

ASSUMPTION OF THE SECTION 404 PROGRAM

MINNESOTA DEPARTMENT OF NATURAL RESOURCES

Division of Waters

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In the Wetland Conservation Act of 1991, the legislature intended that the state should obtain approval from the administrator of the United States Environmental Protection Agency (USEPA) to administer the Section 404 program as expeditiously as possible. The "Section 404 Program" is the permit program under Section 404 of the Federal Clean Water Act, United States Code, title 33, section 1344, that regulates the discharge of dredged and fill material into the waters of the United States. The legislature stipulated that the rules may not be more restrictive than the program under section 404, or state law, if it is more restrictive than the federal program.

The Wetland Conservation Act of 1991 directed the Commissioner of Natural Resources to:

- (1) Adopt rules that provide adequate authority for administering the section 404 program;
- (2) Consult with the attorney general on existing laws that are inconsistent with the authority necessary for administering the section 404 program; and,
- (3) Report to the Environment and Natural Resources committees of the legislature

This was to be followed with the Governor's submission to the administrator of the USEPA documentation required in United States Code, title 33, section 1344(g), to obtain authority to administer the section 404 program by March 1, 1993.

On October 1, 1988, the Minnesota Department of Natural Resources, Division of Waters, completed a detailed study [*State of Minnesota Federal Section 404 Assumption Feasibility Study. 55 pages*] and presented it to the legislature and Governor. The report was further revised August 31, 1989, and submitted to the USEPA. The FY92-93 budget reduction of \$530,000 from Wetland Conservation Act funding precluded further development of assumption rules.

From the above study and with respect to the Wetland Conservation Act of 1991, we have currently identified five areas of specific concern that should be resolved prior to seeking the authority for the Section 404 assumption.

Five areas of concern

1. SINGLE STATE AGENCY NEEDED TO ASSUME THE SECTION 404 PROGRAM
2. WETLAND CONSERVATION ACT EXEMPTIONS SUBJECT TO SECTION 404 PROVISIONS
3. WETLAND DEFINITION
4. DITCH MAINTENANCE
5. COST OF IMPLEMENTATION

CONCERN -- SINGLE STATE AGENCY NEEDED TO ASSUME THE SECTION 404 PROGRAM

"The ability to assume the Section 404 permit program is limited to a State....It is, therefore, not possible for an agency other than a State to assume the Federal permit program. The Clean Water Act and the regulations do not provide for local units of government to assume the program" (attached letter from Douglas A. Ehorn, Deputy Chief, USEPA Region V, to David Johnson, DNR, November 19, 1991).

On November 9, 1992, Ehorn explained in a letter to Charles W. Williams, Commissioner, Minnesota Pollution Control Agency (MPCA): "...if the State of Minnesota intends to file an application for "assumption" of the Section 404 permit program, there needs to be a full documentation of....how these authorities will be combined to administer the program.... This will probably require the appointment of a single lead agency as the designated permitting agency..."

SITUATION

The Commissioner of Natural Resources has administrative authority over the allocation and control of public waters and public waters wetlands (M.S. 103G.255). The Wetland Conservation Act of 1991 empowers Local Government Units to implement the rules instead of just one State agency (M.S. 103G.2242, M.R. Ch. 8420).

Primary State agencies involved in the protection and regulation of Minnesota's water and wetland resources are the DNR, Board of Water and Soil Resources (BWSR) and the MPCA. The DNR manages the Protected Waters Permit Program for the waters of the State (M.S. 103G). DNR Protected Waters Permits are required for activities which alter the course, current or cross-section of public waters and public waters wetlands. The BWSR oversees Local Government Unit (LGU) regulation of wetland areas outside of the DNR's jurisdiction (Wetland Conservation Act of 1991). The MPCA administers the Federal Clean Water Act (Section 401) for discharges into navigable waters of the State (M.R. Ch. 7050) and comments only on federal 404 permits--not a separate permit.

For the 1991 Wetlands Conservation Act, wetland jurisdictional limits closely resemble those used by the U.S. Army Corps of Engineers (COE). Counties and cities as Local Government Units (LGU) will regulate wetland areas not under the jurisdiction of the DNR. WMO's may regulate wetlands in the Twin Cities seven county metropolitan area.

OPTIONS

The State of Minnesota could consolidate wetland regulatory authority granted to LGU's into one state agency.

The USEPA could accept the locally administered state program. However, this option is precluded now and will not be considered despite local government units' capability to administer the Wetland Conservation Act.

The COE may be able to issue a COE General Permit for wetland activities regulated by LGU's. This would provide many benefits of delegation without a formal assumption of the Section 404 program.

CONCERN -- WETLAND CONSERVATION ACT EXEMPTIONS SUBJECT TO SECTION 404 PROVISIONS

The COE issues Nationwide General Permits which can give blanket authorization by conveying Section 404 authority, Section 10 authority, or both to activities which will have minimal environmental impact. The COE also issues a regional General Permit which is a blanket authorization covering routine projects that will have little, if any, significant environmental impact (e.g. DNR boat ramps/public accesses). All other activities require individual permits.

SITUATION

The Wetland Conservation Act of 1991 incorporates 24 specific exemptions for different wetland types and/or activities (a copy of the Wetland Conservation Act of 1991 exemptions is attached). Only one of these exemptions cites the COE Nationwide or General permit authority. Activities allowed by the remaining 23 exemptions are subject to Section 404 permitting.

The Wetland Conservation Act of 1991 recognizes COE General and Nationwide Permits in exemption 6 of M.S. 103G.2241 Subd.1 which states:

Exemption -- "(6) activities authorized under, and conducted in accordance with, an applicable general permit issued by the United States Army Corps of Engineers under section 404 of the federal Clean Water Act, United States Code, title 33, section 1344, except the nationwide permit in Code of Federal Regulations, title 33, section 330.5, paragraph (a), clause (14), limited to when a new road crosses a wetland, and all of clause (26)".

The MPCA is currently revising the State water quality standards by amending Minn. Rules Ch. 7050. The focus is on wetland water quality and is structured around the Wetland Conservation Act of 1991. On November 9, 1992, Douglas A. Ehorn (Chief, Wetlands and Watersheds Section, USEPA) wrote to Charles W. Williams (Commissioner, MPCA) and noted:

"Subpart 1a (*exemption language of the Wetland Conservation Act of 1991, M.S. 103G.2241*) exempts certain waters of the United States and waters of the State from coverage by the water quality standards for the State....the standards that a State intends to use in providing compliance with the CWA must also be all inclusive of waters of the United States. Consequently, subpart 1a (*Wetland Conservation Act of 1991 exemptions*) must be removed from the proposed water quality standards."

OPTIONS

The Wetland Conservation Act of 1991 exemptions would need to be eliminated as one aspect for assuming the Section 404 program.

The Wetland Conservation Act of 1991 exemptions would remain but the state would not assume the Section 404 program.

CONCERN -- WETLAND DEFINITION

On November 9, 1992, Douglas A. Ehorn (Chief, Wetlands and Watersheds Section, USEPA) wrote to Charles W. Williams (Commissioner, MPCA) in reference to the definition of wetlands for CWA Section 401 certification. He noted:

"While this definition (*Wetland Conservation Act of 1991*) roughly approximates the definition used by the Clean Water Act Section 404 program, and may be perfectly useful for the State's purposes, it is not as fully inclusive as the federal definition. For the Clean Water Act Section 401 certification program, the only acceptable definition is the one that is set forth in the Section 404 (b) (1) Guidelines at 40 CFR 230.3 (t)."

This federal definition is as follows:

"(t) The term *wetlands* means those areas that are inundated or saturated by surface or ground water at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs, and similar areas."

SITUATION

The Wetland Conservation Act of 1991 Article 6 Section 6 amended Minnesota Statutes 1990, section 103G.005, by adding a subdivision to read:

Subd. 19. WETLANDS. (a) "Wetlands" means lands transitional between terrestrial and aquatic systems where the water table is usually at or near the surface or the land is covered by shallow water. For purposes of this definition, wetlands must have the following three attributes:

- (1) have a predominance of hydric soils;
- (2) are inundated or saturated by surface or ground water at a frequency and duration sufficient to support a prevalence of hydrophytic vegetation typically adapted for life in saturated soil conditions; and
- (3) under normal circumstances support a prevalence of such vegetation.

OPTIONS

Change the state's definition to be identical to the federal definition set forth in the Section 404 (b) (1) Guidelines at 40 CFR 230.3 (t).

Retain the existing wetland definition and not assume the Section 404 program.

CONCERN -- DITCH MAINTENANCE

State assumption of the Section 404 program would require regulation of drainage or ditch maintenance activities presently exempt under the provisions of M.S. 103G.245 and 103G.2241 subd. 1(3).

SITUATION

M.S. 103E.011 subd. 1 provides that drainage authorities may construct and maintain drainage systems; deepen, widen, and straighten the channel of a natural waterway that is part 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. 103G.245 subd. 2. Drainage authorities are presently exempt from permitting requirements on lawfully established drainage systems and for activities which do not substantially affect public waters. Natural altered water courses, however, includes rivers and or streams regulated under the Federal Section 404 Program.

The Wetland Conservation Act of 1991 contains exemptions allowing draining and filling activities associated with specific wetland types and land management activities. Exemption 3, M.S. 103G.2241 subd. 1(3), specifically allows activities necessary to repair and maintain existing public or private drainage systems as long as wetlands that have been existence for more than 20 years are not drained.

OPTIONS

The state law would need to be changed to conform with federal regulations. The existing exemptions in the state law would need to be eliminated.

The existing exemptions in the state law would be retained and the state would not assume the Section 404 program.

CONCERN -- COST OF IMPLEMENTATION

High costs of assuming and administering the Section 404 program cannot be absorbed by the present Department budget without significant program changes or a permanent, increased budget allocation.

SITUATION

The Department conducted the Federal Section 404 Assumption Feasibility Study (31 August 1989) as mandated by the 1987 Minnesota Legislature. It provided a detailed accounting of initial two to three year assumption documents preparation costs to the State along with estimates of annual administrative costs ranging from \$ 864,743 - \$ 1,304,743 depending upon the administrative scenario. These figures do not include the cost for preparation of USEPA mandated assumption documents, external program costs, or costs associated with required legislative changes.

Departmental funding for the Wetland Conservation Act of 1991 program received a major budget cut of \$530,000 for FY 92 and 93. This greatly reduced staffing for the program. No monies were available to pursue the feasibility of assuming the 404 permitting program from the COE. Many of the elements in the Federal Section 404 Assumption Feasibility Study (31 August 1989) remain and are exasperated by the Wetland Conservation Act of 1991.

The Department feels that assumption costs for any other unit of State government would be at least comparable to that of the DNR and contingent upon existing or potential resources. Local Government Units would have lower costs but the cumulative cost of the program across the State and complexity of program coordination would make the costs at least comparable to the DNR's.

The only state that has assumed Section 404 permitting authority is Michigan. No Federal funding was made available for program implementation.

OPTIONS

The state would assume the Section 404 program and allocate adequate funding to assume and administer the program.

The state would assume the Section 404 program and reduce other program areas to compensate for the assumption and administration costs.

The state would fund an economic study of the Section 404 program and would assume the program provided benefits exceeded costs.

The state would assume that the costs of assumption would exceed the benefits and the state would not assume the Section 404 program.

