BOARD OF WATER AND SOIL RESOURCES

Memo

Date: **September 11, 2018**

To: **Minnesota Section 404 Assumption Stakeholders**

From: **Les Lemm, BWSR Wetlands Section Manager**

RE: Assumable Waters Update

The purpose of this memo is to inform interested stakeholders of the latest events related to potential State assumption of Section 404 of the Federal Clean Water Act; specifically those affecting "assumable waters." These events include a recent memo from the U.S. Army Corps of Engineers (attached). Previous events and information related to the assumable waters issue are also included and summarized for context.

Background

Section 404 of the federal Clean Water Act (CWA) regulates the discharge of dredged or fill material into waters of the U.S. (33 USC §1344). The program is administered by the U.S. Army Corps of Engineers (COE) with oversight by the U.S. Environmental Protection Agency (EPA).

Section 404(g) of the CWA allows states or tribes to apply to the EPA to administer their own state/tribal regulatory program to meet Section 404 requirements (aka "404 assumption"), thereby eliminating the need for separate, federally-issued permits. However, due to multiple barriers to assumption, only two states and no tribes have assumed implementation of the CWA Section 404 program since congress authorized it in 1977.

When a state assumes implementation of Section 404 of the CWA, not all waters and wetlands are assumable. The COE retains permitting authority over certain waters and, under current EPA regulations, it is the responsibility of the COE to determine which waters it will retain. The CWA provision identifying what waters are to be retained lacks clarity and, until recently, the COE maintained an expansive interpretation, leaving relatively few waters that would be assumable by states or tribes. In addition, the COE supported a case-by-case process for identifying some retained waters, thereby limiting much of the efficiency to be gained by state/tribal assumption.

The process for identification and extent of COE-retained vs. state-assumable waters has perhaps been the greatest barrier to Section 404 assumption for many states and tribes, including Minnesota. However, a recent memo from the COE now provides a consistent national interpretation that changes both the extent of assumable waters and the process to identify them.

Below is a brief timeline of events relevant to identifying assumable waters in Minnesota, followed by additional information about those events and a brief discussion of next steps for Minnesota.

Timeline of Relevant Events

- April 2014 – Joint letter from state associations (see below) sent to EPA recommending they take steps to clarify the scope of assumable and non-assumable waters.
- June 2015 – EPA establishes Assumable Waters Subcommittee to provide recommendations to EPA on how to best clarify assumable and non-assumable waters.
- June 2015 – A Minnesota law was enacted requiring the Minnesota Board of Water and Soil Resources (BWSR) and the Minnesota Department of Natural Resources (DNR) to study the feasibility of the state assuming the Section 404 program.
- January 2017 – BWSR and DNR complete the "Minnesota Federal Clean Water Act Section 404 Permit Program Feasibility Study."
- June 2017 – The Assumable Waters Subcommittee final report is submitted to EPA, containing a majority recommendation (with COE the lone dissent) on what waters should be retained under direct COE permitting authority.
- May 2018 – BWSR, in cooperation with the COE and other State agencies, completes the "Analysis of Retained and Assumable Waters in Minnesota" final report.
- June 2018 – EPA releases its regulatory agenda indicating the intent to initiate rulemaking to update 404 assumption regulations, specifically including the clarification of assumable waters.
- August 2018 – The U.S. Army released a memo clarifying that waters retained by the COE under assumption will be identified consistent with the Assumable Waters Subcommittee majority recommendations.

State Association Letter to EPA

In April of 2014, the Environmental Council of the States, the Association of Clean Water Administrators, and the Association of State Wetland Managers sent a joint letter to the EPA recommending that "steps to further clarify the scope of assumable and non-assumable waters be initiated in a timely manner." The letter cited concerns that "states currently considering assumption are having difficulty making progress because of the current uncertainty." The letter further outlined the challenge and need for clarity as follows:

> *"Clear identification of assumable and non-assumable waters has been made more difficult by legal decisions that address terms such as "navigable" and "adjacent." Nonetheless, Congress intended that states be able to assume regulatory responsibility for the majority of waters within their boundaries. Clarification of assumable waters will help to facilitate state assumption where it is desired – providing benefits to the public, the resource, and the state and federal agencies."*

Assumable Waters Subcommittee

In June of 2015, partly in response to the above request by the state associations, EPA established the Assumable Waters Subcommittee of the National Advisory Council for Environmental Policy and Technology (NACEPT) to "provide advice and develop recommendations on how the [EPA] can best clarify for which waters the state/tribe has CWA section 404 permit responsibilities, and for which waters the USACE retains CWA section 404 permit responsibility, under an approved state/tribal program."

The Charge to the Subcommittee also identified a lack of clarity as a challenge to states:

"When a state or tribe considers assuming such responsibilities, among the first questions that needs to be answered is for which waters will the state or tribe assume permitting responsibility and for which waters will the USACE retain permitting authority. States have raised concerns to the EPA that section 404 of the CWA and its implementing regulations lack sufficient clarity to enable states and tribes to estimate the extent of waters for which they would assume program responsibility and thus calculate associated program implementation costs. The lack of clarity on these questions has been identified by the states as a challenge to pursuing assumption as envisioned under the CWA."

In further recognizing the importance of this issue to states and tribes considering assumption, the Subcommittee's charge also includes:

"Specifically, this effort will address the states' request to provide clarity on this issue enabling them to assess and determine the geographic scope and costs associated with implementing an approved program."

I (Les Lemm, Wetlands Section Manager for BWSR) represented the State of Minnesota on the Assumable Waters Subcommittee. The Subcommittee's final report was completed in May, 2017 and submitted to EPA Administrator Scott Pruitt on June 2, 2017. The report included majority and minority recommendations, with all members but the COE agreeing to the majority recommendations. In general, the majority recommendations would:

1) Define COE-retained waters primarily based on Rivers and Harbors Act Section 10 lists of navigable waters.
2) Define COE-retained wetlands as those wetlands adjacent to a COE-retained water, landward to an administrative boundary established during the development of the required state/tribal MOA with the COE.
3) Allow flexibility in establishing the COE-retained wetland administrative boundary in order to address state-specific circumstances and provide consistency with existing state programs.

The Assumable Waters Subcommittee's Final Report is available on the EPA website at: https://www.epa.gov/cwa-404/submission-assumable-waters-subcommittees-final-report

Implementation of the Assumable Waters Subcommittee majority recommendations should result in a reasonable amount of waters for Minnesota to assume, utilizing a process that both provides certainty and is implementable on the ground. These recommendations would significantly improve the feasibility of 404 assumption in Minnesota.

Minnesota Assumable Waters Analysis

As a follow-up to the "Minnesota Federal Clean Water Act Section 404 Permit Program Feasibility Study" (January 17, 2017), BWSR, in coordination with other State agencies, conducted an analysis to estimate State-assumable and COE-retained waters & wetlands based on a letter from the COE St. Paul District dated January 25, 2017. With the concurrence of the COE, BWSR developed specific criteria to identify the approximate extent of the waters described in the COE letter using a Geographic Information Systems (GIS) mapping program. The GIS analysis resulted in a statewide map predicting the status of each mapped water based on the jointly developed criteria.

The results of the GIS mapping exercise, along with further analysis of the results, were summarized in the "Analysis of Retained and Assumable Waters in Minnesota" Final Report (May 3, 2018). In general, the results of

the analysis were not favorable to assumption in Minnesota, primarily due to the relatively low proportion of assumable wetlands and the often complicated and cumbersome process necessary to differentiate State vs. COE permitting responsibilities on a case-by-case, project-by-project basis.

The final report was presented to stakeholders and provided to the EPA for review. Both the GIS map and the final report are available on the BWSR website: http://www.bwsr.state.mn.us/wetlands/cwa_404/2015-17_CWA_404_Feasibility_Study.html

EPA Rulemaking for 404 Assumption

The process and requirements for 404 assumption are established in Federal Rule. Earlier this summer, the EPA released their spring 2018 Regulatory Agenda which indicated EPA's intent to initiate rulemaking to update the 404 assumption regulations, specifically including the clarification of assumable waters. The agenda did not include a detailed rulemaking plan, but did include the following abstract:

> *"CWA section 404(g) provides for state and tribes to assume administration of the dredged and fill permitting program for certain waters, and addresses the requirements for implementation and EPA oversight. This rule is intended to provide general updates to the 1988 regulations and provide clarity on specific issue(s) requested by the states and tribes. Specifically, states and tribes requested that the EPA clarify which waters the state/tribe has CWA section 404 permit responsibilities, and which waters the USACE retains CWA 404 permit responsibility, under an approved state/tribal program. In 2015, EPA convened a Federal Advisory Committee (FACA), comprised of state, tribal and other stakeholder representatives charging them with providing recommendations on how EPA could provide clarity on this issue. This rule is intended to provide clarity on which waters are assumable after consideration of the FACA recommendations and provide needed technical corrections and updates to the 1988 regulations."*

The Regulatory Agenda also indicated that EPA expects to have a final rule by September 2020. The EPA's Regulatory Agenda can be accessed through this web-page: https://www.epa.gov/laws-regulations/regulatory-agendas-and-regulatory-plans

Corps of Engineers Memo Adopting Assumable Waters Subcommittee Recommendations

On August 7, 2018, the U.S. Army released a memorandum from the Assistant Secretary of the Army for Civil Works (dated 7-30-18) that clarifies the waters that would be retained by the COE under state assumption. The memo is consistent with the Assumable Waters Subcommittee's majority recommendations regarding the scope of retained waters. According to the memo, those waters are:

a. *waters that are jurisdictional under Section 10 of the Rivers and Harbors Act of 1899, provided that –*
   - *retained waters include tidal waters shoreward to their mean high water mark, or mean higher high water mark on the west coast, and*
   - *retained waters do not include those waters that qualify as "navigable" solely because they were "used in the past" to transport interstate or foreign commerce; and*

b. *wetlands adjacent to waters retained under a. above, landward to an administrative boundary agreed upon by the state or tribe and the Corps.*

The memo specifically recognized the assumable waters issue as a barrier to assumption:

> *By clarifying what waters States and tribes may assume, the guidance addresses a key barrier to State and tribal assumption. When States and tribes assume the Section 404 permit program, they protect the*

waters to the same level as the federal government and often increase efficiencies and remove redundancies in permitting processes.

In effect, the memo appears to provide general consensus between EPA, COE, and the states regarding COE-retained waters under assumption. The memo also indicated that letters are being sent to all fifty State Governors and the tribal leaders for all the Federally recognized tribes encouraging them to assume 404.

The memorandum and more information is available at: https://www.army.mil/asacw/

A direct link to the COE announcement is:
https://www.army.mil/article/209359/army_issues_memorandum_to_empower_states_tribes_in_their_permitting_authority

Next Steps for Minnesota

Assumable Waters in Minnesota. The recent COE memo changes the outcome of the State's Assumable Waters Analysis significantly. BWSR has already met with staff from the COE St. Paul District to discuss an update to the 5-3-18 mapping analysis that incorporates the Assumable Waters Subcommittee majority recommendations as outlined in the 7-30-18 COE memo. St. Paul District staff have begun work on mapping Section 10 waters in a Geographic Information Systems layer. This map will form the basis of a revised analysis of assumable waters in Minnesota. The results of this revised analysis will be made available to stakeholders and provided to State agency leadership (BWSR, DNR and PCA) for use in developing recommendations on whether to seek State assumption.

EPA Rulemaking. If State decision-makers are interested in assumption, it will be important for Minnesota State agencies to collaborate and engage in this rulemaking effort as its outcome will directly affect the process and requirements for 404 assumption. BWSR staff have also begun coordinating with other states that are interested in assumption in order to share information and ideas regarding how EPA can best revise the regulations for 404 assumption through this upcoming rulemaking effort.

National Assistance/Coordination. The Association of State Wetland Managers (ASWM) recently submitted a Wetland Program Grant proposal to EPA entitled "Strengthening Opportunities for State Assumption of the Section 404 Dredge and Fill Program," for which BWSR provided a letter of support. If successful, the grant would allow ASWM to provide assistance to states who are pursuing 404 assumption and further support information sharing between the states.

Moving Forward with Assumption in Minnesota. Section 404 assumption is a significant commitment and undertaking. If State decision-makers decide to pursue assumption, the next steps would include development of the assumption application package to EPA, identification of specific necessary changes to State statutes, rules, and procedures, and since assumption will involve all categories of waters and wetlands, in-depth agency coordination on all aspects of program and application development. BWSR will coordinate with DNR and PCA to develop a general timeline and estimate to complete these steps for consideration by decision-makers.