall be taken and other information shall be gathered in a manner that will produce evidence admissible in an enforcement proceeding or in Court (e.g., using proper "chain of custody" procedures).
- d. Procedures for receiving and ensuring proper consideration of information submitted by the public about violations. The State shall encourage public effort in reporting violations and shall make available information on reporting procedures (53 Fed. Reg. p. 20782 (1988)).

9. To meet the Federal requirements for enforcement authority as follows:

- a. The State shall have available the following remedies for violations of State 404 program requirements:
 - 1) To restrain immediately and effectively any person by order or by suit in a State court from engaging in any unauthorized activity which is endangering or causing damage to public health or the environment.
 - 2) To sue in Courts of Competent jurisdiction to enjoin any threatened or continuing violation of any program requirements, including permit conditions, without the necessity of a prior revocation of the permit.
 - 3) To immediately and effectively halt or remove any unauthorized discharges of dredged or fill material, including the authority to issue a cease and desist order, interim protection order, or restoration order to any person involved in an unauthorized discharge.
 - 4) To assess or sue to recover in court, civil penalties, and to seek criminal remedies, including fines, as follows:
 - a) Civil penalties shall be recoverable for any discharge of dredged or fill material without a permit; any violation of Section 404 permit conditions or filing requirements; any duty to allow or carry out inspection, entry or monitoring activities; or, any regulation or orders issued by the State Director. The penalties shall be assessable in at least the amount of \$5,000 per day for each violation.

- b) Criminal fines shall be recoverable against any person who willfully or negligently violates any applicable standards or limitations; any Section 404 permit condition; or any Section 404 filing requirement. The fine shall be assessable in at least the amount of \$10,000 per day for each violation.
 - c) Criminal fines shall be recoverable against any person who knowingly makes any false statement, representation of certification in any Section 404 form, notice or report required by a Section 404 permit, or who knowingly renders inaccurate any monitoring device or methods required to be maintained by the Director. The fines shall be recoverable in at least the amount of \$5,000 for each instance of violation.
- b. The maximum civil penalty or criminal fine (as provided in paragraphs a, b, and c above) shall be assessable up to the maximum amount for each day of violation.
 - c. The burden of proof and degrees of knowledge or intent required under State law for establishing violations in paragraphs a, b, and c above or under § 233.41, a, 3, shall be no greater than the burden of proof or degree of knowledge or intent EPA must provide when it brings an action under the CWA (this requirement is not met if State law includes mental state as an element of proof for civil violations).
 - d. A civil penalty assessed, sought or agreed upon by the State Director under paragraph 9 a, 4 above or § 233.41, a, 3, shall be appropriate to the violation. If EPA believes that the penalty amount or settlement is substantially inadequate in comparison to what EPA would require, then EPA may commence separate actions for penalties. In addition to the Federal requirements, the State may have other enforcement remedies such as procedures to assess or sue for costs incurred by the State or damage to the environment regarding Section 404 violations.
 - e. The State shall provide for public participation in the State enforcement process by providing either:
 - 1) Authority which allows intervention as of right in any civil or administrative action to obtain remedies specified in § 233.41 a, 3, by any citizen having an interest which is or may be adversely affected;
 - 2) Assurance that a State agency or enforcement authority will:
 - a) Investigate and provide written responses to all citizen complaints submitted pursuant to State procedures specified in § 233.41, 3, e, 2.
 - b) Not oppose intervention by any citizen when permissive intervention may be authorized by statute, rule, or regulation.

- c) Publish notice of and provide at least 30 days for public comment on any proposed settlement of a State enforcement action (53 Fed. Reg. p. 20783 (1988)).
10. The State must go through a Section 404 approval process with the EPA. The program submittal is distributed by EPA to other required agencies and will publish notice in various newspapers within the State. During the approval process, which may take as long as 120 days after EPA receives a complete program submission, EPA will hold a public hearing for the purpose of public comments. The Administrator (EPA) shall approve or disapprove the program based on the requirements of § 233.10, the CWA, and comments received (53 Fed. Reg. p. 20778 (1988)).
11. In the event of any needed revisions to the approved State Section 404 program, (either by the State or EPA) the State shall do the following:
- a. The State shall keep EPA fully informed of any proposed modifications to its basic statutory or regulatory authority, its forms, procedures or priorities.
 - b. If a revision of the State program is required, the State shall submit a modified program description, Attorney General's statement, Memorandum of Agreement, or such other documents as EPA determines to be necessary. A program revision shall not become effective until approved by the EPA Administrator.
 - c. States with approved Section 404 programs shall notify EPA of a proposed transfer of all or part of any program from the approved State agency to any other State agency and shall identify any new division of responsibility among the agencies involved. No transfer is authorized until approved by the EPA Administrator.
 - d. The State shall provide a supplemental Attorney General's Statement, program description or other documents or information to the EPA if the Administrator has reason to believe the circumstances have changed with respect to the State Section 404 program (53 Fed. Reg. p. 20779 (1988)).
12. The EPA Administrator may withdraw program approval when a State program no longer complies with the requirements of 40 CFR, Chapter 1, Part 233, and the State fails to take corrective action. The withdrawal criteria includes the following:
- a. When the States' legal authority no longer meets the requirements including:
 - 1) The State failing to promulgate or enact new authorities when necessary.
 - 2) State legislative action striking down or limiting State authorities.
 - b. When the operation of the State program fails to comply with the requirements including:

- 1) Failure to exercise control over activities required to be regulated, including failure to issue permits.
 - 2) The issuance of permits which do not conform to the requirements.
 - 3) Non-compliance with the public participation requirements of 40 CFR, Chapter 1, Part 233.
- c. When the State's enforcement program fails to comply with the requirements including:
- 1) Failure to take action on violations of permits or other program requirements.
 - 2) Failing to seek adequate enforcement penalties or to collect administrative fines when imposed.
 - 3) Failing to inspect and monitor activities subject to regulation.
- d. The Federal Government may order the commencement of proceedings to determine whether to withdraw approval of a State program if the State fails to comply with the requirements of § 233 as set forth in § 233.53 or in number 14 above (53 Fed. Reg. pp. 20784-20785 (1988)).
13. There are procedures for the State to withdraw from administration of the Section 404 program as well.
- a. If the State wishes to withdraw from the program, a 180 day notice and transfer plan must be submitted to the Administrator and the Secretary of the Army. After receiving the notice and approved transfer plan, the Federal Government will coordinate and make the necessary public notices for the transfer.
14. No permits shall be issued by the State Director in the following circumstances:
- a. When the conditions of the permits do not comply with the requirements of CWA, or regulations and guidelines implementing the CWA, including the Section 404(b)(1) environmental guidelines (40 CFR Part 230).
 - b. When the Regional Administrator has objected to issuance of the permit under § 233.50 (c) and the objection has not been resolved.
 - c. When, in the judgment of the Secretary of the Army acting through the Chief of Engineers, anchorage and navigation in or on any of the waters of the United States would be substantially impaired by the discharge.
 - d. When the proposed discharge would be into a defined area for which specification as disposal site had been prohibited, restricted, denied, or withdrawn by the Administrator under Section 404 (c) and the discharge fails to comply with the Administrator's action under that authority (53 Fed. Reg. p. 20779 (1988)).

15. EPA requires routine submission of the following reporting requirements:

- a. A copy of public notice for each completed application (except those exempted under the Memorandum of Agreement (MOA));
- b. A copy of every draft permit the Administrator intends to issue;
- c. Notice of every significant action taken with regard to a permit application;
- d. A copy of each issued permit;
- e. A copy of the State's response in regard to another state's comments/recommendations (if such comments are disregarded);
 - 1) Unless waived under Section 233.51, the EPA shall supply the U.S. Fish and Wildlife Service (USFWS), the U.S. Army Corps of Engineers (USCE), and the National Marine Fisheries Service (NMFS), with a copy of each public notice, draft general permit, and supplemental materials necessary to review such permits.
 - 2) The Federal agencies mentioned above have forty-five (45) days to notify the EPA of their desire to comment, with EPA reserving right for final permit determinations.
 - 3) If the State submits insufficient evidence to evaluate a permit application, general permit, public notice, EPA may, within thirty days (30), request the complete record of such a permit proceeding before the State, including supplemental materials deemed applicable.
 - 4) If EPA decides to comment or object to a permit application, draft permit, general permit, or the State's failure to accept recommendations/comments from another affected state, such notification shall be delivered within thirty days (30) of receipt. The issuance of the permit or application in question shall be withheld pending a ninety (90) day review period. EPA may notify the State within thirty (30) days that no comments are immediately forthcoming, but reserves right to object or comment for ninety days (90) on information divulged as a component of the public review process.
 - 5) If EPA decides to comment or object to a public notice, draft permit, or general permit, EPA shall submit a written statement of comments, objections, the justifications for such comments, and the action which shall be taken by the State to eliminate such objections (53 Fed. Reg. p. 20784 (1988)).

The State shall also prepare and submit an annual report within ninety (90) days from a mutually agreed upon yearly period. The content and production process shall include the following:

- 1) A component detailing the State's administration of the Section 404 program, problems encountered, and recommendations for resolving problems.
- 2) An assessment of the cumulative impacts of the State's permit program on the integrity of the State's waters, identification of critical areas of concern or interest, the number and nature of individual and general permits issued, modified, or denied; the number of violations and enforcement actions taken; the number of unauthorized activities reported and action taken as a result; and the number of permits awaiting processing.
- 3) A draft copy of the annual report shall be made publicly available.
- 4) EPA shall transmit comments, objections, or requests for further information, within sixty (60) days of receipt.
- 5) The State shall respond to EPA's comments and return a final copy of the annual report within thirty (30) days.
- 6) EPA shall publish public notice of availability upon acceptance of the annual report (53 Fed. Reg. p. 20784 (1988)).

16. Coordination Requirements.

a. General Coordination

- 1) At the present time no State agency is responsible for a Statewide CWA Section 208(b)(4) regulatory program which involves agricultural, mining, construction, salt water and residual waste pollution. However, the Minnesota Pollution Control Agency did develop a 208(b)(4) Report (during the 1970's) which contained recommendations mainly with "best management practices" (BMP's). If at a future date MPCA did assume the 208(b)(4) Federal regulatory program, the State Director of a 404 program will have to develop an agreement with the agency designated to administer the program which shall include:
 - a) A definition of the activities to be regulated by each program;
 - b) Arrangements providing the agencies an opportunity to comment on prospective permits, BMPs, and other relevant actions; and
 - c) Arrangements incorporating BMPs developed by the Section 208(b)(4) program into Section 404 permits, where appropriate.

- 2) Where a CWA Section 208(b)(4) program has been approved under Section 208(b)(4)(C), no permit shall be required for activities for which the Administrator has approved BMP's under such approved program except as provided in § 232.3 (a) and (b). Until such Section 208(b)(4) program has been approved by the Administrator, a person proposing to discharge must obtain an individual permit or comply with a general permit.
 - 3) The State Director shall consult with any State agency(ies) with jurisdiction over fish and wildlife resources.
- b. State Section 404 programs shall assure coordination of State Section 404 permits with Federal and Federal-State water related planning and review processes.
- 1) The State Director shall assure that the impact of proposed discharges will be consistent with the Wild and Scenic Rivers Act when the proposed discharge could affect portions of rivers designated wild, recreational, scenic, or under consideration for such designation.
 - 2) Agencies with jurisdiction over Federal and Federal-state water related planning and review processes, including the U.S. Army Corps of Engineers, the U.S. Fish and Wildlife Service, and the National Marine Fisheries Service, shall notify the Regional Administrator that they wish to comment within 45 days of receipt by the Regional Administrator of the permit application, draft permit, or draft general permit. Such agencies should submit their evaluation and comments to the Regional Administrator within 50 days of receipt by the Regional Administrator of the permit application, draft permit, or draft general permit. Upon request, the Regional Administrator may allow any such agency up to an additional 30 days to submit comments. All comments from the U.S. Army Corps of Engineers, the U.S. Fish and Wildlife Service, and the National Marine Fisheries Service, regarding permit applications, draft permits, and draft general permits, shall be considered by the Regional Administrator. If the Regional Administrator does not adopt a recommendation of any such agency, a consultation shall occur with the affected agency. The final decision to object or to require permit conditions shall be made by the Regional Administrator.
- c. If the proposed discharge may affect the quality of the waters of any state(s) other than the state in which the discharge occurs, the State Director shall provide an opportunity within the public comment period for such state(s) to submit comments, recommendations, and desired additional permit conditions. If such comments are not accepted by the State Director, these comments shall be submitted to the effected state and Regional Administrator, along with an explanation for the failure to do so (53 Fed. Reg. p. 20784 (1988)).

COSTS FOR STATE ADMINISTRATION

COSTS FOR STATE ADMINISTRATION

The costs involved in the preparation of Section 404 assumption documents are excluded from the following table. Overall assumption costs include a State responsibility for the funding and preparation of documents outlining the State's Section 404 authority and capability, as well as establishing agreements for the orderly transfer of permit records and procedures for public interest review. This process is expected to cost about \$67,400 annually and require on average two to three years for completion.

I. UNDER M.S. 105.37/105.42

A. State Waterbank Program	\$ 240,000
B. Wetland Tax Exemption Program	\$ 200,000
C. Division of Fish and Wildlife (\$60,000 is a one-time cost).	\$ 284,640
D. Rule Hearings (a one-time cost)	\$ 50,000
E. Public Hearings	\$ 72,000
F. Information Management Charges (a one-time cost).	\$ 9,000
G. Permit Processing (\$60,000 is a one-time cost).	\$ 316,992
H. Violations.	\$ 263,561
I. Computer Entry.	\$ 1,200
J. Public Notices.	\$ 45,750
K. Inter-Agency Mailings	\$ 600
L. Annual Report	\$ NA
M. Certification	\$ NA
FIRST YEAR COST TOTAL	\$1,483,743
ANNUAL TOTAL (minus one-time costs)	\$1,304,743

II. UNDER A NEW SECTION OF MINNESOTA STATUTES

Costs would be identical to those above except that (A) Waterbank, and (B) Wetland Tax Exemption would not be accrued.

FIRST YEAR COST TOTAL.	\$1,483,743
TOTAL (minus "A" and "B").	\$1,043,743
TOTAL (minus one-time costs)	\$ 864,743
ANNUAL TOTAL	\$ 864,743

One time expenditures and set up costs are expenses associated with assumption of the Section 404 program. Set up costs generally refer to the addition of new employees. Such costs include the purchase of data processing equipment, field supplies (i.e. camera, additional instrumentation, transportation, etc.) and routine office supplies. One time expenditures are costs associated with record transfers and required public hearings. Included within these figures are expenses related to converting or moving records and those associated with the rule making process. The public rule making process includes the services of the Attorney General's office, an administrative law judge, DNR hydrologists, and, at times, affiliated State personnel.

If the State Legislature approves assumption of the Section 404 program, it will require two to three years to prepare documents, reports, and agreements, required by EPA. It is the Department's belief that such assignments necessitate the support of both a Hydrologist 1 and 2, in addition to legal assistance from the State Attorney General's office.

The annual personnel expenditures (including fringe benefits) required to prepare documents necessary for assumption of the Section 404 program are listed below:

Section 404 Assumption

Hydrologist 1	=	\$ 31,400.00
Hydrologist 2	=	\$ 34,500.00
Legal Assistance	=	\$ 1,500.00
Annual Total	=	\$ 67,400.00
Two Year Total	=	\$134,800.00
Three Year Total	=	\$202,200.00

Were the State to assume administration of the Federal Section 404 Authority, it can expect a potential increase of 600 permit applications per year, or a 47% increase in permit activity. The figures are based upon review of fiscal 1987 permits to determine the number of permits issued by the State and those issued by the Corp of Engineers which would be added with 404 assumption (Appendix C).

Assuming the State chooses to change its definition of "public waters" and "wetlands", the effect will be an increase in the number of waters and wetlands being regulated. This will impact some 75 additional public statutes (Appendix A) which now include the term "public waters" in their language. As the state definition expands that acreage which the State must oversee, it necessarily expands the coverage of other state programs dealing with public waters and wetlands.

If the State assumes the Section 404 program and elects to create an additional section in Minnesota Statutes, then the definitions of public waters under M.S. 105.37 will not change. If the new section option is selected, the State will not be obligated to include the additional Section 404 wetlands into the State Waterbank or Wetland Tax Exemption Programs listed below. This action could save the State approximately \$440,000 per year. Also, the costs associated with the changes in 75 other statutes would be eliminated. The new section could be titled "Other Waters of the United States" and would require its own set of agency rules dealing only with the discharge of dredged or fill material. The 404 wetlands (the larger type 3, 4, or 5) currently protected under the M.S. 105.42 authority would remain under the same authority. The agency rules currently being used for processing these applications would have to be reviewed by the U.S. EPA and could require some slight modifications prior to EPA approval.

A. STATE WATER BANK PROGRAM

The Water Bank program is designed to compensate landowners for not converting wetlands into cropland. In order for an area to qualify for the program, the area must be classified as a "wetland" according to Minnesota Statutes Chapter 105 or be identified as a "qualifying wetland" by the Department. The State is obligated to offer the qualifying landowner the following choices of indemnification within 60 days of receipt of a complete drainage permit application:

1. An offer to purchase the area, provided the landowner can provide public access.
2. An offer to acquire a perpetual easement on the area.
3. An offer to acquire a limited duration easement of not less than 20 years on the area.

Payments are based on appraisal of assessed land values and average \$400 per acre. Up to one acre of adjacent property per wetland acre may be included in the terms of any offer at the option of the Department. Current program costs are estimated to double with adoption of Federal definitions. The current number of 25 applications per year could potentially double to 50. In the 1986-87 biennium, the State spent \$580,000. Expanded regulation would likely push costs over \$1 million. It would mean an increase of at least \$580,000 in the next biennium, or \$240,000 per year.

STATE WATER BANK PROGRAM

\$240,000

B. WETLAND TAX EXEMPTION

M.S. 272.02, subd. 10 provides that wetlands which meet the definition of M.S. 105.37, subd. 15 and which otherwise could be legally drained and made economically viable for agricultural production, are exempt from property taxation. Eligible wetlands are presently confined to types 3, 4 and 5 (as defined by the U.S. Fish and Wildlife Service, Bulletin #39). With assumption of the Section 404 program, all wetlands of the State are eligible for tax exempt consideration.

The total value of the wetland tax exemption credit is expected to increase significantly with assumption of the Section 404 program. State law provides tax exemption for all wetlands which satisfy the definition described under M.S. 272.02, subd. 20. Although this exemption previously applied only to types 3, 4 and 5 wetlands, adopting the Federal definition of U.S. Waters automatically obligates the State to provide tax exempt consideration for all remaining wetlands. This property tax exemption is available without regard to previous size or type restrictions.

During 1986 the value of the wetland tax exemption credit was estimated at \$200,000.00. This figure is expected to at least double with the increase in eligible wetlands associated with assumption of the Section 404 program. Overall, this increase in value is highly dependent upon any publicity generated as a result of State assumption. Landowners, for instance, may deluge public officials once they realize nearly any previously exempt wetland could be considered eligible for tax credit.

WETLAND TAX EXEMPTION VALUE

\$200,000

C. DIVISION OF FISH AND WILDLIFE

The DNR Division of Fish and Wildlife's primary responsibilities are the management of Minnesota's wildlife and fish resources. As such, this charge includes an obligation to review and comment on M.S. 105.42 permit applications. It is the Division of Fish and Wildlife's responsibility to point out detrimental resource impacts, to recommend denial or mitigation measures, and, or, to suggest alternatives or actions which protect or enhance fish and wildlife resource values.

At present, the staff resources of the Division of Fish and Wildlife are inadequate to thoroughly review M.S. 105.42 permit applications. Because of responsibilities to other program areas, Division staff are only able to review what are considered the most "significant" permit applications. Without a provision for field inspections, review comments for these significant permits are typically of little value. In most cases, field inspections are the only way to obtain an understanding of unique site or project characteristics.

It is impossible to consider imposing additional Section 404 permit review responsibilities without, first, providing sufficient staff support.

Adequate M.S. 105.42 permit review requires a capability to examine and comment on all applications, as well as regularly perform field inspections. This obligation necessitates an increase in personnel to satisfy the current level of permit applications. Meeting an anticipated increase of 600 additional Section 404 permits requires further personnel support.

The Division of Fish and Wildlife believes the addition of six Natural Resource Specialist 3 positions are required for thorough review of current M.S. 105.42 permits, as well as to accommodate Section 404 permits. To assure coordination with existing programs and to provide access for field inspections, the Division believes each Natural Resource Specialist 3 position should be dedicated to a regional office.

A summary of recommended personnel additions and associated costs are as follows:

Personnel Allowances

Natural Resource Specialist 3 - Region 1	= \$ 37,440
Natural Resource Specialist 3 - Region 2	= \$ 37,440
Natural Resource Specialist 3 - Region 3	= \$ 37,440
Natural Resource Specialist 3 - Region 4	= \$ 37,440
Natural Resource Specialist 3 - Region 5	= \$ 37,440
Natural Resource Specialist 3 - Region 6	= \$ 37,440
Setup Costs	= \$ 60,000
Total	= \$284,640

DIVISION OF FISH AND WILDLIFE

\$284,640

D. RULE HEARINGS

The State must sponsor a public rule making session with assumption of the Section 404 program. A rule making session involves legal assistance from the Attorney General's office at \$20.00 an hour; legal drafting services at \$30.00 per hour; services of an administrative law judge at \$69.00 per hour plus travel expenses; public notices at approximately \$45.00 each; and costs associated with preparation, testimony, and involvement of State personnel. The total hearing cost, based upon previous examples, ranges from \$50,000 to \$100,000 (depending upon the complexity of the hearing).

RULE MAKING HEARINGS

\$50,000

E. PUBLIC HEARINGS

If a permit application is granted with or without conditions or refused, the applicant, the mayor of the city, the managers of the watershed district, and the board of the soil and water conservation district, may demand a public hearing. Each public hearing requires the involvement of the Attorney General's office, an administrative law judge, witnesses, and any State personnel involved in the hearings themselves or consequent investigations. Costs for these public hearings have historically ranged from \$6,000 to \$20,000.

The Department anticipates an additional 12 hearing demands with assumption of the Section 404 program. The total cost of \$72,000 represents 12 new hearing demands multiplied by a minimum hearing cost of \$6,000 (a \$20,000 hearing is atypical).

PUBLIC HEARINGS

\$72,000

It is important that EPA's role in the public hearing process be recognized. EPA exercises oversight responsibility for the State's administration of the Section 404 program. This responsibility allows EPA to overrule any State decision and render its own findings.

F. INFORMATION MANAGEMENT

Access to current and historical permit actions are an important component for State assumption of the Section 404 program. EPA requires that the Secretary of the Army, acting through the Chief of Engineers, provide for orderly transfer of any pending Section 404 permit records. The Corps of Engineers are under no obligation to provide for the transfer of current and historical permit files.

The transfer of the Corps' Section 404 permit records are valuable as staff reference sources and might improve the overall efficiency of permit review. Ready access to permit files reduces the level of staff involvement in information requests and facilitates the use of historical permits as reference materials. Permit files themselves may provide clues for project and permit evaluations, historical perspectives of particular permits or resources, advance warning of anticipated problems, and a host of other values. Any costs associated with transferring these records might easily be recouped by their value and use for the State's Section 404 program.

The costs of transferring the Corps of Engineers' Section 404 records involve storing, moving, and reorganizing two years worth of paper files (at any given time only two years of paper records are available); the cost of storing, copying, and reorganizing eight years worth of microfilm records; the costs of transferring, storing, reorganizing, and distribution of computer files; and any related moving expenses. The total transfer costs, including a \$2,000 appropriation for computer training, is estimated at \$9,000. Adjustments for cost saving measures might alter the total cost accordingly.

INFORMATION MANAGEMENT

\$9,000.00

G. PERMIT PROCESSING

State assumption of the Section 404 program is expected to increase the DNR Division of Waters permit load by approximately 600. Assuming Section 404 permit applications require about the same processing time as M.S. 105.42 permits, it is anticipated that 600 new permits require an additional 3900 hours of processing time. It is recognized that a percentage of this additional permit load will be the equivalent of the Corps' Nationwide and General permits. However, even in the case of Nationwide permits, there are informal review requirements. Nationwide permit applicants typically request written determinations regardless of specific application policies.

The current review costs represent an anticipated increase of 600 permits multiplied by the \$18.25 hourly wage (including benefits) of a Hydrologist 1/2 and an average processing time of 6.5 hours. This review figure

amounts to \$71,175. The Division of Waters, however, is unable to assimilate this increase of 600 permits, along with at least an equivalent number of general inquiries, phone calls, correspondence, and preliminary investigations.

Specific requirements for disseminating Section 404 information, along with an equivalent work load of 1200 permits, justifies a request for six new Hydrologist 1 positions and a Central Office Hydrologist 2 Coordinator. The hydrologist positions are necessary to adequately address this additional permit load. A State Director (Coordinator), on the other hand, is responsible for implementing the requirements specified under a section of this report entitled "Conditions for State Assumption". A State Director is the designated liaison with EPA and other Federal agencies, along with being responsible for preparing an annual report and responding to public inquiries.

Following is a summary of costs associated with the Division of Waters' recommendation: The Division recommends that each of six new hydrologists be assigned to a regional office. This arrangement provides for continuity in the existing permit structure, as well as local Section 404 review and program access.

Permit Processing

Hydrologist 1 - Region 1	= \$ 31,400
Hydrologist 1 - Region 2	= \$ 31,400
Hydrologist 1 - Region 3	= \$ 31,400
Hydrologist 1 - Region 4	= \$ 31,400
Hydrologist 1 - Region 5	= \$ 31,400
Hydrologist 1 - Region 6	= \$ 31,400
Hydrologist 2 - Central Office	= \$ 34,450
Setup Costs	= \$ 60,000
Total	= \$282,900

DIVISION OF WATERS

\$282,900

CLERICAL ASSISTANCE

Accommodating 600 new Section 404 permits impacts the DNR Division of Waters clerical staff. It is the responsibility of the clerical staff to log each permit as it arrives; to index files; to type and verify draft permits, letters, and memorandums; to prepare and update mailing lists; to coordinate the distribution of public notices; and to assist with phone inquiries and communications. The typing and tracking type assignments require, on average, an hour per permit. Public notification requirements for the 300 anticipated Individual Review type permits will impose an estimated work load equivalent to another 3000 hours.

Clerical costs for State assumption of the Section 404 program represent a combined typing and mailing type assignment work load increase of 3600 hours multiplied by the \$9.47 hourly salary of a Clerk Typist II

(including benefits). It should be recognized that this additional work load will not be distributed evenly among the DNR Division of Waters regional offices. Actual work load increases are dependent upon the individual permit load at each regional office.

CLERICAL ASSISTANCE

\$34,092

Permit Processing Total

Division of Waters	=	\$282,900
Waters' Clerical Staff	=	\$ 34,092
Total		<u>\$316,992</u>

PERMIT PROCESSING

\$316,992

H. VIOLATIONS

An annual increase of 150 permit violations is a conservative prediction of the impacts associated with State assumption of the Federal Section 404 program. The State presently issues about 50% of the Corps of Engineers Section 404 type permits. In fiscal year 1985 some 300 violations were processed. Assuming the permit to violations ratio remains constant, a 50% increase in overall permit applications should roughly increase annual permit violations to 450.

Field work, review time, draft restoration orders, and processing, average 16 hours per case. The number of increased violations multiplied by the hourly salary of a DNR Hydrologist 2 and the combined administrative average of 16 hours are represented below: Any of these cases may also require assistance from the Division of Enforcement, as well as additional correspondence, surveying activities, contested case hearings, and other courses of action.

DIVISION OF WATERS VIOLATIONS

\$52,800

The total number of violations could be larger than predicted because of the State's enforcement structure. Minnesota's 171 conservation officers are stationed geographically throughout every county in the State. The Corps of Engineers, on the other hand, currently enforces the Section 404 program with five personnel distributed among offices in Bemidji, St. Paul and Duluth, Minnesota. The DNR's 171 person conservation officer contingent is supplemented by Waters Division employees, as well those of other divisions. DNR Waters Division personnel are advised to report suspected violations to area and regional hydrologists. Area and regional hydrologists are required to assist conservation officers in the investigation, reporting, determination, and documentation of suspected and actual permit violations.

Bruce Norton, Chief of Enforcement for the St. Paul District of U.S. Army Corps of Engineers, believes Section 404 permit violations are sure to increase with State assumption. Mr. Norton thinks residents are more likely to report a suspected violation with the DNR's local access and phone numbers. Mr. Norton reported that "violations increased dramatically for the Corps of Engineers around Green Bay, Wisconsin after opening a new Corps field office".

Survey Unit

Any increase in permit violations directly effects the DNR Division of Waters' Survey Unit. The Survey Unit's primary responsibility relates to establishing the ordinary high water mark (OHW) for public waters and investigating fill violations. In an average year some 125 OHW determinations and 15 violation sites are surveyed. Currently the Survey Unit's priorities are determined in response to specific requests or anticipated shoreland development pressure. It is impossible with current resources to engage in preemptive surveys or to instigate the development of a lake gauging network (this network would be used to substantiate normal lake levels).

State assumption of the Federal Section 404 program would roughly double the Survey Unit's work load. At present about 40% of the State's waters are regulated. Most of the remaining State waters become eligible for surveying under Section 404 assumption (regardless of whether the State decides to incorporate the program under M.S. 105.42 or within a new section). This near 60% increase in State regulated waters logically translates into a need for at least 125 additional OHW determinations, with a minimum of 26 additional violations surveys.

The complexity of surveys vary a great deal. Some survey assignments involve short morning or afternoon trips; others include overnight accommodations in remote areas of the State. All surveys involve transportation, employee salaries, use of instrumentation, and the production of official drawings. These costs averaged approximately \$3,000.00 per survey (depending on the complexity of the survey and the availability of prior survey data).

Accommodating the Section 404 program would have less impact if the Survey Unit had excess production capability. The Survey Unit, however, is fully occupied by OHW determinations, violations, and a host of other State sanctioned activities. The Survey Unit is not in a position to accept a doubling of its responsibilities. Such a volume is enough, in and of itself, to occupy an entirely new survey team.

The Division of Waters' Survey Unit recommends addition of the following personnel to meet anticipated Section 404 survey demands:

Survey Crew

Survey Technician 1	= \$ 30,000
Survey Technician 1	= \$ 30,000
Survey Supervisor	= \$ 40,000
Setup Costs	= \$ 40,000
Total	= \$140,000

Draftsman/Woman

Technician	= \$ 30,000
Setup Costs	= \$ 10,000
Total	= \$ 40,000

Survey Unit Total = \$180,000

SURVEY UNIT

\$180,000

*(Setup costs include levels, transits, electronic survey instrumentation, transportation arrangements, related hand tools, data processing equipment, storage cabinets, specialized drawing tables and computerized graphics equipment, art supplies, etc.)

Clerical Assistance

An anticipated increase of 150 Section 404 violations imposes a new set of demands upon the clerical staff. Currently an average violations case involves the preparation of letters, memorandums, draft restoration orders, Commissioner's orders, the proofreading of any such documents, file searches, and phone calls. On average, these assignments amount to one hour of clerical assistance per permit. Assuming this hourly total holds true for Section 404 violations, the overall increase in clerical work load amounts to 150 hours. This 150 hour work load increase multiplied by the \$9.47 hourly salary (includes benefits) of a Clerk Typist II represents the Section 404 program's estimated impact on clerical costs.

CLERICAL ASSISTANCE

\$1,421

Division of Enforcement

The addition of 150 Section 404 permit violations imposes new costs and demands upon the Division of Enforcement. Based upon M.S. 105.42 permit violations, the Division estimates that each new permit violation entails about 20 hours worth of a conservation officer's time. Typically each violation involves a site investigation; correspondence with area and regional hydrologists, county attorneys, State attorneys; legal

investigations; interviewing suspects and witnesses; any time involved in testifying and preparing for contested case hearings; and the completion of required forms.

Conservation officers are responsible for enforcing a gamut of natural resource laws, including those associated with M.S. 105.42 and Section 404 activities. While the number of enforcement officers and their specializations have changed little over time, the increasing number of activities and people engaging in recreational pursuits are demanding a substantial amount of enforcement action. It is increasingly difficult for officers to devote their resources to recreation demands without compromising the enforcement of other resource laws.

The cost of accommodating 150 new Section 404 violations are calculated at the average review time of 20 hours per violation multiplied by a Natural Resources II (Conservation Officer) overtime hourly rate of \$27.38. An overtime rate is used because officers are allocated 319 hours of annual overtime and Section 404 violations are an addition to already stressed enforcement responsibilities.

DIVISION OF ENFORCEMENT VIOLATIONS

\$82,140

Stationing a conservation officer in each of the six regions could be an effective option for enforcing Section 404 and M.S. 105.42 regulations. This arrangement would release currently overburdened conservation officers for enforcement of other natural resource laws, while providing an effective means of policing and protecting the State's waters. The overall cost, which is summarized below, could be lower over the long run because of consistency of enforcement and specialization. An effective program might, for instance, reduce the number of costly contested case hearings or overrulings by EPA.

Enforcement Option			
Region I	Conservation Officer	=	\$ 39,000
Region II	Conservation Officer	=	\$ 39,000
Region III	Conservation Officer	=	\$ 39,000
Region IV	Conservation Officer	=	\$ 39,000
Region V	Conservation Officer	=	\$ 39,000
Region VI	Conservation Officer	=	\$ 39,000
Setup Costs		=	\$180,000
Total		=	\$414,000

*(The costs included the above estimate are based on the annual salary and benefits of a Natural Resources Specialist II (Conservation Officer), in addition to set-up costs, which typically include an appropriately outfitted vehicle; a boat, motor and trailer; handgun; baton; mace; etc. The above estimate is excluded from the assumption totals because it is presented as an option.

Violations Total

Waters' Survey Unit	=	\$180,000
Clerical Assistance	=	\$ 1,421
Division of Enforcement	=	\$ 82,140
Total	=	\$263,561
Total with Enforcement Option	=	\$595,421

VIOLATIONS

\$263,561

I. COMPUTER ENTRY

The system used for tracking M.S. 105.42 and new Section 404 permits is a combination mainframe and microcomputer system. New permits are entered directly by computer modem connection from each of the six regional offices to the State Planning Agency's Prime computer. Historical permit records are available for review or re-activation by modem connection to the St. Paul Central Office's IBM AT. Historic permit records can be activated through a series of menu controlled instructions. A system administrator then uses a utility program to transfer any activated permits to the Minnesota State Planning Agency's Prime computer.

The data management costs associated with assumption of 600 additional Section 404 permits are CPU (Central Processing Unit) time and data entry. These two expenses are estimated at approximately \$2.00 per permit or a grand total of \$1,200.00 (600 permits @ \$2.00).

COMPUTER ENTRY

\$1,200

J. PUBLIC NOTICES

The Director is required to give public notice of the following actions:

1. Submission of permit applications requiring public review.
2. Preparation of a draft general permit.
3. Consideration of a major modification to an issued permit.
4. Scheduling of a public hearing.
5. Issuance of an emergency permit.

Notice shall be given by each of the following methods:

1. By mailing a copy of the notice to the following:
 - the applicant
 - any agency with jurisdiction over the activity or disposal site, whether it issues the permit or not
 - owners of property adjoining the property where the regulated activity will occur
 - all persons who have specifically requested copies of public notices

2. 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.

EPA requires that states conduct a full public interest review for all significant permit actions (those which are defined as Individual Review by the U.S. Army Corps of Engineers). After examining the Corps public notice process, it is estimated that 50% of the expected increase in Section 404 permits require some level of public notification. The figure arrived at for an annual mailing cost represents 300 mailings multiplied by .50 for each of the Corps' present mailing list of approximately 200 names. The State's actual mailing costs could be significantly higher with any publicity generated as a result of State assumption.

MAILING LIST NOTICES

\$30,000

Past records indicate the cost of newspaper notices range anywhere from \$30.00 to \$60.00. Using an average of \$45.00 for each of the anticipated 300 significant permits (Individual Review) and 50 miscellaneous notices (notices of contested case hearings, rule hearings, etc.), the total costs are as follows:

NEWSPAPER NOTICES

\$15,750

Public Notification Totals

Mailing List Notices	=	\$30,000
Newspaper Notices	=	\$15,750
Total	=	\$45,750

PUBLIC NOTICES

\$45,750

K. INTER-AGENCY MAILINGS

As a condition of State assumption, EPA requires that states routinely submit copies of permits, significant actions taken in regard to permits, and any supporting material deemed necessary. It is expected that most of the 600 additional permits anticipated with state assumption of the Section 404 program will require at least two mailings, or a grand total of 1200 pieces. This average mailing cost of .50 multiplied by 1200 pieces is represented below:

INTER-AGENCY MAILINGS

\$600.00

L. ANNUAL REPORT

The production of an annual report is a requirement for State assumption of the Section 404 program. The State Director or Section 404 liaison must prepare a draft copy of the annual report for submission to the Regional Administrator (EPA). The draft annual report is then returned with the Regional Administrator's comments and recommendations. The report is considered final and its availability published once the Regional Administrator determines the revisions and comments are satisfactory.

Based upon the experience of Michigan's Section 404 program, production of an annual report requires approximately 120 staff hours. The estimated cost of producing the annual report amounts to the \$18.25 hourly salary of a Hydrologist 2 multiplied by 120 hours. This is not an additional cost if the Hydrologist 2 Central Office Coordinator position is approved. An annual report would simply be an assignment required of this position.

ANNUAL REPORT

\$2,200

M. CERTIFICATION

Section 401 of the Clean Water Act specifies that any applicant for a Federal license or permit to conduct an activity which may result in the discharge of pollutants into waters of the United States, requires the certification of the State from which the discharge originates or would originate from, or from a designated interstate pollution control agency having jurisdiction over the affected waters at the point where the discharge originates or would originate. A certification for the construction of any facility must also detail the subsequent operation of the facility.

Section 401 certification is no longer a requirement under State assumption of the Section 404 program. However, in the interest of protecting State water quality, it is recommended that a process similar to that of Section 401 remain. The Minnesota Pollution Control Agency (MPCA) indicated its desire to be active in the certification process and would be the most appropriate agency to do so.

No significant additional costs are anticipated by State certification of Section 404 permits. MPCA staff already review and comment on most of the Corps of Engineers Individual Review permit applications. Unless State assumption precipitates a dramatic change, the proportion of permits requiring review should remain essentially unchanged.

CERTIFICATION

NA

ALTERNATIVE FUNDING STRATEGIES

ALTERNATIVE FUNDING STRATEGIES

The total State cost to administer the Federal Section 404 permit program has been estimated to range from \$864,743 to \$1,304,743 depending on which change in legislation is chosen. None of these costs have been considered in the current budget request of the Department of Natural Resources. The funding for the total estimated amount has been investigated for the following:

1. Federal Grants
2. Permit Fees
3. Fee for Services
4. Fines
5. Legislative Funding

Federal Grants. Inquiries have been made to the U.S. Environmental Protection Agency, Chicago Office, as to the availability of federal grants or funding to administer the program. The Department was informed, by Mr. Douglas Ehorn, that there are no funds available at the present time nor will it be likely that any funds will be made available to any State in the near future for the administration of the 404 program. The U.S. EPA requires that once a 404 program is assumed by a state government, it is the responsibility of the state to finance the program. Also, prior to state assumption approval by the U.S. EPA, the state must show that it has adequate funding to administer the program.

Permit Fees. At the present time, permit fee income received by the Department of Natural Resources is turned over to the State's general fund. The DNR averages approximately 1,000 M.S. 105.42 permits per year. If the State assumes the Section 404 program, an additional 600 permits can be expected. At the current permit fee rate of \$75 per permit application, the State would receive approximately \$45,000 for processing the additional 404 permit applications. If you add the present M.S. 105.42 permit fees of approximately \$75,000 to the income received from the 404 fees, the total expected would be approximately \$112,500 annually. If the legislature were to dedicate the permits fee income to the DNR, then part of the 404 program costs would be compensated (It should be noted that the Corps of Engineers charges a minimum of \$10.00 and the DNR a minimum of \$75.00 for a non-commercial permit).

Fee for Services. A "fee for services" permit system represents another alternative for funding the Section 404 program. The fee for services permit system requires that applicants be held accountable for all or a portion of the costs incurred by the State in evaluating their permit application. Applicants would be charged for permit evaluation, routine field inspections, hydrologic analyses, legal investigations, land and OHW surveys, and a host of other services currently performed below cost by the State.

The State could expect to recover \$300,000 annually, for instance, by using the State of New Jersey's \$1,000 flat fee for any Individual Review permit (Individual Review permits require a full public interest review and have potentially significant environmental impacts). Added to this sum would be incidental service revenue such as OHW determinations. Again, using New Jersey as an example, the State can expect to recover \$12,500 annually in OHW surveys.

There are a number of significant considerations associated with a "fee for services" permit system. One issue centers on the State's authority to impose such fees. With few exceptions, the State and the DNR in particular, do not have the authority to collect fees in excess of that stated in the Minnesota Statutes. Any change in this fee structure would require legislative action.

Another consideration revolves around the design of a fee for services system. It is important that a fee for services system strive to be as equitable as possible. A fee system should be responsive enough so that applicants proposing minor projects are not charged at a level appropriate to large scale alterations. Minor activities, for instance, might be exempted under a Nationwide permit or divided into categories with lesser fees.

Fines. Revenue derived from penalties are another source of funding the Section 404 program. It is the State's responsibility to enforce and collect fines for violations of the Section 404 program. Any revenue derived from fines remains the property of the State as long as EPA determines such penalties are in compliance with the Section 404 program and appropriate to the violation. If State fines are determined insufficient, EPA has absolute authority to begin its own enforcement proceedings and collect any resulting fines.

It is difficult to determine the value of fines in underwriting the State's administration of the Section 404 program. At present many State M.S. 105.42 violations are resolved without fines. Violators typically avoid fines by agreeing to voluntary restoration or mitigation. While this is usually the case with the Corps of Engineers' administration of the Section 404 program, EPA can and does exercise its oversight responsibility by imposing significant fines. Last year, for instance, EPA levied a \$75,000 administrative penalty for a blatant violation at an Andover, Minnesota development site.

Legislative Funding. It would appear that a major source of funding the Federal 404 permit program would be this option. As stated in the above "Federal Grants" paragraph, a state must show that it has adequate funding to administer the 404 program before the U.S. EPA can give approval for state assumption.

APPROPRIATE ROLES FOR STATE AGENCIES
AND
LOCAL UNITS OF GOVERNMENT

APPROPRIATE ROLES FOR STATE AGENCIES

AND

LOCAL UNITS OF GOVERNMENT

Under Section 404 of the Federal Clean Water Act, a person who wishes to place fill material within a water basin or tributary must first check with the Department of Natural Resources, the Army Corps of Engineers, and local units of government, for any required permits. Under Minnesota Statutes Chapters 378 and 469, local units of government have the authority to develop a regulatory program and to require permits for work done within water basins or tributaries. At the present time however, most have not desired to do this. In order for the local units of government and/or other State agencies to actually assume the Section 404 Authority, each one would have to develop a permit program, distinguish between a MS 105.42 and a Section 404 permit requirement, and hire appropriate staff to administer the program. The Department of Natural Resources already has the experience, knowledge and most of the staff required to assume the Section 404 program. Also, the redundancy of applying to the State and another unit of government would be eliminated. For these reasons, the Department of Natural Resources would be in the best position to assume the program and to solicit comments concerning permit applications from local units of government and State agencies.

NECESSARY CHANGES IN CURRENT STATE LAW

NECESSARY CHANGES IN CURRENT STATE LAW

The Environmental Protection Agency requires that states have statutory authority to carry out the provisions of 40 CFR, Chapter 1, Parts 232 and 233. As such, the following amendments are changes necessary for assumption of the Federal Section 404 program. Any additional provisions may be stipulated at the discretion of the State.

GENERAL AUTHORITY

M.S. 105.39, Subd. 3 provides the Commissioner of Natural Resources with administrative authority over the allocation and control of public waters and wetlands, the establishment, maintenance and control of lake levels and water storage reservoirs, and the determination of the ordinary high water mark for public waters and wetlands.

An amendment must be added to allow the Commissioner authority to make agreements and prescribe rules in compliance with assumption of the Federal Section 404 program, such as:

The Commissioner of Natural Resources shall have authority to assume operation of the Section 404 program. As such, the Commissioner may make agreements with appropriate Federal agencies; regulate discharge of dredge and fill materials to the extent necessary for the Section 404 program, into waters of the State which are not public waters or wetlands, but which are waters of the United States as defined by the Environmental Protection Agency pursuant to Section 404 of the Federal Clean Water Act; and adopt rules as necessary to implement this section.

WATER BANK

The State Water Bank program was established to acknowledge the value and protect for future generations, the wetlands of Minnesota. As such M.S. 105.392, Subd. 1 requires the Commissioner of Natural Resources to make rules and establish compensatory payment rates necessary for the preservation and conservation of the State's wetlands. Participating land owners agree not to drain, burn, or otherwise alter the character of wetland area; to implement a wetland conservation plan if stipulated in the agreement; to abide by the agreement's financial requirements, including violations resulting in forfeiture of future payments and grants; not to adopt practices which defeat the agreement's purpose, and to abide by additional provisions as stipulated by the Commissioner.

Wetlands presently eligible for Water Bank consideration are identified in the U.S. Fish and Wildlife Service Circular #39 as types 3, 4 and 5. This authority should as a matter of fairness, be expanded to include Section 404 waters such as specified below:

The wetland no drainage and compensation provisions of M.S. 105.391, Subd. 3 shall be enlarged to cover wetlands as defined by the Environmental Protection Agency, which are not inventoried under 105.391, Subd. 1, but which are waters of United States under Section 404 of the Federal Clean Water Act.

DRAINAGE

M.S. 106A.B11, Subd. 1 provides that drainage authorities may construct and maintain drainage systems; deepen, widen, and straighten the channel of a natural waterway that is a part of a drainage system or is located at the outlet of a drainage system; extend a drainage system through a municipality for a suitable outlet; and construct dikes, dams, control structures, power appliances, and pumps, as provided by law.

State assumption of the Section 404 program requires regulation of drainage activities exempt under the provisions of M.S. 105.42, Subd. 3. Currently drainage authorities are exempt from permitting requirements for activities established under M.S. 106.005 - 108A.11, which are part of a drainage systems lawfully established and which do not substantially affect public waters. Natural altered watercourses, however, includes rivers, and, or streams regulated under the Federal Section 404 program.

The provisions of M.S. 105.42 can be amended to comply with the Section 404 program by incorporating the following clause:

Notwithstanding any other laws to the contrary, the Commissioner may regulate ditch maintenance under Chapters 106A and 112 which affect waters of the United States, to the extent necessary to qualify for Federal Section 404 assumption.

PENALTIES

M.S. 105.541 provides that any person in violation of provisions in Minnesota State Statutes, Chapter 105, is guilty of a misdemeanor. A misdemeanor is punishable by fines up to \$700.00, and, or 90 days in jail.

The Federal Section 404 program requires that M.S. 105.541 be amended to reflect penalties as specified below: The Regional Administrator (EPA) may waive these requirements if the State provides evidence of an alternative program with equivalent deterrence and compliance capability. Evidence consists of at least one year's worth of records from the alternative program.

The State shall have the authority to assess or recover civil penalties for discharges of dredge or fill material without a required permit or in violation of any Section 404 permit condition in an amount of at least \$5,000.00 per day for each instance of a violation.

The State shall have authority to seek criminal charges against any person who knowingly makes false statements, representations, or certification in any application, record, report, plan, or other document filed or required under the Act, Federal 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 \$5,000.00 for each instance of a violation.

The State shall have authority to seek criminal fines against any person who willfully or with criminal negligence discharges dredge or fill material without a permit or in violation of any Section 404 permit condition in the amount of at least \$10,000 per day for such violation.

The civil penalties assessed or sought by the State shall be appropriate to the violations. However, EPA may institute separate proceedings if penalties are inadequate compared to what EPA would impose.

STATUTORY ALTERNATIVES

There are two basic statutory alternatives for State assumption of the Section 404 program. One option is to amend M.S. 105.37, subd. 14 to include waters of the United States as defined by the EPA. The other alternative is to develop a new section and definitions specifically applicable to Section 404 activities.

Alternative One

Amend the definition of public waters in M.S. 105.37, subd. 14 and subd. 15 to encompass all waters of the State which are waters of the United States as defined by the Environmental Protection Agency for Section 404 of the Federal Clean Water Act.

Alternative Two

Create a new section providing the Commissioner with authority to regulate dredge and fill activities to the extent necessary for assumption of the Federal Section 404 program. The jurisdictional interpretation of waters applicable to this section might be termed "Other Waters of the United States".

DISCUSSION

There are some 75 State statutes which use the term public waters. If the definition of public waters are broadened under M.S. 105.37, the reach of each of these statutes also increases. Expanding the term public waters impacts hunting and fishing regulations, purple loosestrife control, cranberry and wild rice harvesting, shoreland protection, wildlife management, lake bed mining, demand for legal services, and a host of other regulations or programs.

This all inclusive Federal definition of "public waters", for instance, would require the State, under M.S. 97B.811B, to enforce duck decoy regulations on almost all presently unregulated State waters. Conservation officers would then be held responsible for policing such waters, with the additional costs assumed by the State.

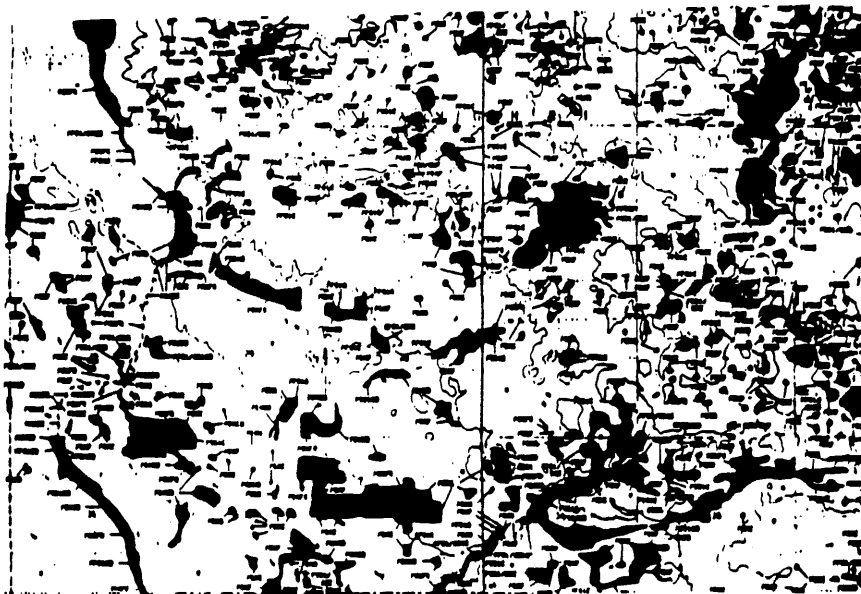
Alternative two restricts the impact of broadening the term public waters by limiting the Commissioner's authority in these additional waters to that required for assumption of the Section 404 program. The Commissioner's authority would extend only to the regulation of dredge and fill materials. The State would not be held responsible for enforcing the gamut of activities discussed under alternative one.

As a precaution, the Department of Natural Resources, Division of Waters, also recommends that no attempt to inventory the remaining waters of the State be made. It cost the State some \$1,170,345.00 to inventory and map waters presently designated as public water (Protected Waters). Since this inventory

represents approximately 40% of the State's waters, it is expected that any effort to record the remaining waters will at least match, if not exceed the previous cost.

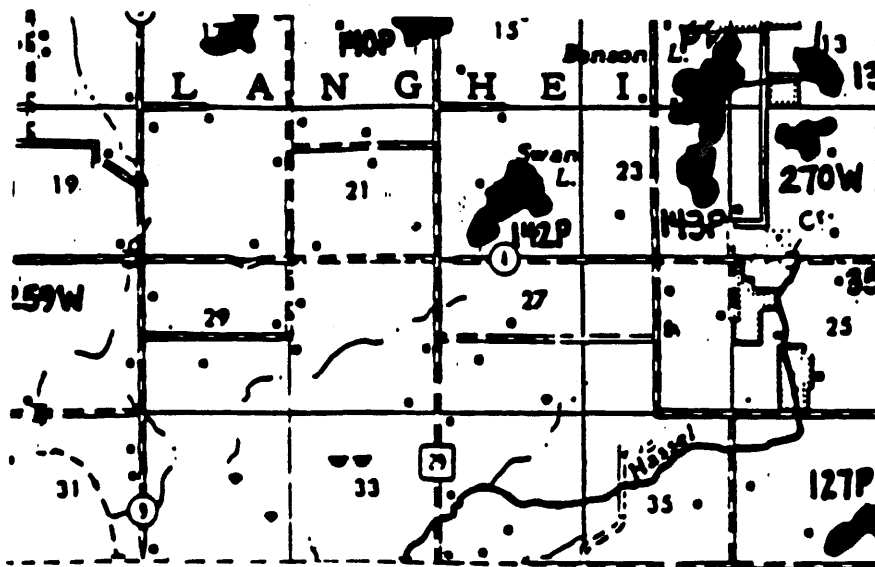
The following maps represent typical examples of jurisdictional differences between waters protected under the Section 404 program and those currently regulated by the State's Protected Waters program: It should be noted, however, that Section 404 waters are generally more comprehensive than identified by this U.S. Fish and Wildlife Service, National Wetland Inventory map.

FEDERAL SECTION 404 WATERS



Source: U.S. Fish and Wildlife Service, National Wetlands Inventory, 1980, Pope County, Minnesota, Secs. 13-36, T 123N, R 39W.

DNR REGULATED WATERS



Source: Minnesota Department of Natural Resources, Division of Waters, 1980 Protected Waters Inventory Map, Pope County, Minnesota, Secs. 13-36, T 123 N, R 39W.

APPENDIX

APPENDIX A

PUBLIC WATERS IN 001 TO 650

08/30/88

003*#736S

- 1 18 <IN> Subd. 3.
- 3 20 <IN> (n)
- 3 22 or maintain open water on the ice of PUBLIC WATERS, that is

018*#121S

- 1 15 <IN> Subd. 2.
- 1 18 the commissioner deems necessary for the protection of PUBLIC
- 1 19 WATER, wild animals and natural resources before control

018*#171S

- 2 3 <IN> Subd. 8.
- 2 3 <IN> Subd. 8. +b Land. +c "Land" includes wetlands and PUBLIC
- 2 4 WATERS.

018*#191S

- 1 14 underlying PUBLIC WATERS or wetlands designated under section
- 1 17 level of the PUBLIC WATER or wetland. The commissioner of
- 1 19 purple loosestrife on PUBLIC WATERS and wetlands designated
- 1 23 upon PUBLIC WATERS and wetlands designated under section 105.391
- 2 1 to control and eradicate purple loosestrife on PUBLIC WATERS and

018B#07S

- 2 10 <IN> Subd. 5.
- 2 10 <IN> Subd. 5. +b Use of PUBLIC WATER supplies for filling
- 2 12 equipment directly from a PUBLIC WATER supply, as defined in
- 2 13 section 144.382, unless the outlet from the PUBLIC WATER supply
- 2 17 <IN> Subd. 6.
- 2 17 <IN> Subd. 6. +b Use of PUBLIC WATERS for filling equipment. +c
- 2 19 directly from PUBLIC WATERS of the state, as defined in section
- 2 23 filling the equipment from the PUBLIC WATERS.
- 2 24 <IN> (b)
- 2 25 applications of aquatic pesticides to PUBLIC WATERS.
- 2 26 <IN> Subd. 7.
- 3 9 <IN> (b)
- 3 10 application of aquatic pesticides to PUBLIC WATERS.

040*#41S

- 1 7 PUBLIC WATERS and drainage systems, from crop production and to

040A#123S

- 1 2 <IN> Subdivision 1.
- 1 4 projects for public sanitary sewer systems, PUBLIC WATER

084*#031S

- 1 6 condition of PUBLIC WATERS beyond the boundaries of the state in

084*#09S

- 1 23 the wild rice harvesting upon all PUBLIC WATERS of the state and
- 1 25 wild rice crop upon all PUBLIC WATERS within the original

084*#091S

- 1 1 <SHN> 84.091 +a Aquatic vegetation in PUBLIC WATERS.
- 1 2 <IN> Subdivision 1.
- 1 3 wild rice and other aquatic vegetation growing in PUBLIC
- 1 4 WATERS. A person may not acquire a property interest in wild

084*#0911S

- 1 9 <IN> Subd. 3.
- 1 11 for management of designated PUBLIC WATERS to improve natural

084*#092S

- 1 3 <IN> Subdivision 1.
- 1 5 <IN> (1)
- 1 6 than wild rice from PUBLIC WATERS;
- 1 7 <IN> (2)
- 1 7 <IN> (2) transplant any aquatic plants into other PUBLIC WATERS;
- 1 8 <IN> (3)
- 1 9 organisms in PUBLIC WATERS under prescribed conditions to

084*#111S

- 1 2 <IN> Subdivision 1.
- 1 3 wild rice in any PUBLIC WATERS in this state, any water craft
- 1 17 <IN> Subd. 4.
- 1 18 PUBLIC WATERS between 3:00 p.m. and 9:00 a.m. following except
- 1 22 <IN> Subd. 5.
- 1 24 body of PUBLIC WATERS may use mechanical harvesting devices to
- 1 27 <IN> (a)
- 1 27 <IN> (a) Any body of PUBLIC WATERS greater than 125 acres in
- 2 2 <IN> (b)
- 2 2 <IN> (b) Any body of PUBLIC WATERS to which the public has
- 2 4 <IN> (c)
- 2 4 <IN> (c) Any body of PUBLIC WATERS within the original

084*#14S

- 1 21 <IN> Subd. 3.
- 1 22 the harvesting of wild rice on all PUBLIC WATERS or portions
- 2 5 be conducted on any or all PUBLIC WATERS or portions thereof.
- 2 11 <IN> Subd. 4.
- 2 14 the PUBLIC WATERS of this state and to rotate the opening of

084*#15S

- 1 2 <IN> Subdivision 1.
- 1 3 the harvesting of wild rice grain on PUBLIC WATERS of any
- 1 9 <IN> Subd. 2.
- 1 12 and replanting in PUBLIC WATERS of the state, including waters

084*#415S

- 1 2 <IN> Subdivision 1.
- 1 15 land or PUBLIC WATER under the control of the commissioner of
- 1 23 cause. All such land or PUBLIC WATER shall remain subject to
- 1 26 disposition of land or PUBLIC WATER all rights included in any

084*#43S

- 1 6 <IN> Subd. 2.
- 1 8 <IN> (1)
- 1 10 approved June 22, 1948, and all PUBLIC WATERS included therein
- 1 23 <IN> Subd. 3.
- 1 23 <IN> Subd. 3. "PUBLIC WATERS" shall mean all waters lying

084*#44S

- 1 4 area and PUBLIC WATERS therein is necessary for the protection

086*#11S

- 1 12 <IN> Subd. 2.

- 1 14 vegetation, control of algae and scum conditions on PUBLIC
- 1 15 WATERS, methods of combating and controlling the same, and shall

086A#02S

- 1 22 <IN> Subd. 4.
- 1 27 recreational activities conducted upon the PUBLIC WATERS and

089*#022S

- 1 3 <IN> Subdivision 1.
- 1 23 required for purposes of providing access to PUBLIC WATERS or

092*#45S

- 1 3 and other PUBLIC WATERS and watercourses, with the live timber
- 1 19 PUBLIC WATERS and watercourses and withdrawn from sale, a strip

092*#67S

- 1 2 <IN> Subdivision 1.
- 1 5 resources shall sell state property bordering PUBLIC WATERS that

093*#10S

- 1 4 PUBLIC WATERS within the area described by such lease.

093*#11S

- 1 3 described in section 93.08 under the PUBLIC WATERS in the state

093*#15S

- 1 2 <IN> Subdivision 1.
- 1 20 <IN> (3)
- 1 20 <IN> (3) An area of any size within the bed of any PUBLIC WATERS

093*#34S

- 1 1 <SHN> 93.34 +a Unlawful to mine under PUBLIC WATERS.

093*#43S

- 1 18 authorization for the use of PUBLIC WATERS issued by the

094*#342S

- 1 19 <IN> Subd. 3.
- 1 21 any meandered or other PUBLIC WATERS and withdrawn from sale by
- 1 25 PUBLIC WATERS in the same general vicinity affording at least
- 2 3 bordering on PUBLIC WATERS shall be subject to reservations by
- 2 15 exchange bordering on PUBLIC WATERS must be subject to the

097A#015S

- 5 27 <IN> Subd. 41.
- 5 27 <IN> Subd. 41. +b PUBLIC WATERS. +c "Public waters" means
- 5 27 <IN> Subd. 41. +b PUBLIC WATERS. +c "PUBLIC WATERS" means

097A#085S

- 2 14 <IN> Subd. 7.
- 2 18 <IN> (b)
- 2 22 PUBLIC WATERS. Where the boundary of a refuge extends more than

097A#101S

- 1 1 <SHN> 97A.101 +a PUBLIC WATER reserves and management designation.
- 1 2 <IN> Subdivision 1.
- 1 3 designate and reserve PUBLIC WATERS of the state to propagate
- 1 5 <IN> Subd. 2.

1 6 commissioner may designate, reserve, and manage PUBLIC WATERS

097A#141S

1 1 <SHN> 97A.141 +a PUBLIC WATER access sites.
1 2 <IN> Subdivision 1.
1 3 commissioner shall acquire access sites adjacent to PUBLIC
1 4 WATERS and easements and rights-of-way necessary to connect the
1 9 <IN> Subd. 2.
1 10 not be acquired under this section adjacent to PUBLIC WATERS
1 13 institution. Access sites adjacent to PUBLIC WATERS that
1 16 <IN> (1)
1 16 <IN> (1) the PUBLIC WATER contains at least 150 acres within the
1 18 <IN> (2)
1 18 <IN> (2) the PUBLIC WATERS are to be managed intensively for

097A#145S

1 2 <IN> Subdivision 1.
1 10 <IN> (b).
1 17 Circular No. 39 (1971 edition), that are PUBLIC WATERS. Lands

097A#205S

1 3 <IN> (1)
1 4 relating to wild animals, wild rice, PUBLIC WATERS, water

097A#451S

2 5 <IN> Subd. 6.
2 8 angling in adjacent and connected PUBLIC WATERS without a
2 10 commissioner that describes the PUBLIC WATERS where the fishing

097A#475S

6 12 <IN> Subd. 29.
6 19 <IN> (3)
6 19 <IN> (3) To take sucker eggs from PUBLIC WATERS for a private
6 22 <IN> Subd. 29a.
6 25 <IN> (2)
6 25 <IN> (2) to take sucker eggs from PUBLIC WATERS for a fish farm,

097B#805S

1 3 <IN> Subdivision 1.
1 9 <IN> (b)
1 10 rails in PUBLIC WATERS from a permanent artificial blind or sink
1 21 <IN> Subd. 3.
1 23 for hunting waterfowl in PUBLIC WATERS between sunset and one

097B#811S

1 2 <IN> Subdivision 1.
1 4 PUBLIC WATERS or on public land more than one hour before the
1 6 <IN> Subd. 2.
1 8 in PUBLIC WATERS or on public lands more than one hour before
1 10 <IN> Subd. 3.
1 12 decoys in PUBLIC WATERS between sunset and one hour before
1 18 <IN> Subd. 4.
1 19 prohibited. +c A person may not leave decoys in PUBLIC WATERS

097C#055S

1 3 accumulate in or upon the shores of PUBLIC WATERS in quantities

097C#071S

- 1 1 <SHN> 97C.071 +a Permit required for structure in PUBLIC WATERS.
- 1 3 obstruction, except a boat pier, in or over PUBLIC WATERS

097C#205S

- 1 6 <IN> (1)
- 1 7 by seining PUBLIC WATERS;
- 1 10 <IN> (3)
- 1 10 <IN> (3) prescribe methods for stocking the fish in PUBLIC
- 1 11 WATERS that give priority to the needs of the community where

097C#211S

- 1 12 <IN> Subd. 2a.
- 1 20 acquired must be processed and not released into PUBLIC WATERS,
- 2 14 <IN> Subd. 4.
- 2 15 person may not take sucker eggs from PUBLIC WATERS for a private

105*#37S

- 2 18 <IN> Subd. 14.
- 2 18 <IN> Subd. 14. +b PUBLIC WATERS. +c "Public waters" includes
- 2 18 <IN> Subd. 14. +b PUBLIC WATERS. +c "PUBLIC WATERS" includes
- 2 24 <IN> (2)
- 2 25 determined to be PUBLIC WATERS or navigable waters by a court of
- 3 16 <IN> (9)
- 3 19 PUBLIC WATERS regardless of the size of their drainage area.
- 3 27 sections 105.38 and 105.391, the term "PUBLIC WATERS" shall
- 4 2 <IN> Subd. 15.
- 4 5 edition), not included within the definition of PUBLIC WATERS,
- 4 8 <IN> Subd. 16.
- 4 9 water level" means the boundary of PUBLIC WATERS and wetlands,

105*#38S

- 1 5 <IN> (a)
- 1 5 <IN> (a) Subject to existing rights, PUBLIC WATERS and wetlands
- 1 10 <IN> (c)
- 1 12 course, current, or cross-section of PUBLIC WATERS or wetlands,
- 1 16 structures, and waterway obstructions in PUBLIC WATERS or

105*#39S

- 1 17 <IN> Subd. 3.
- 1 19 <IN> (1)
- 1 19 <IN> (1) the use, allocation, and control of PUBLIC WATERS and
- 1 23 <IN> (3)
- 1 24 PUBLIC WATERS and wetlands.

105*#391S

- 1 2 <IN> Subdivision 1.
- 1 6 county and make a preliminary designation as to which are PUBLIC
- 1 7 WATERS and wetlands. The commissioner shall send a list and map
- 1 8 of the waters preliminarily designated as PUBLIC WATERS and
- 2 6 may challenge the designation of specific waters as PUBLIC
- 2 7 WATERS or wetlands or may request the designation of additional
- 2 8 waters as PUBLIC WATERS or wetlands, by filing a petition for a
- 3 14 to be PUBLIC WATERS and wetlands. The commissioner shall
- 3 15 complete the PUBLIC WATERS and wetlands inventory by December
- 3 18 <IN> Subd. 3.
- 3 19 Except as provided below, no PUBLIC WATERS or wetlands shall be
- 3 20 drained, and no permit authorizing drainage of PUBLIC WATERS or
- 3 21 wetlands shall be issued, unless the PUBLIC WATERS or wetlands

3 22 being drained are replaced by PUBLIC WATERS or wetlands that
5 1 <IN> Subd. 10.
5 3 PUBLIC WATERS for pasture or cropland during periods of drought,
5 6 drainage of the wetlands or PUBLIC WATERS. This chapter does
5 18 <IN> Subd. 12.
5 19 rights or trespass law. +c The designation of waters as PUBLIC
5 20 WATERS or wetlands under this section does not grant the public
5 25 the designation of waters or lands as PUBLIC WATERS or wetlands,

105*#40S

3 16 <IN> Subd. 11.
3 19 proceedings and proceedings relating to PUBLIC WATERS. The

105*#418S

1 1 <SHN> 105.418 +a Conservation of PUBLIC WATER supplies.
1 3 by the governor and declared by order of the governor, PUBLIC
1 4 WATER supply authorities appropriating water shall adopt and
1 15 of any PUBLIC WATER supply authority's appropriator's permit.

105*#42S

1 1 <SHN> 105.42 +a Permits; work in PUBLIC WATERS.
1 2 <IN> Subdivision 1.
1 7 or waterway obstruction on any PUBLIC WATER; or in any manner,
1 9 any PUBLIC WATERS, wholly or partly within the state, by any
1 11 placing of materials in or on the beds of PUBLIC WATERS, without
1 21 substantially affect PUBLIC WATERS.
1 26 hangars in or adjacent to PUBLIC WATERS of the state except
2 1 <IN> Subd. 1a.
2 6 from other uses and changes in the level of PUBLIC WATERS to
2 23 beds of PUBLIC WATERS shall be granted only where the area in
3 1 excavation in the PUBLIC WATERS must include provisions
3 6 <IN> (2)
3 15 of PUBLIC WATERS under flood emergency conditions, the
3 18 <IN> No permit that will change the level of PUBLIC WATERS shall

105*#43S

1 3 on any PUBLIC WATER and applications to establish the natural
1 4 ordinary high water level of any body of PUBLIC WATER may be

105*#44S

1 2 <IN> Subdivision 1.
1 6 repairs or abandonment proposed to be made, or the PUBLIC WATER
1 24 <IN> Subd. 1a.
1 26 PUBLIC WATERS, as provided in chapter 93.
5 11 <IN> Subd. 8.
5 13 PUBLIC WATERS, the soil and water conservation district may make

105*#45S

1 12 shall also fix the control levels of PUBLIC WATERS accordingly.

105*#461S

1 4 applicant to take any action necessary to restore the PUBLIC
1 5 WATERS or their beds to the condition existing before unlawful

105*#462S

1 5 relation to PUBLIC WATERS without a permit as required by

105*#463S

- 1 5 PUBLIC WATER or in any manner change or diminish the course,
- 1 6 current, or cross-section of any PUBLIC WATERS. These actions

105*#471S

- 1 6 waters of the state as PUBLIC WATERS under sections 105.38 to

105*#48S

- 1 4 the public interest in the shore and shore lines of PUBLIC
- 1 5 WATERS, and promote public health, the commissioner may

105*#485S

- 1 2 <IN> Subdivision 1.
- 1 5 <IN> (1)
- 1 6 of PUBLIC WATERS and thus preserve and enhance the quality of
- 1 12 <IN> Subd. 2.
- 1 14 <IN> (b)
- 1 15 distances from the ordinary high water elevation of PUBLIC
- 1 16 WATERS: (1) land within 1,000 feet from the normal high
- 1 23 <IN> Subd. 3.
- 2 13 <IN> (5)
- 2 13 <IN> (5) changes in bottom contours of adjacent PUBLIC WATERS;

105*#541S

- 1 4 <IN> (1)
- 1 5 alteration in the course, current, or cross section of PUBLIC
- 1 6 WATERS or appropriates waters of the state without a permit from
- 1 10 <IN> (2)
- 1 11 alteration in the course, current, or cross section of PUBLIC
- 1 12 WATERS or appropriates waters of the state in violation or in
- 1 18 <IN> (3)
- 1 19 alteration in the course, current, or cross section of PUBLIC
- 1 20 WATERS or appropriates waters of the state after a permit to

105*#63S

- 1 3 <IN> Subdivision 1.
- 1 6 operate dams or other control works affecting PUBLIC WATERS, the

106A#005S

- 4 4 <IN> Subd. 23.
- 4 4 <IN> Subd. 23. +b PUBLIC WATERS. +c "Public waters" has the
- 4 4 <IN> Subd. 23. +b PUBLIC WATERS. +c "PUBLIC WATERS" has the

106A#011S

- 1 13 <IN> Subd. 2.
- 1 17 not PUBLIC WATERS. If a water body or watercourse is determined
- 1 18 to be PUBLIC WATERS, the drainage proceedings are subject to
- 1 19 section 105.391, subdivision 3, relating to replacing PUBLIC
- 1 20 WATERS and the water bank program.
- 1 21 <IN> Subd. 3.
- 1 21 <IN> Subd. 3. +b Permission of commissioner for work in PUBLIC
- 1 22 WATERS; application. +c (a) The drainage authority must receive
- 1 24 <IN> (1)
- 1 24 <IN> (1) remove, construct, or alter a dam affecting PUBLIC
- 1 25 WATERS;
- 1 26 <IN> (2)
- 1 26 <IN> (2) establish, raise, or lower the level of PUBLIC WATERS;
- 2 1 <IN> (3)
- 2 1 <IN> (3) drain any portion of a PUBLIC WATER.

- 2 2 <IN> (b)
- 2 4 to do work in PUBLIC WATERS or for the determination of public
- 2 4 to do work in PUBLIC WATERS or for the determination of PUBLIC
- 2 5 WATERS status of a water body or watercourse.
- 2 6 <IN> Subd. 4.
- 2 11 body or watercourse that is not PUBLIC WATERS the drainage

106A#025S

- 1 12 <IN> Subd. 2.
- 1 26 <IN> (d)
- 1 26 <IN> (d) PUBLIC WATERS may not be taken, damaged, or impaired
- 2 1 of any other law for the protection or conservation of PUBLIC
- 2 2 WATERS may not be abridged or superseded by this subdivision.

106A#245S

- 1 3 <IN> Subdivision 1.
- 1 11 <IN> (3)
- 1 13 areas that are PUBLIC WATERS; and

106A#255S

- 1 6 under the PUBLIC WATERS determination in section 105.37, and the

106A#285S

- 1 5 <IN> Subd. 2.
- 1 17 <IN> (6)
- 1 17 <IN> (6) the outline of any lake basin, wetland, or PUBLIC WATER

106A#321S

- 1 2 <IN> Subdivision 1.
- 1 11 <IN> (4)
- 1 12 by the proposed drainage of PUBLIC WATERS;
- 1 16 <IN> (7)
- 1 17 lot by the proposed drainage of PUBLIC WATERS, wetlands, and
- 1 19 <IN> (8)
- 1 22 PUBLIC WATERS under section 105.42, to excavate or fill a

106A#323S

- 1 3 <IN> Subdivision 1.
- 1 11 <IN> (3)
- 1 12 lot by the proposed drainage of PUBLIC WATERS, wetlands, and
- 1 14 <IN> (4)
- 1 17 PUBLIC WATERS under section 105.42, to excavate or fill a

106A#701S

- 1 12 <IN> Subd. 1a.
- 1 12 <IN> Subd. 1a. +b Repairs affecting PUBLIC WATERS. +c Before a
- 1 14 commissioner if the repair may affect PUBLIC WATERS. If the

106A#745S

- 1 6 <IN> (1)
- 1 7 acres of PUBLIC WATERS in Anoka county;
- 1 8 <IN> (2)
- 1 8 <IN> (2) the PUBLIC WATERS have existed for 15 or more years;

110*#31S

- 1 4 being PUBLIC WATERS of the state, where the following conditions

110*#70S

- 1 5 shall in no manner apply to PUBLIC WATERS of an area of more
- 1 10 within a distance of 20 miles from the body of PUBLIC WATER;
- 1 11 and, as to such PUBLIC WATERS, nothing contained in sections
- 1 15 major portion of such PUBLIC WATERS is located.

110*#71S

- 1 3 <IN> Subdivision 1.
- 1 5 undesirable aquatic vegetation or organisms in PUBLIC WATERS and

110A#02S

- 1 10 <IN> Subd. 4.
- 1 17 wells, reservoirs, tanks and other appurtenances of PUBLIC WATER

115*#61S

- 1 9 limits, for the purpose of preventing pollution of PUBLIC WATERS

115*#71S

- 1 21 <IN> Subd. 7.
- 1 21 <IN> Subd. 7. "Water supply system" means a PUBLIC WATER supply

116A#C

- 1 2 <RH> PUBLIC WATER AND SEWER SYSTEMS

116A#01S

- 1 2 <IN> Subdivision 1.
- 1 6 maintained, PUBLIC WATER or sewer systems or combined water and
- 1 9 reservoirs, tanks, and other appurtenances of PUBLIC WATER or
- 1 11 not organized into cities, or in any area added to a PUBLIC
- 1 12 WATER or sewer system or combined water and sewer system by
- 3 20 <IN> Subd. 4.
- 3 21 by any PUBLIC WATER or sewer or combined system or to be
- 4 24 <IN> Subd. 5.
- 4 26 PUBLIC WATER or sewer or combined system or in a district formed

116A#02S

- 1 2 <IN> Subdivision 1.
- 1 2 <IN> Subdivision 1. +b Form. +c Before any PUBLIC WATER or

116C#41S

- 1 2 <IN> Subdivision 1.
- 1 3 <IN> (1)
- 1 3 <IN> (1) coordinate PUBLIC WATER resource management and

117*#47S

- 1 24 permit or authorization for the use of PUBLIC WATERs issued by

117*#48S

- 1 26 of any rights in PUBLIC WATERS except after permit, lease,

144*#145S

- 1 10 PUBLIC WATER supplies which shall include, but not be limited to

144*#382S

- 1 9 <IN> Subd. 4.
- 1 9 <IN> Subd. 4. +b PUBLIC WATER supply. +c "Public water supply"
- 1 9 <IN> Subd. 4. +b PUBLIC WATER supply. +c "PUBLIC WATER supply"
- 1 13 days of the year. "PUBLIC WATER supply" includes a collection,
- 1 19 <IN> Subd. 5.

- 1 20 owns, manages or operates a PUBLIC WATER supply.

144*#383S

- 1 2 <IN> In order to insure safe drinking water in all PUBLIC WATER
- 1 4 <IN> (a)
- 1 5 alteration of PUBLIC WATER supply;
- 1 6 <IN> (b)
- 1 6 <IN> (b) To enter the premises of a PUBLIC WATER supply, or part
- 1 10 delivered by PUBLIC WATER supplies;
- 1 11 <IN> (c)
- 1 13 routine surveys, inspections, and testing of PUBLIC WATER supply

144*#385S

- 1 2 <IN> If a PUBLIC WATER system has violated a rule of the

160*#81S

- 1 2 <IN> Subdivision 1.
- 1 12 <IN> (3)
- 1 13 and other parking areas, tourist information facilities, PUBLIC
- 1 14 WATER access points and other facilities intended to expand the

161*#27S

- 1 2 <IN> Subdivision 1.
- 1 7 highway improvement affecting PUBLIC WATERS shall be made until

164*#15S

- 1 13 <IN> Subd. 2.
- 1 23 be constructed. If PUBLIC WATERS are involved, the plans shall

282*#018S

- 1 7 PUBLIC WATERS and watercourses, and the live timber growing or
- 1 23 meandered lakes and other PUBLIC WATERS and watercourses and so

296*#421S

- 3 4 <IN> Subd. 4.
- 3 10 access and boating facilities on PUBLIC WATERS; lake and river

360*#041S

- 1 2 <IN> Subdivision 1.
- 1 5 in, over, and upon any PUBLIC WATERS of this state within the
- 1 7 submerged land under such PUBLIC WATERS, and any artificial or
- 1 10 PUBLIC WATERS, and as well the power to construct and maintain
- 1 15 <IN> Subd. 2.
- 1 18 and upon PUBLIC WATERS, submerged land under public waters, and
- 1 18 and upon PUBLIC WATERS, submerged land under PUBLIC WATERS, and

378*#20S

- 1 2 <IN> Subdivision 1.
- 1 4 mean any public land, road or highway adjoining PUBLIC WATERS,
- 1 8 <IN> Subd. 2.
- 1 12 PUBLIC WATERS upon which the same immediately borders for the
- 1 16 <IN> Subd. 3.
- 1 21 bathing beaches and PUBLIC WATERS immediately bordering thereon

378*#22S

- 1 2 <IN> Subdivision 1.
- 1 3 operating an aeration system on PUBLIC WATERS within the state
- 1 7 <IN> Subd. 2.

1 8 system is used on the ice of PUBLIC WATERS, signs shall be
1 13 <IN> (b)
1 14 the shoreline of the PUBLIC WATERS at each public access point
1 19 <IN> Subd. 3.
1 22 periods of ice cover on PUBLIC WATERS, shall be given by the
2 1 <IN> Subd. 4.
2 4 periods of ice cover on PUBLIC WATERS, evidence of compliance
2 9 <IN> Subd. 5.
2 13 oxygen or to maintain open water on the ice of PUBLIC WATERS.
2 14 <IN> Subd. 6.
2 14 <IN> Subd. 6. +b PUBLIC WATERS without access. +c (a) A
2 15 riparian landowner may aerate PUBLIC WATERS with a permit under
2 16 this subdivision if the PUBLIC WATERS do not have a public
2 17 access and the person aerating the PUBLIC WATERS owns all of the
2 20 <IN> (b)
2 21 aeration under this subdivision except the PUBLIC WATERS must be

378**31S

2 8 <IN> Subd. 5.
2 9 current or cross section of PUBLIC WATERS when approved by the
3 9 <IN> Subd. 11.
3 10 course, current or cross section of PUBLIC WATERS within

378**51S

1 16 <IN> Subd. 3.
2 6 <IN> (3)
2 7 cross section of PUBLIC WATERS that are approved by the

383A#07S

6 15 <IN> Subd. 19.
6 18 declared to be PUBLIC WATERS of the state of Minnesota, and

398**34S

1 2 <IN> Subdivision. 1.
1 19 PUBLIC WATERS. Every ordinance shall be recorded by the county
1 25 <IN> Subd. 2.
2 8 affecting PUBLIC WATERS shall be valid except with the approval
2 10 of a proposed ordinance affects any PUBLIC WATERS, notice of the

458**20F

1 1 <FGH> PUBLIC WATER HIGHWAYS IN CITIES OF FIRST CLASS

458**21S

1 1 <SHN> 458.21 +a Condemned land must be PUBLIC WATER highway.
1 3 a PUBLIC WATER highway for the travel accommodation and passage

459**20S

1 1 <SHN> 459.20 +a Authority over PUBLIC WATERS.

473**845S

1 8 <IN> Subd. 2.
1 11 monitor the quality of water in PUBLIC WATER supply wells and

473H#11S

1 3 public sanitary sewer systems and PUBLIC WATER systems

475**51S

1 14 <IN> Subd. 4.

2 3 <IN> (5)

2 4 of PUBLIC WATERworks systems, and public lighting, heating or

501*#11S

2 17 <IN> (7)

3 18 preserves, public parks, public grounds, PUBLIC WATERways,

609*#68S

1 4 highway, PUBLIC WATERS or the ice thereon, shoreland areas

TOTAL DOCUMENTS = 107

TOTAL DATA RECORDS = 433

APPENDIX B

U.S. ARMY CORPS OF ENGINEERS

JURISDICTION

	SECTION 10	SECTION 404
WATERBODY	Navigable waters of the United States	Waters of the United States, e.g.: Rivers, Tributaries, Lakes, Potholes, Bogs, Marshes & Wetlands
ACTIVITY	Any work affecting the course, condition, location or capacity of the waterbody, e.g.: Structures Excavation Fill	Discharge of Dredge or Fill material

APPENDIX C

FEDERAL/STATE PERMIT COMPARISON (1987)

(404 Type Permits Issued)

<u>Region</u>	<u>State</u>	<u>Federal</u>	<u>Percent Additional 404 Permits</u>
1	115	249	54
2	77	144	47
3	151	256	41
4	85	181	53
5	49	70	30
6	184	356	48

The Department of Natural Resources concurrently issues approximately 53 percent of the U.S. Army Corps of Engineer's Section 404 issued permits. The Department can expect an increase of approximately 595 Section 404 permit applications or an increase in workload of about 47 percent if the State assumes the Section 404 program.

*Section 404 type permits refer to the Section 404 permits issued by the Corps of Engineers, as well as State M.S. 105.42 permits that are concurrently issued for the same Section 404 permit.



REPLY TO
ATTENTION OF

DEPARTMENT OF THE ARMY

ST. PAUL DISTRICT, CORPS OF ENGINEERS
1135 U.S. POST OFFICE & CUSTOM HOUSE
ST. PAUL, MINNESOTA 55101-1479

27 DEC 1988



GENSC-CO-R

Ron Anderson
Special Projects Coordinator
Minnesota Department of Natural Resources
500 Lafayette Road
St. Paul, Minnesota 55155

Dear Mr. Anderson:

We have reviewed the draft Mandated Feasibility Assumption Study (Study) as requested by your letter of December 14, 1988.

We find that the description of the Corps Section 404 regulatory program in Minnesota is generally correct. However, the Study would perhaps be more explanative if it contained some additional information.

Page 9 of the Study discusses Corps nationwide permits. The last sentence concerns discharges into specific categories of headwaters and other non-tidal waters, including wetlands and lakes (isolated waters) which are not tributaries to interstate or navigable waters. At least partially as a result of the settlement of a lawsuit brought against the Corps, our present regulations require rather cumbersome determinations of the area of waters or wetlands that would be affected by a proposed project, and case-by-case coordination with the U. S. Fish and Wildlife Service (Service) if the activity would cause a substantial, adverse effect upon more than one acre, but less than 10 acres, of waters of the U. S. The Corps, after coordination with the Service, then must determine whether to require an individual permit for projects affecting between 1 and 10 acres. Projects which would have a substantial adverse effect upon more than 10 acres of waters of the U. S. cannot be authorized under this nationwide permit, and require an individual permit. The Corps is presently considering changes to these procedures, and it may be possible for the state to develop simplified procedures if it assumes the 404 program. However, this illustrates the uncertainty faced by an implementing agency concerning future administration of the 404 program that may be changed by future Federal laws or affected by lawsuits.

Page 10 of the Study discusses individual permit reviews and indicates that this type of review is used for projects having "potentially significant impacts". More appropriate wording would be: "...for activities having more than minimal individual and cumulative environmental impacts".

Paragraph 7. a. of page 16 references the Section 404(b)(1) Guidelines (40 CFR Part 230). It may be helpful to the reader to describe the major requirements of these mandatory Guidelines. In general, these U. S. Environmental Protection Agency Guidelines require the permitting authority to deny Section 404 permits for non-water dependent projects, unless the permit applicant clearly demonstrates that there is no less environmentally damaging project location or method that is practical. The Guidelines also mandate

denial of a permit for any activity that would cause significant (defined by the Guidelines as more than trivial) adverse effects upon the aquatic environment, or which would violate state water quality standards.

We found the table on page 62 confusing. For example, it appears that Region 1 had state jurisdiction over 115 of the 249 activities that required Federal 404 permits. If Region 1 had jurisdiction over all projects that required Federal 404 permits, this would represent an increase in Region 1 workload of about 116%, not 54% as the table indicates. The figures presented in the table seem to indicate that the Department of Natural Resources permit workload would increase by approximately 90%, instead of the 47% cited in the narrative, if the Department assumed the 404 program.

We appreciate the opportunity to comment on the draft Study. Please contact Mr. Michael Weburg of my staff at 612 220-0367, if you have questions.

Sincerely,

For



Ben Wopat
Chief, Regulatory Branch
Construction-Operations Division

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