CORRESPONDENCE/MEMORANDUM

State of Wisconsin

Date: DRAFTv3 Nov8, 2021

To: **Mike Thompson, Director Waterways and Wetlands**

From: **Macaulay Haller, Water Resources Management Specialist**
Dan Helsel, Field Integration Leader
Amanda Minks, Chief, Wetlands Section
Tom Pearce, In-lieu Fee Program Project Manager
Marty Dillenburg, Water Resource Management Specialist

Re: **Section 404 Assumption Feasibility Report**

Partial funding for the development of this report was provided by United States Environmental Protection Agency Wetland Program Development Grant (FY18 WPDG #CD00E02441) awarded to the Wisconsin Department of Natural Resources in September 2018 with a completion date of December 2021 (extended 1 year).

Chapter 1. Summary

The United States Army Corps of Engineers (USACE), with oversight from, and in partnership with, the United States Environmental Protection Agency (USEPA), has implemented Section 404 federal regulation (§404 program) for discharge of fill into Waters of the United States (WOTUS) in Wisconsin since the Clean Water Act (CWA) was passed into law in 1972. Comparable to the federal program, the Wisconsin Department of Natural Resources (WDNR) also has a robust state waterway and wetland regulatory program for activities affecting navigable waters and wetlands enacted by state statute and administrative code. Section 404 of the CWA provides a legal mechanism for states and tribal nations to assume federal regulatory authority for activities that result in discharges of fill into Waters of the United States.

Only three states have assumed the federal §404 program – Michigan, New Jersey and, recently in 2020, Florida. Many other states have evaluated the feasibility of assumption, including Wisconsin in 1993 and 2001, and identified numerous obstacles and/or uncertainties that justified not pursuing assumption.

The decision of a state to pursue assumption hinges on the political support of the state legislature, which must enact statutes and regulations that are at least as stringent as the CWA, and the political support of the governor and attorney general, who must submit the application to the USEPA. The support of stakeholders interested in wetland management and protection across the state is also critical for success of any state assumption program.

The USACE and the WDNR have similar waterway and wetland permitting programs with comparable types of permits, standards, public notices, and processing procedures. However, there are some specific parts of the state program that are not as stringent as the federal programs described in this report and summarized in Appendix 1. For example, Wisconsin limits the breadth of the practical alternative analysis for certain types of projects and in some cases impacts to artificial wetlands are not regulated.

In April 2020, Wisconsin's Wetland Study Council (WSC) recommended the state not pursue assumption based on the regulatory breadth of the §404 program and the need for additional financial and human resources. Corroborating the WSC recommendation, this report estimates a short term need of an additional 16.4 staff at a cost of $1.4 million per year and a long term need of an additional 11.9 staff at a cost of $1.0 million per year to implement the §404 program. These costs are based on the estimate that about 85% of the federal and state programs overlap, with an anticipated 15% increase in workload for WDNR staff. The estimated time to navigate a public support process for assumption and enact the necessary statutes and administrative standards is three to five years.

The estimated costs would be in addition to staffing and budget initiatives to bring the program up to a level needed to implement the existing state program. The WDNR waterways program (WW) is authorized 73.5 full time employees (FTE) and one two-year project position to provide waterway, wetland, dam, and floodplain safety, and shoreland zoning services in state fiscal years 2022-23. Of those 73.5 position, 58 positions currently implement the waterway and wetland permitting program which also includes mitigation, in-lieu fee, and jurisdictional determinations. State general program revenue, permit fees, and federal grant funding have been trending flat or declining over time and have not kept pace with inflation. Requests for services currently exceed levels of program funding and staff capacity (Thompson pers. comm., 2021).

In addition to the established increase in staffing and resources to implement the §404 program, there are several uncertainties that would likely influence Wisconsin's approach to assumption. Highlighted in Chapter 5, these include the definition of assumable waters and WOTUS, USEPA's plans to modernize §404 assumption and the effort associated with implementation of the federal Endangered Species Act (ESA).

In the future, reviewing Florida's new state §404 program that launched in 2020 will help further identify the successes and downsides of state §404 assumption. Information from other states that are pursuing or considering assumption including Oregon, Minnesota and Arizona will provide useful information and templates supplemental to this report into the future. This includes information on how to involve stakeholders in the decision to pursue assumption, a template for a §404 assumption application, and funding required to develop an application and implement a state §404 program.

If the USEPA moves forward with modernization of the federal assumption rule, a stronger and clear-cut incentive for Wisconsin to assume the federal program could be created. Information on revised or new federal laws and guidance can be found on USEPA websites (USEAP, 2021) and information on states' assumption activities can be found on the Association of State Wetland Managers websites (ASMW, 2021).

Since the primary driver for Wisconsin to consider the feasibility of §404 assumption is to streamline the federal and state permitting programs resulting in less costs, reduced permitting timeframes and more direct public services, Chapter 8 of this report also discusses several streamlining initiatives that may be considered by both the USACE and the WDNR.

Chapter 2. Feasibility Study Background

2.1. Scope

This report evaluates the WDNR's feasibility to assume the §404 program currently administered by the USACE with oversight by the USEPA. The WDNR and federal agencies are continually striving to streamline government actions and minimize regulatory costs imposed on businesses and the public, while maintaining a high level of protection for wetlands and other aquatic resources. Accordingly, as part of looking for opportunities to reduce permitting redundancies and streamline regulatory programs, Wisconsin Governor Scott Walker signed into law 2017 Wisconsin Act 183 that stated the WDNR "may submit an application" to the USEPA seeking §404 assumption. Act 183 also directed the department to create a "Wetland Study Council" (WSC) directing the WSC to research and develop recommendations on program elements necessary for §404 assumption. The WDNR previously evaluated the feasibility of §404 assumption in 1993 and 2001 (WDNR, 1993), (WDNR, 2001) and both reports recommended Wisconsin not pursue assumption at that time.

Federal and state regulatory programs have evolved since the previous two WDNR assumption reports. This report provides a foundation for the Governor's office, state legislators, WDNR and key Wisconsin public and private stakeholders to understand the advantages and disadvantages of §404 assumption and ultimately assists the state of Wisconsin with the decision of whether to develop and submit a §404 assumption application for review by the USEPA.

This report specifically addresses three key elements related to the feasibility of §404 assumption for Wisconsin: 1) a comparison of existing §404 and state permitting elements, 2) an evaluation of fiscal and staffing impacts, and 3) an analysis of alternatives to §404 assumption. This report also summarizes past and present analyses of §404 assumption and discusses topics to promote better wetland conservation, restoration, and management, including working toward a more transparent, streamlined regulatory process and supporting healthy wetland ecosystems in Wisconsin.

2.2. Stakeholder Involvement

In development of this report the WDNR sought input and feedback from agency leadership and key stakeholders. The WSC was briefed on the progress and information contained in this report in 2019 and 2021. The WDNR met with USACE- St. Paul District regional managers and technical staff multiple times in 2019 and 2020. USACE Regulatory Division and WDNR Secretary's Office leadership were briefed on the content of the report and authorized public release of the report in 2021.

2.3. Wetland Study Council

Section 15.347(22), Wis. Stats. directs the WDNR to create a Wetland Study Council (WSC) comprised of nine members appointed for staggered six year terms (WDNR, 2021). In accordance with the statue, the WSC is a diverse assembly of stakeholders from agricultural, business, environmental and waterfowl sectors. The WSC was formed in 2019 and held their first meeting in June 2019 with administrative support from WDNR staff. The Act calls upon the WSC to research and make recommendations on a variety of wetland issues including the "program elements" necessary for the state to assume the §404 program.

The WSC was briefed on the components of §404 assumption including the application process, the legal requirements and the advantages and challenges for Wisconsin on June 27 and July 25, 2019. In December 2020, the WSC was briefed on the comparison of waterway and wetland permitting processing and staffing levels between the WDNR and USACE. On April 16, 2020, the WSC issued the following statement related to the feasibility of Wisconsin pursuing §404 assumption:

> *The Wetland Study Council recommends the DNR not pursue authority to issue federal wetland and waterway permits, as allowed under §404 of the federal Clean Water Act, at this time. The §404 program regulates much more than wetlands such as dams and levees, infrastructure development (highways and airports), mining projects, etc. and would require*

the state to assume many responsibilities outside of wetland oversight. Under federal law, full assumption of the responsibilities to administer §404 would be necessary and would require extensive financial and human resources and potential state law changes. The Wetland Study Council recommends continuing to work on other alternatives to address the concerns of wetland permit timing and consistency that prompted consideration of §404 assumption.

2.4. USACE – Regulatory Program St. Paul District

The WDNR met numerous times with USACE- St. Paul District managers and technical staff. At the request of the WDNR, the USACE provided permit processing information from their database for analysis and inclusion in the report. The WDNR met specifically on two occasions to review the states data analyses and obtaining feedback from the USACE on data syntheses approaches and methodologies (Appendix 2). The USACE was provided an opportunity to review and comment on the content of this report in March of 2021 and September of 2021.

2.5. USEPA

Staff funding to develop this feasibility evaluation of §404 assumption was provided by the USEPA Wetland Program Development Grant program. As part of the grant requirements, annual progress reports were provided to the USEPA Region 5 wetland grant office. The scope of work addresses three key elements of §404 assumption:

1) Comparing federal and state regulatory standards for the discharge of dredged or fill materials in navigable waters of the state,
2) Evaluating the existing and necessary fiscal and staffing resources for §404 assumption, and
3) Evaluating alternatives to §404 assumption that could provide permit streamlining and reduced costs for applicants.

Chapter 3. Federal and State Regulatory Roles

Currently both the USACE and the WDNR administer regulatory programs for the discharge of dredged or fill material into waterways and wetlands in Wisconsin. Although the foundational regulatory premise is the same for both programs and both programs have substantial overlap, there are also dissimilarities between the federal and state programs.

3.1. Federal Regulatory Roles

The CWA (33 U.S.C. 1251 et seq.) sets forth the basic structure for regulating pollutant discharges into WOTUS and established regulations for surface water quality standards. Section 404 (33 U.S.C 1344) established a federal regulatory program for discharge of dredged or fill material into WOTUS. This includes conventional wetland fills and many different types of activities that affect waterways including ponds, lakes rivers, and streams. The fundamental premise of §404 prohibits the discharge of dredged or fill material if 1) a practicable alternative exists that is less damaging to the aquatic environment or 2) if WOTUS would be significantly degraded because of the discharge.

The USACE administers permitting components of the program including the review of individual and general permits, which also includes handling any required mitigation actions (40 CFR 230 – 233). The USACE also has the authority to determine permitting jurisdiction, develop policy and guidance, and take enforcement actions (33 CFR 320 - 332). The USEPA has §404 general oversight responsibilities including development of program policies, guidance, and permit criteria. The USEPA can review and comment on individual permit application and prohibit or deny the use of disposal sites. The USEPA also approves and oversees State and Tribal assumption programs - an important factor to consider for Wisconsin's assumption of the §404 program.

The ESA requires federal agencies to conserve endangered and threatened species and under §7(a)(4) to consult with the USFWS to evaluate the likely effects of projects on federally endangered and threatened species or their critical habitat.

The National Historic Preservation Act (NHPA) (54 USC 306101 *et seq*.) defines the responsibilities of the USACE in implementing §404 for the protection of cultural and historic resources. The USACE is required to conduct consultation for potential impacts to cultural and historical resources in accordance with Section 106 of the NHPA and 36 CFR, Part 800 which specifies consultation practices with the state historic preservation office (SHPO), tribal nations, and other interested parties. More specifically, the USACE consultation follows Section 106, and 33 CFR, Part 325, Appendix C, and applicable guidance.

The USACE also has responsibility to consult on their §404 permitting activities with tribal nations under Executive Order 13175 (2000) and other policy guidance. As sovereign nations, the USACE is obligated to pre-decision government to government consultation for each of the 565 federally recognized American Indian and Alaska Tribes. The USACE is responsible for contacting all the potentially affected tribal nations when any activity has the potential to significantly affect protected tribal resources or tribal treaty rights. The USACE collaborates with tribal governments to ensure their comments on specific activities and projects are taken into consideration. A recent publication by the Institute for Water Resources (2020) provides a detailed analysis of USACE tribal engagement and consultation activities and recommendations for policies, procedures, and tools to improve cooperation and collaboration between the USACE and tribal nations.

3.2. State Regulatory Roles

Through the implementation of state statutes and administrative codes, Wisconsin's wetland program is comparable to the Federal §404 regulatory program. The WDNR is responsible for maintaining the quantity and quality of Wisconsin's wetlands while allowing for environmentally sound economic development. The State does this primarily through implementation of s. 281.36, Wis. Stats. that provides a regulatory program for discharges into wetlands and mitigation requirements, and through Chapters 30 and 31, Wis. Stats. that provide the regulatory authority for other types of projects in navigable waterways. Other critical elements of the state program include protecting the biotic integrity of our highest quality wetlands, improving the biotic integrity of

existing wetlands, rehabilitating degraded wetlands where feasible, and restoring lost wetlands are critical elements of Wisconsin's wetland program. The WDNR coordinates wetlands activities, from regulation to acquisition and restoration, with many external partners in other state and federal agencies and conservation organizations. The WDNR implements USEPA Wetland Development Grant projects through the Water Quality and Waterways Bureaus, engaging staff from its research, environmental assessment, water use, wildlife management, natural heritage, and forestry programs. In addition, the WDNR has established a Water Monitoring Section and Wetland Monitoring Technical Team to inform and initiate wetland projects with department staff involved in stream, lake, and groundwater monitoring.

The WDNR is required to comply with Wisconsin's endangered species laws primarily found in s. 29.604, Wis. Stats. and administrative rules chapters NR 27 29 which allow the WDNR to authorize the taking, exportation, transportation or possession of listed plant or animal species if the activity is for zoological, educational, or scientific purposes, or for propagation in captivity for preservation purposes. The WDNR may also issue incidental take permits for proposed activities that are not likely to appreciably reduce the likelihood of the survival or recovery of the species within the state, the whole plant-animal community of which it is a part or the habitat that is critical to its existence.

Wisconsin state agencies are also required to consider whether any proposed action will affect any listed historic property and notify the State Historic Preservation Office (SHPO) under s. 44.40, Wis. Stats. In Wisconsin, the State Historical Society of Wisconsin (SHSW) is the federally designated SHPO. The WDNR has a Memorandum of Agreement (MOA) with the SHSW, and implementation procedures are outlined in Manual Code 1810.1. Generally, the WDNR first determines whether an action involves a property identified in the Wisconsin Historic Preservation Database and then determines if the action may affect the property. When the action is determined likely to affect a property, the SHPO must review the proposal to determine if there may be adverse effects to the recorded property. The SHPO has 30 days to respond to the WDNR or request additional information and extend the review out for another 30 days.

The WDNR also has the responsibility to consult with tribal nations located in the State of Wisconsin under the Constitution of the United States, various treaties, laws, and court decisions and affirmed by Wisconsin Executive Orders #39 (2004) and #18 (2019). WDNR principles for government to government consultation with tribal nations is established in broad policy documents (WDNR, 2005) and numerous WDNR manual codes.

Chapter 4. Section 404 Assumption Background

Since 1977, the U.S. Congress has provided a process for state and tribal nations to take on the CWA 404 program. In a process known as §404 program assumption, a state may request approval from the USEPA to administer the federal dredge and fill permit program for activities regulated under §404. Congress recognized that many states had already established parallel permitting programs and that the traditional role of the states in land use management provides them with a particularly effective basis for wetland management. However, Congress also emphasized the need to retain USACE control over navigation in interstate waters (ASWM, 2011).

To qualify for assumption of the Federal §404 program, the state must meet requirements that assure a level of resource protection that is equivalent to and no less stringent than that provided by the federal agencies. Requirements for assumption of the §404 program are detailed in the USEPA's §404 state program regulations at 40 CFR Part §233. An approved state program must have provisions in laws and regulations that address the following requirements:

- Jurisdiction over all WOTUS, including wetlands, other than waters over which the USACE retains jurisdiction.
- Authority to regulate all activities that are regulated under federal law (a state or tribe cannot exempt activities that are not exempt under the CWA) and partial assumption is not allowed.
- Permitting standards and procedures that will be at least as stringent as the federal permit program, and that will ensure consistency with the federal permitting criteria.
- Compliance and enforcement authority including the ability to enforce permit conditions, to address violations with penalty levels that are at least comparable to federal fines and penalties and sufficient program funding and staffing to implement and enforce the program.

The state may impose more stringent requirements, but not less stringent requirements. The state may adopt Nationwide Permits (NWP) or may develop their own General Permit (GP) categories for its program (ASWM, 2011).

The USACE retains jurisdiction over waters which are, or could be, used as a means to transport interstate and foreign commerce, all waters subject to the ebb and flow of the tide, and wetlands adjacent to these waters (e.g., tidal waters, the Great Lakes and major river systems). The definition of "assumable waters" was historically, an uncertainty associated with §404 Assumption and was affected by a recent July 2018 memo from Assistant Secretary of the Army, R.D. James, and USEPA initiation of rulemaking – both of which will play a role in determining the extent of assumable waters in Wisconsin. The uncertainties associated with assumable waters and WOTUS are described in more detail in Chapter 5.

Under §404 Assumption, the state must develop Memorandums of Agreement (MOA) with the USEPA and USACE that specifies how state and federal agencies will coordinate responsibilities. Typically, the USEPA retains oversight authority and receives copies of all permit applications and the State must notify the USEPA of any action that it takes with respect to such applications. If required, the USEPA Administrator or designee provides copies of the application to the USACE, the Department of Interior, and the USFWS and must notify the state within 30 days if the administrator intends to comment on the state's handling of the application. The state must then await comment before it may issue the permit. If the USEPA objects to the application, the state may not issue the proposed permit but may request a hearing before the USEPA or alter the permit to accommodate the USEPA objections. If the state does not request a hearing, the USEPA transfers authority to issue the permit to the USACE. Once assigned to the USACE, jurisdiction remains there.

While several other federal programs may be delegated to states, delegation differs from assumption. For example, the WDNR is currently delegated to implement most of the federal wastewater and air permitting monitoring and compliance duties. Under delegation, the USEPA provides an oversight role, but the WDNR can choose which portions of the program to implement. The state can also develop state specific standards and implementation practices providing flexibility to the federal standards. More importantly, the WDNR receives federal funding to implement these delegated programs in the range of 2 to 3.5 million dollars per year. On the

other hand, §404 Assumption does not have any federal funding, does not provide for partial assumption, and requires the strict compliance with all federal standards.

4.1. National Setting of §404 Assumption

Only three states (Michigan, New Jersey, and Florida) have requested and received approval for a state §404 program. Michigan and New Jersey, states that have more than 20 years of experience with §404 Assumption, report the program works very well, including expedited permit times, less permit redundancy, and good working relationships with the USEPA (MNDNR, 2017). Neither Michigan nor New Jersey had well established State Wetland permitting programs prior to assuming the federal program and assumed the §404 federal program with a relatively blank regulatory slate.

Other states have carefully evaluated the feasibility of assuming the §404 program and have not pursued assumption nor developed an application package to the USEPA. States like Minnesota, Maryland, Oregon, Virginia, Montana, and Alaska have officially produced reports investigating the feasibility of §404 Assumption. None of these states have decided to go forward with §404 Assumption (NACEPT, 2017). The primary reasons are reported to be a strict requirement for consistency with federal law, setting a relatively high bar for permitting and enforcement, combined with a lack of dedicated federal funding to support state programs and uncertainties associated with jurisdictional/assumable waters and compliance with the ESA (ASWM, 2011).

<u>Oregon</u>

Oregon has a long history of evaluating assumption and historically identified three major issues that curtailed pursuit of assumption including implementation of the ESA, tribal nation relations and concerns, and the delineation between assumable and non-assumable waters (Carlos, 2014). In 2020, Oregon has reported that two of these issues, assumable vs retained waters and compliance with the ESA, have a "clearer path forward" with recent actions by the USACE and USEPA (ORDSL, 2020).

<u>Arizona</u>

More recently, the State of Arizona developed a "Roadmap" for §404 Assumption and started a 3-year long process that included six general stakeholder meetings, 70 technical work group meetings, seven executive work group meetings and nine tribal listening sessions. Ultimately, in April 2020, the Arizona Department of Environmental Quality (AZDEQ, 2020) issued the following statement:

> *In 2018, ADEQ began a collaborative stakeholder process to draft a roadmap for Arizona to assume the Clean Water Act Section 404 Permitting program. Almost 500 people engaged by attending stakeholder meetings, participating in work groups, and providing over 2,100 comments. The majority of stakeholder input supported retaining the current process.*
>
> *Based on this, ADEQ has decided not to continue pursuing state assumption of the §404 permitting program. Stakeholder engagement is an integral part of the potential development of any program, and the Department appreciates the participation of so many people sharing their perspectives. Materials will remain available on the stakeholder page*

<u>Minnesota</u>

In 2019, the Minnesota State Legislation passed a bill, signed into law by the Governor, directing the Environmental Quality Board to begin to assemble the materials required for assumption of the §404 program. The legislation provided funding in the amount of $200,000 for a scope of work that included 1) preparation of §404 assumption application materials, 2) a report on the additional funding necessary to obtain assumption and 3) a report on the additional funding necessary to implement the state §404 assumption regulatory program (MNBWSR, Development of the Minnesota Application for Clean Water Act Section 404 Assumption - Project Work Plan, 2020).

Like Wisconsin, the State of Florida had a robust state-wide waterway and wetland regulatory program when the USEPA approved their §404 Assumption application. The assumption process in Florida took over two years and

created a state §404 regulatory program side-by-side with the state's already existing Environmental Resource Permitting program (ERP).

Florida

Florida's recent assumption of the §404 program provides a recent example of the work and timelines involved with state assumption. During Florida's 2018 legislative session, a bill was passed that gave Florida Department of Environmental Protection (FDEP) authority to begin the public rulemaking process to protect the state's wetlands and surface waters by assuming the §404 program within certain waters. The rulemaking process was completed on July 21, 2020. Through this process, Chapter 62-331, Florida Administrative Code (F.A.C.), "State 404 Program," was created to bring in the requirements of federal law not already addressed by the existing ERP program. Minor changes were also made to the ERP rules in Chapter 62-330, F.A.C., to facilitate assumption. Florida submitted its assumption package to the USEPA on August 20, 2020 and began an internal weekly webinar training program on August 11, 2020 to prepare staff for program implementation. The USEPA approved Florida's program on December 17, 2020." (FDEP, 2020).

The USEPA solicited public review and comment on Florida's proposed program, including two virtual public hearings, during the statutorily mandated 120-day decision period. The USEPA's comprehensive review process included the Biological Evaluation of more than 200 endangered species, consultation with the USFWS under Section 7 of the ESA and consultation under Section 106 of the NHPA. The USEPA determined that Florida demonstrated the necessary authority to operate a §404 program and FDEP's program was consistent with and no less stringent than the requirements of the CWA and its implementing regulations.

Florida's §404 Program is a separate program from the existing Environmental Resource Permitting Program (ERP), and projects in state-assumed waters will require both an ERP and a State §404 Program authorization. Florida considered that efficiency will come from the fact that approximately 85% of review requirements overlap between the existing state and federal programs, eliminating duplicative review. A key component of the State §404 Program is a retained water screening tool that allows users to determine if §404 permitting will be retained by the USACE or assumed by the State. This tool is not guaranteed to be accurate and is meant to assist in the initial screening of a potential project.

- **Florida's Press Release (December 17, 2020) can be found here:** https://content.govdelivery.com/accounts/FLDEP/bulletins/2b18f44
- **Notice of hearings, hearing agendas, and recorded presentations can be found on FDEP's website:** https://floridadep.gov/water/water/content/water-resource-management-rules-development
- **Florida's assumption materials, submitted in August 2020 can be found here:** https://floridadep.gov/water/submerged-lands-environmental-resources-coordination/content/404-assumption

4.2. Summary of Advantages and Challenges of §404 Assumption

There are well documented advantages and challenges for a state to assume administration of the §404 program. Because of Wisconsin's well-developed wetland permitting program, some advantages typically cited are already present, and §404 Assumption would add little to the value of these program components.

Virginia (VDEQ, 2012) summarized the benefits of §404 Assumption as follows:

- Regulatory streamlining and increased efficiency: State §404 assumption may reduce duplicative state and federal permitting requirements, resulting in reduced time for review of regulated activities.
- Increased consistency in permit decisions: A state run §404 program provides a single point of contact for the regulated community and can eliminate potentially conflicting permit decisions and conditions.

- Increased regulatory program stability and certainty: During a time of jurisdictional uncertainty at the federal level, such as in the wake of an individual federal legal decision, state governments can maintain a consistent and predictable definition of waters they regulate.
- State-specific resource policies and procedures tailored to address conditions and needs of the state: A state §404 program can be designed in accordance with the state's unique water resources, geographic features, and water protection goals. (VDEQ, 2012).

While many states have evaluated the feasibility of §404 Assumption, the fact that only three states (Michigan in 1984, New Jersey in 1994, Florida in 2020) have assumed the §404 program since 1977 reflects the well-studied disadvantages and challenges associated with the §404 Assumption.

A general list of disadvantages of §404 Assumption (VDEQ, 2012) (ASWM, 2011) includes the following:

- High financial costs of creating state laws equivalent to §404, developing an application for §404 Assumption, and yearly implementation of the program.
- Lack of dedicated federal funding for §404 operation and administration: while grant funds may help to evaluate and develop a §404 Assumption program, there is no implementation funding.
- Difficulty in meeting the program requirements of regulatory equivalent authority in all areas of the federal §404 program (e.g., stream mitigation requirements).
- Unclear or ambiguous mechanisms and requirements under the ESA.
- Section 10 Navigable Waters remain under USACE jurisdiction and are not assumable waters by the State. In the coastal states, Great Lake states and states with large rivers, a greater geographical extent of waters could be designated as non-assumable, reducing the benefits of a state §404 program.
- Loss of USACE knowledge and technical resource base especially with respect to complex ordinary high water mark determinations, wetland delineations and enforcement investigations.
- Any subsequent changes to state regulatory programs may trigger a re-evaluation of the program by the USEPA and any changes to federal regulations may require a state to revise state law.
- Developing the wide breath of broad public and political support for a state program that strictly implements federal laws.

Funding is a major obstacle that states face when considering §404 assumption. Congress does not provide funding to states to assume permitting authority, which would encompass the responsibility of "project review, impact assessment, program enforcement and administration, and the assumption of new responsibilities for compliance with certain federal statutes" (Fletcher, 2000). If a state receives approval to assume §404 yet finds that they lack the funding to support the assumption, state resources, project and permit issuance supervision, enforcement, mitigation, and the overall protection of the state's wetlands and waterways will deteriorate. If the USEPA deems the state incapable of effective assumption, the program will be terminated, and authorization will return to the USACE, squandering the funds and resources spent towards assumption feasibility studies and application materials. In turn, public and federal support may dissipate, and the state can find themselves in a more unpleasant situation than before they applied for state assumption.

Section 404 Assumption is a political process, pursued at the request of the Governor, based on laws passed by the Legislature, with a legal evaluation by the Attorney General's office and approval by the USEPA. Assumption must have enough political popularity to spur the Governor's request, and then maintain enough political momentum to pass the needed legislative and regulatory law changes and allocate financial resources through the legislature with public support. Due to the politics of §404 assumption, a state ultimately needs to develop broad support through stakeholder engagement.

Permittees are interested in clear permit streamlining benefits such as reduced permitting costs and faster turnaround times and also need reassurance that the regulatory burden will not increase. For example, currently the WDNR implements several regulatory flexibilities that have been passed by the legislature since the early 2000s and most recently in 2018. For assumable waters and under a state §404 permit program, the State may not

have the same level of regulatory flexibility. If the State is applying two different set of standards for wetland approvals, one under state law and another to meet federal requirements, this may cause confusion with applicants.

Environmental advocates may be concerned about the loss of an additional layer of federal agency technical knowledge, experience, and resource protection. Environmental advocates may be apprehensive that even if the state has a program that is "equivalent to" the federal program on paper, the process will not be "equivalent to" in application (Carlos, 2014).

4.3. Permitting Process under § 404 Assumption

The USEPA directly reviews permit applications defined in a MOA with the state and may object to issuance of a permit when federal guidelines are not met, or if the permit is subject to an interstate dispute. The USEPA review also provides for coordination with other federal programs, including the USACE, the USFWS and the National Marine Fisheries Service (NMFS). A state cannot issue a permit under §404 if the USEPA objects to issuance of the permit and the state has not taken steps required by the USEPA Regional Administrator to eliminate the objection (ASWM, 2011).

The detailed process for USEPA review of state/tribal §404 program permit applications is spelled out in federal law and regulations (Section 404(j); 40 CFR §233.50). Generally,

- The state or tribe is required to send USEPA a copy of the public notice for any complete permit application received by the state except when USEPA has waived review in the MOA. Public notices must be sent to the applicant, adjoining property owners, any agency with jurisdiction (including tribal nations) and all persons who request a copy.
- The USEPA in turn, provides the permit application to the USACE and the USFWS for review. These agencies are given 50 days to provide comments to the USEPA.
- The USEPA must provide comments to the state within 90 days of its receipt of the permit application. These comments incorporate comments from the other federal agencies.
- If the USEPA objects to the proposed project - typically by finding that some aspect of the project is not consistent with the §404(b)(1) Guidelines - then the state cannot issue a permit. In most instances, federal concerns are resolved by the following: modification of the project by the applicant, provision of clarifying information by the applicant, or by agreement on conditions to be added to the permit.
- There is a time limit for resolution of federal issues. Once the USEPA has sent a letter of objection, all issues must be resolved within a 90-day period. After this, the USEPA cannot withdraw the objection to the permit.
- If the state does not satisfy a USEPA objection or requirement for a permit condition or does not deny the permit, then processing of the §404 permit reverts to the USACE. The applicant may seek federal authority by filing a new application with the USACE. Should the USACE deny the permit, the applicant may appeal through the federal process. The state may, in some circumstances, issue a permit under state law despite a USEPA objection – but in this instance the state permit would not provide any authority under §404 (ASWM, 2011).

A state that has assumed the §404 program must also submit an annual report to the USEPA Regional Administrator evaluating the state's administration of its regulatory program(s), including identifying problems and providing recommendations for solutions. New Jersey's 2016 annual report to the USEPA consisted of approximately 16 pages of reporting text and 130 pages of spreadsheet data summarizing different components of the program. Specifically, the state report must address the following as detailed in 40 CFR §233.52:

- Assessment of the cumulative impacts of the state's permit program(s) on the integrity of state-regulated waters.
- Identification of areas of particular concern and/or interest.
- Number and nature of individual and general permits issued, modified, and denied.

- Number of violations identified, and number and nature of enforcement actions taken.
- Number of suspected unauthorized activities reported, and nature of action taken.
- Estimate of extent of activities regulated by general permits.
- Number of permit applications received but not yet processed (MNDNR, 2017).

In addition, the USEPA reviews the state's annual program performance and provides federal technical assistance. The USEPA also retains the right to take enforcement action on any §404 violation, although the primary responsibility for enforcement rests with the state §404 program.

4.4. §404 Assumption Application Process

The EPA must approve a state's application to assume the §404 program under §404(g). The statute requires the Governor of the applying state to submit a description of the program to the USEPA, along with a statement from the state Attorney General that the laws of the state "provide adequate authority to carry out the described program."

A State must submit to the USEPA Regional Administrator the following six items:

1) A letter from the Governor of the state.

   This letter confirms support for state assumption of the §404 program by the Governor and verification of the application materials submitted to the USEPA.

2) A complete program description.

   The program description must include various essential elements to be approved. First, the description must explain the state's permitting, administrative, judicial review, and other applicable procedures. In addition, it must include a description of the funding and manpower available for program administration, a description of how the State will coordinate its enforcement strategy with the USACE and USEPA for non-assumable waters or projects, a comparison of state and federal definitions of wetlands, and the extent of the state's jurisdiction, scope of activities regulated, anticipated coordination, and the scope of permit exemptions, if any.

3) An Attorney General's statement.

   The Attorney General's statement must also include certification that each agency responsible for administering the state program has full authority to administer the program within its jurisdiction. In addition, the state must have full authority to administer a complete state program. Finally, the statement should include a legal analysis of the likelihood of a constitutional taking because of the successful implementation of the state's program.

4) A Memorandum of Agreement with the USEPA Regional Administrator.

   The MOA with the USEPA must set out state and federal responsibilities for program administration and enforcement including provisions specifying classes and categories of permit applications for which USEPA will waive federal review authority and provisions addressing USEPA and state roles and coordination with respect to compliance monitoring and enforcement activities.

5) A Memorandum of Agreement with the Secretary of the Army.

   The MOA with the Secretary of the Army must include a description of the WOTUS within the state over which the secretary retains jurisdiction and an identification of all general permits 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 general permits to the state.

6) Copies of applicable State statutes and regulations

The USEPA will coordinate review and evaluation of the state statutes and regulations applicable to the state §404 program with USACE, USFWS, and the NMFS. The USEPA has up to 120 days to approve or disapprove the

state's program. Once the USEPA approves the state application, the USACE transfers to the state those permit applications for projects in the State's jurisdiction.

Finally, the §404 requires that USEPA review any revisions to the state wetlands program, determine whether such revisions are substantial or not substantial, and approve or disapprove the revisions. The USEPA also maintains the authority to withdraw approval of the program. If the administration of the state program does not meet USEPA guidelines, the USEPA may take corrective action and may, within a reasonable time, withdraw approval of the program and redirect authority to the USACE.

Florida and Arizona are two states that have recently proceeded through the public stakeholder process, with the Florida process concluding with an approved §404 program (FDEP, 2021) and the Arizona process concluding with a decision not to pursue assumption (AZDEQ, 2020). The public stakeholder process in each state spanned 3-5 years and included many diverse stakeholders. Programmatic costs to navigate the public stakeholder process, enact laws as stringent as §404 and assemble the assumption application was substantial in the hundreds of thousands of dollars (MNBWSR, 2020).

Chapter 5. Federal Program Uncertainties

Like many regulatory programs, there are uncertain elements of the federal §404 program that may affect state assumption. Some uncertainties are related to executive office policy changes or updates due to administration turnover, while some are the result of court decisions affecting laws, policies, or guidance and still others are related to guidance issued by either the USEPA or USACE. Known or anticipated key uncertainties are covered in more detail below.

5.1. USEPA Assumption Regulation Modernization

In 2018, the USEPA started rulemaking to update §404 assumption regulations (USEPA, 2020), with a September 2018 letter sent to states and tribes requesting their input regarding the modernization of the dredge and fill permitting program's assumption laws. The original timeline for updating §404 assumption regulations by December 2021 is unlikely to be met and at the time of this report publication a revised timeline was not available (Kathy Hurld, 2021). An overarching uncertainty exists regarding how many of the items raised by states and highlighted in Chapter 5 will be addressed and to what extent by efforts of the USEPA to update the assumption rules.

5.2. Definition of Waters of the United States (WOTUS)

The jurisdiction of §404 applies to "navigable waters" which the CWA defines as "the waters of the United States" (WOTUS) including territorial seas. Because WOTUS is broadly defined by the CWA, the USEPA and USACE must further define the term to implement the program. The agencies' regulatory definition has been brought before the courts many times and may continue to raise legal challenges indefinitely.

Two Supreme Court rulings issued 2001 and 2006 interpreted the scope of the CWA more narrowly than previous guidance and regulations. In 2014, the USEPA and USACE issued a final "Clean Water Rule" focused on clarifying the regulatory status of waters in the United States with the final rule issued in 2015. The 2015 Clean Water Rule went through multiple court challenges with the result of the rule being in effect in 22 states and enjoined in 28 states where regulations promulgated in 1986/1988 were still in effect.

In February 2017, the Trump Administration issued Executive Order 13778 directing the USEPA and USACE to rescind or revise the 2015 Clean Water Rule and to consider interpreting the term navigable waters in a manner consistent with Justice Scalia's opinion in *U.S. Army USACE of Engineers and Rapanos v. United States* (2006). This action ultimately ended with a final Navigable, Waters Protection Rule (NWPR) by the USEPA and USACE that became effective on June 20, 2020. Challenges to the NWPR were filed in several courts across the country including courts in Maryland, Massachusetts, South Carolina, New Mexico, and Colorado.

Most recently and concurrent with publication of this report, in late August 2021, Federal Judge Rosemary Marquez vacated the Trump's administration's NWPR. Judge Marquez's decision provides a thorough discussion of case law related to the definition of WOTUS (Pasqua Yaqui Tribe et al., v USEPA et al. , 2021). Therefore, the extent of WOTUS will likely continue to be determined by executive administrations and state and federal court actions. Section 404 assumption will, in turn, continue to be influenced by the uncertainties of navigable waters and WOTUS definitions.

5.3. USEPA Assumable Water Rule

Historically, states that have evaluated the feasibility of §404 assumption noted the uncertainties and lack of rules that specifically define assumable and retained water. Section 404 establishes a category of waters which are covered by Federal acts, and requires the USACE to retain jurisdiction, and a category of waters which the state can assume jurisdiction over. Section 10 of the Rivers and Harbors Act (RHA) grants the USACE full and un-assumable authority over the "navigable capacity of any water of the United States." This includes all designated Section 10 Navigable Waters and in Wisconsin this includes 44 waterbodies or portions of water bodies (Figure 1).

Figure 1. Designated Section 10 waters in Wisconsin

The CWA also reserves certain waters to the exclusive jurisdiction of the federal government, including any water that has been, could be, or used to be used for navigation or interstate commerce, waters subject to the ebb and flow of the tide, and all waters and wetlands "adjacent to" any of the jurisdictional waters.

In Minnesota's 2017 §404 feasibility study, the state found that some interpretations of the federal statute would result in a limited number of the state's waters being assumable, creating little incentive for the state to pursue §404 assumption (MNDNR, 2017). Until recently, there was no hard-and-fast definition of the boundaries in either guidance documents or in regulations, so states and the USACE had to develop a method by which they divvy up the retained and assumed waters (Carlos, 2014).

That recently changed with some work lead by the USEPA that formed the Assumable Waters Subcommittee under the National Advisory Council for Environmental Policy and Technology (NACEPT). The Subcommittee was charged to develop recommendations to help clarify which waters a state or tribe may assume §404 permit responsibilities, and for which waters the USACE retains §404 permit responsibility. The Subcommittee included members representing states and tribes, federal agencies, and other stakeholders" (NACEPT, 2017). Ultimately, the majority of Subcommittee members recommended the USEPA develop guidance or regulations to clarify that when a state or tribe assumes the §404 program, the USACE must retain authority over waters included on lists of waters regulated under RHA. More importantly, the Subcommittee recommended the USEPA adopt and implement a policy under which the USACE would retain administrative authority over all wetlands adjacent to retained Section 10 Waters landward to an administrative boundary agreed upon by the state or tribe and the USACE.

In 2018, the Department of Army moved forward with this recommendation and issued a memo (James, 2018) that established the following criteria for retained waters by the USACE:

a. Waters that are jurisdictional under Section 10 of the RHA, provided that:
    i. Retained waters included tidal waters shoreward to their mean high water mark, or mean higher high water mark on the west coast; and
    ii. 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 USACE.

Florida used these criteria to determine USACE retained waters and state assumed waters in their approved §404 assumption application process. Florida and the USACE determined that retained waters were within an administrative boundary of 300 feet to designed Section 10 Waters in the state and has created a mapping tool depiction of retained waters (FDEP, 2021).

However, the James memo clearly specifies the retained waters criteria is subject to further proceedings by the USEPA and USACE and the federal rule process has not been completed at the time of publication of this report. In addition, a different administration could rescind the 2018 USACE memo and enact different criteria.

Accordingly, there is still a high level of uncertainty about the long-term delineation of USACE retained and state assumed waters under §404 assumption.

5.4. Endangered Species Act Implementation

The ESA is commonly perceived as the strongest environmental protection statute in the federal government and imposes strict requirements on any discretionary agency action undertaken. However, this duty to consult only applies to federal actions, and does not carry over to states, even under the §404 Assumption program. While ESA consultation does not apply to either the states or to the transfer of authority from the USEPA, states are still required to provide some protections for endangered species and the USEPA still has the responsibility to review permits for discharges with reasonable potential for affecting endangered or threatened species as determined by the USFWS. When a state is creating its equivalent endangered species program, a state needs to determine a compliance process with §7 under §404 Assumption, instead of compliance with §10 which is commonly implemented by state programs (Carlos, 2014).

State permitting programs do not explicitly require consideration of impacts to federally listed threatened or endangered species, although some federally listed species are also listed under the Wisconsin Endangered Species Act, which is a consideration under state permitting programs. Under §404 assumption, the USEPA cannot waive their review of state permits that may affect federally listed species and designated critical habitat and must coordinate with the USFWS and the USACE. If Wisconsin assumed the §404 program, it is likely that the state would need to implement a procedure to screen permit applications for both state and federally listed species and notify the USEPA accordingly. The Michigan Department of Environmental Quality and the New Jersey Department of Environmental Protection, through consultation with the USEPA and the USFWS, have developed such a screening process as part of their state permit reviews under §404 assumption (MNDNR, 2017).

The Florida Department of Environmental Protection (FDEP) application to the USEPA for §404 Assumption included the development of a comprehensive Biological Evaluation of more than 200 endangered species throughout Florida. USEPA also consulted with USFWS under §7 of the ESA, resulting in the issuance of a Biological Opinion and Incidental Take Statement related to the approval and implementation of FDEP's program.

The Biological Evaluation (USEPA, 2020) that lead to the Biological Opinion detailed the FDEP's process to send copies of all permit applications and preliminary site-specific determination of potential effects to listed species to the USFWS for review and comment. The FDEP committed to including all species protection measures that the USFWS recommend as permit conditions or deny the request for a permit. Key to this process is the dispute resolution process developed in the MOU between Florida state agencies and the USFWS that specifies roles and responsibilities of the agencies under §404 assumption (FDEP, 2020) . If the concerns of the USFWS are not addressed, the permit is transferred to the USEPA for processing. The FDEP estimated the USFWS review process will require a timeframe of between 55 and 90 days depending on completeness of the application and public notice requirements.

Coordination and consultation with the USFWS are negotiated agreements between the state and federal agencies with concurrence from the USEPA through the development of the MOU. Since these are negotiated processes with regional offices, there is uncertainty associated with the coordination process, timelines, and level of involvement that USFWS and USEPA may require.

5.5. Partial Assumption

While the CWA does not address whether a state may assume the §404 program in whole or in part, the federal regulation implementing the CWA prohibits partial assumption (40 CFR 233.1(b)). In 2020 the Environmental Council of States (ECOS) submitted proposed amendments to the CWA to allow for partial assumption (ECOS, 2020). ECOS suggests that allowing for partial assumption creates consistencies with other CWA program such delegation provisions of the National Pollutant Discharge Elimination System and permitting under the Clean Air Act. The letter concludes that partial assumption would allow states to apply for a portion of the §404 program that is workable for that state. In 2020, Oregon Department of State Lands (ORDSL) completed an initial

feasibility study of a partial assumption for three activities (urban growth, mining, and mitigation banking) while recognizing partial assumption is dependent on the USEPA's promulgation of the modernized §404 assumption rule. Accordingly, the ECOS recommendation and USEPA plans for a revised rule results in uncertainty whether there may be more flexibility to assume portions of §404 rather than the current "all or nothing" requirement in federal regulations.

5.6. Federal Preemption and Regulatory Nexus

In Oregon's recent evaluation of the benefits and disadvantages of partial §404 assumption (ORDSL, 2020), the loss of a federal nexus (i.e., a state issued permit vs a USACE issued permit) was identified as a potential disadvantage. Oregon suggested that state-issued §404 permits could potentially affect other regulatory actions of the state including compliance with the National Environmental Policy Act and the NHPA. The loss of a federal nexus was also called out as impacting the ability to enforce tribal treaty rights and federal trust responsibilities. In addition, the loss of a federal nexus could potentially allow the Federal Energy Regulatory Commission decision to preempt local or state regulations and interfere with §401 Water Quality Certifications for some federal projects. Some of these concerns are not applicable in Wisconsin since the state has legal requirements designated by administrative orders, statutory language, or court decisions (e.g., Wisconsin Environmental Policy laws, tribal treaty court cases, etc.). The impact of the loss of a federal nexus for state regulatory programs is uncertain at this time and will have to be examined if assumption is pursued.

Chapter 6. Comparison of State and Federal Laws

As highlighted above, state requirements of an assumed §404 program must be at least as stringent as the requirements set forth in federal regulations. Specifically, §404 states the following:

> *40 CFR §233.1(d) Any approved State Program shall, at all times, be conducted in accordance with the requirements of the Act (Clean Water Act) and of this part. While States may impose more stringent requirements, they may not impose any less stringent requirements for any purpose.*

USACE and Wisconsin follow comparable standards for permits decisions under the general concepts that 1) impacts to jurisdictional waters/wetlands cannot be significant, 2) impacts must be avoided and minimized to the greatest extent practicable, and 3) unavoidable impacts generally require compensatory mitigation aimed at replacing the lost resources and their associated functions and values. As described in detail in this chapter, some aspects of Wisconsin's state regulatory programs are equivalent, though not necessarily identical to the §404 in terms of protecting aquatic resources. However, certain parts of the state regulatory programs would likely be quite different between the state regulatory program and the assumed state §404 permitting program.

States have considered different approaches to implement a §404 program. Minnesota identified state regulatory programs with varying degrees of inconsistency with federal regulations and found it would be necessary to consult further with the USEPA to clearly identify the specific changes to state laws that would be necessary to obtain approval. This consultation would be extensive and would require a dedicated state staff position as well as considerable time from other state regulatory program staff (MNDNR, 2017). In Minnesota's example, the state contemplated replacing the state program with a permitting program that reproduced the §404 federal program. Florida took a different approach and largely left their state Environmental Resource Permitting (ERP) wetland permitting program in place and developed a new set of rules (62-331 F.A.C) to implement the federal §404 standards. In most cases, both the ERP and the state 404 permits are required as side by side permitting programs.

6.1. Waterway and Wetland Permitting Framework

In considering an approach to assuming the §404 program, it's useful to understand and compare the existing waterway and wetland permitting framework used by the USACE and the WDNR. A framework includes the types of permit mechanisms available (i.e., exemptions, general permits, individual permits, etc.) and what applicable activities or thresholds are applied for each instrument. Both the federal and state regulatory frameworks also consider other regulatory authorities that address endangered species, historic site preservation and Tribal consultation.

6.1.1. Federal Framework

Under §404, a USACE permit is required for the discharge of dredged or fill material into WOTUS., which include both wetlands and waterways. Regulated discharges include filling wetlands for development, grading or pushing material around within a wetland, disturbing wetland soil during land clearing, etc. The general rule is that for an activity to receive a §404 permit, it must comply with the USEPA's Section 404(b)(1) guidelines.

In general, the §404 guidelines require that the activity be the least environmentally damaging alternative that is feasible, and that adverse impacts are avoided, then minimized, and then compensated for (such as creating or restoring wetlands to replace those that are proposed to be filled). Activities also must not be contrary to the public interest, as determined by the USACE. Certain discharges for some farm, forestry, maintenance, and other purposes are exempt from §404 regulation. Exempt discharges must be for defined purposes and must satisfy certain conditions.

The USACE also implements §10 (33 USC 403) that requires a permit to do any work in, over or under a Navigable Water of the U.S. (Section 10 waters) or to do any work that affects the course, location, or condition of the waterbody in such a manner as to impact on its navigable capacity. Activities such as dredging and

construction of docks, bulkheads and utility lines require review under Section 10 of the Rivers and Harbors Act of 1899 to ensure that they will not cause an obstruction to navigation and are not contrary to the public interest.

Waterbodies have been designated as Section 10 waters based on their past, present, or potential use for transportation for interstate commerce. Wisconsin has 44 water bodies or portions of water bodies currently designated as Section 10 waters. Section 404 jurisdiction for projects on designated Section 10 waters cannot be assumed by states and USACE will retain permitting authority on these waters. This is discussed in detail in Section 5.3.

A general permit is issued for structures, work or discharges that could result in only minimal adverse effects and for projects that fit specific categories of activities. There are three types of general permits (33 CFR Part 330): nationwide permits, regional general permits, and state programmatic general permits. General permits are usually valid for five years and may be reauthorized upon their expiration. Nationwide permits are issued by USACE on a national basis and are designed to streamline authorization of projects such as commercial developments, utility lines, or road improvements that produce minimal impact to the nation's aquatic environment. Nationwide permits may be "certified" by individual states for use and if not certified, are not available for use within that state. Regional general permits are issued for a specific geographic area by an individual USACE District. Each regional general permit has specific terms and conditions, all of which must be met for project-specific actions to be verified. Programmatic general permits are based on an existing state, local, or other federal program and designed to avoid duplication of that program. A state programmatic general permit (SPGP) is a type of permit that is issued by the USACE and designed to eliminate duplication of effort between USACE districts and state regulatory programs that provide similar protection to aquatic resources. In some states, the SPGP replaces some or all the USACE nationwide permits, which results in greater efficiency in the overall permitting process.

The USACE also has implemented abbreviated letter-of-permission (LOP) authorization procedures for many projects that are not eligible for general permits. A LOP is used when the project is minor, does not have significant individual or cumulative impacts on environmental values and no appreciated opposition is expected. An individual, or standard permit, is required when projects have more than minimal individual or cumulative impacts and evaluated using additional environmental criteria and involve a more comprehensive public interest review.

There are non-reporting general permit authorizations for some minor activities that do not require applying or reporting to the USACE. If requested, the USACE may confirm whether the non-reporting general permit applies to proposed work. Some general permits can be confirmed or issued in one day, while other general permits and LOPs may require a 30-day agency and public review process depending on the nature and location of the project and will therefore take 45 days or more. Standard individual permits typically require a 30-day agency and public review and take 60 to 120 days or more. There is no fee for general permits or LOPs. For standard individual permits there is a permit issuance fee of $10 for non-commercial projects and $100 for commercial projects while public entities are exempt from fees.

6.1.2. State Waterway & Wetland Framework

State statutes and administrative codes provide the legal foundation for protecting Wisconsin's waterways and wetlands. Different from the federal program where all discharges and fills to WOTUS are regulated under a single federal regulation, Wisconsin fill and discharge activities are regulated under multiple statutes and administrative codes. Depending on the type of activity and whether specific statutory thresholds are met, discharge or fill regulations are applicable to both navigable waterways and non-navigable watercourses or wetlands. Other specific state statutes regulate some fill and discharge activities associated with metallic mining (ch. 293, Wis. Stats.) and cranberry operations (s. 94.26, Wis. Stats.)

Chapter 30 details the regulatory framework for Wisconsin's navigable waterways. Chapter 30 and various administrative codes in the NR 300 series identify those activities for which a waterway permit is required, describes the circumstances under which activities are exempt from permitting requirements, and identifies the type of permit required when permitting is necessary. Examples of activities requiring permits include the placement of structures in or near waterways, shoreline erosion control measures, dredging, and water

withdrawals. Under the framework established in Chapter 30, there are two primary types of waterway permits in Wisconsin, general permits, and individual permits. In addition to these two permit types, exemptions from permitting requirements are possible under certain circumstances. For waterway permits, a general permit application fee is $300, and an individual permit application fee is $600 (actual costs to the permittee are higher due to processing fees).

Section 281.36 Wis. Stats. details the framework for discharges and fills to wetlands and includes both general permits and individual permits and exemptions. When reviewing projects for permit approval, the WDNR determines if they comply with the requirements of section 281.36, Wis. Stats, and applicable portions of administrative codes, namely NR 103 Water Quality Standards for Wetlands. State regulations typically require avoidance and/or minimization of wetland fill if practicable considering costs, available technology, and logistics.

A state general permit (GP) authorizes activities that follow the design, construction, and location specifications defined by administrative rule. General permit specifications are designed in a way to minimize adverse environmental impacts. Only certain activities are eligible for GPs, and currently, over thirty activity types qualify. The WDNR may require an applicant to apply for an individual permit in lieu of a general permit if it finds that the general permit conditions are not sufficient to ensure the wetland discharge will cause only minimal adverse environmental impacts. If review shows that a GP proposal is consistent with GP standards, the permit must be issued, and a decision document sent to the applicant within 30 days (with some exceptions during non-growing season applications). If an applicant receives no indication from the Department within 30 days that additional information is needed or a different permit required, the activity is considered authorized by the general permit (i.e., presumptive approval). The applicant may then proceed with the project based on presumptive approval if the project is carried out in compliance with all applicable GP standards. For wetland general permits, the application fee is $500 (Wis. Stat. § 281.36; actual costs to the permittee may range from $500 to $800 depending on the activity due to the addition of GP Surcharge Fees).

For activities that do not meet the permit exemption criteria or specifications for general permits, an applicant can apply for an individual permit (IP). Individual Permits are issued by the WDNR for projects that do not have design, location, and construction specifications defined by administrative rule. Therefore, a detailed application and site-specific review process is required. A pre-application meeting with WDNR Waterways staff is required for all wetland individual permit applications. The meeting helps the applicant design an approvable project and complete their application. Wetland compensatory mitigation is also required for all wetland individual permits that are approved.

The IP process allows the WDNR to review applicable fishery, wildlife, and water quality data. However, the IP process differs from the GP process in three keyways: first, a pre-application meeting is required prior to filing a permit application; second, a public comment period is required and third, WDNR staff are required to visit the site to observe navigation patterns, habitat, and other site features. If requested, the WDNR may hold an informational hearing, which is an open meeting through which the WDNR provides information about a proposed project and allows the public to ask questions and provide comments. Informational hearings can occur only when requested during the public comment period. Anyone can request an informational hearing, and the WDNR staff must hold a hearing within 30 days after providing the Notice of Public Hearing. Individual permit fees for wetland activities are $800.

Certain types of activities or proposed project locations may result in only minor or inconsequential impacts to the public interest. In such cases, the activity or location may be specified in statute as eligible for a permit exemption. The purpose of an exemption is to allow activities considered to have low environmental risk to proceed without the detailed project review that occurs for a permit application.

Exemptions from Wisconsin's waterway and wetland permitting requirements are outlined in the various subsections of Chapter 30 and s. 281.36(4), Wis. Stats., that correspond with the activities for which exemptions are allowed. Some exemptions are not allowed in sensitive or rare resource types including areas of special natural resource interest (ASNRI), public rights features (PRF) or rare and high quality wetlands. The differences between federal and state exemptions are described in detail in Sections 6.2 and 6.3.

6.2. Wisconsin's Less Stringent Implementation Standards

As highlighted above, both §404 and State waterway and wetland permitting have the general premise for review and use comparable permitting instruments like exemptions, general permits, and individual permits. However, there are some portions of the Wisconsin wetland laws that appear to be less stringent than §404 standards described below.

6.2.1. Artificial Wetlands

WDNR has used a definition of artificial wetlands since first enacting state water quality standards in 1991 (NR 103 Wis. Adm. Code). For decades, the WDNR had a narrow definition of artificial wetlands that included four different types:

- Sedimentation and stormwater detention basins and conveyance features,
- Active sewage lagoons, cooling ponds, waste disposal pits fish rearing ponds and landscape ponds,
- Actively maintained farm drainage and roadside ditches, and
- Artificial wetlands within active nonmetallic mining operations.

This code provided a "recapture" clause that provided to revoke the exemption if the artificial wetland "has significant functional values or uses." Applicants were not required to notify DNR before completing an activity under an exemption so long as the conditions of the exemption were satisfied.

In 2017, the introduction of Wisconsin Act 183 defined and enacted a specific exemption under s. 281.36(4n), Wis. Stats., for artificial wetlands. Artificial wetlands were defined as "landscape features where hydrophytic vegetation may be present as a result of human modification to the landscape or hydrology, which lack definitive evidence of a wetland or stream history prior to August 1, 1991." The s. 281.36(4n) exemption does not include: 1) wetlands that serve as a fish spawning area or passage to a fish spawning area and 2) wetlands created as a result of mitigation requirements.

The WDNR's current application process for an artificial wetland exemption, stated in s. 281.36(4n), requires an exemption request, with supporting materials, to be submitted to the WDNR at least 15 days before beginning a project. Artificial wetlands that are not exempt include sites that serve as fish spawning areas or artificial wetlands that were created for mitigation purposes.

Artificial wetland exemptions are not offered by the USACE and, as part of §404 assumption, the state would have to enact laws that do not include exemptions for artificial wetlands. Under a state §404 program, applicants would need to apply for a general or individual permits for their project, which can require additional fees, supporting materials, and resources.

6.2.2. Wetland Exemptions Not Included in §404

As discussed, the state has several wetland exemptions in state statute and administrative code that were expanded in 2017 through Wisconsin Act 183 which enacted new wetland permitting exemptions under s. 281.36(4), Wis. Stats., for specific activities. Similar to state wetland requlations, §404(f)(1) of the CWA exempts certain activites from the permitting requirements under §404 (USEPA, 2021). The federal exemptions are further defined in 33 CFR §323.4 – Discharges not requiring permits. Table 1 compares the activities that are exempt under each set of regulations. Under a state §404 program, the WDNR would be required to use the exemptions provided in federal code.

While the existing state and federal exemptions do not match up completely, many of the exemptions are applied under both sets of regulations. Section 33 CFR §323. contains the language when exemptions would not apply and applies it to all exemptions. The two part test in both regulations means any discharge of dredged or fill material that results in the destruction of the wetlands of an area (e.g., if the activity results in conversion from wetlands to uplands due to new or altered drainage) is considered a change in the WOTUS, and by definition, a reduction of their reach and is not exempt (USEPA, 2021). Section 281.36(4)(e), Wis. Stats., applies similar language but only to a farm, fish farm and mining roads.

Table 1. Comparison of State and Federal Exemptions

Activity	Federal Exemption	State Exemption	Comment
Normal farming, silviculture, and ranching activities	✓	✓	Federal exemptions apply to "on-going" activities on an established operation. Activities which bring an area into farm, silviculture or ranching are not part of an established operation.
Construction of fish farm ponds and improvements of swales or other drainage areas (USEPA, 2021)	Ø	✓	Aquaculture exemptions apply to wetlands in areas without wetland history (i.e., state artificial wetlands)
Maintenance of drainage ditches (not construction)	✓	✓	Both federal and state law does not exempt the construction of drainage ditches.
Construction and maintenance of irrigation ditches	✓	✓	Federal regulations include clarifying language about appurtenant to ponds and irrigation ditches.
Construction and maintenance of farm or stock ponds	✓	✓	Federal regulations include clarifying language about appurtenant to ponds and irrigation ditches.
Construction of farm and forest roads in accordance with best management practices	✓	✓	Federal regulations include several conditions that must be followed to meet the exemption provision.
Maintain of structures such as dam, dikes, levees, groins, riprap, breakwaters, causeways, bridge abutments or approaches, and transportation structures.	✓	✓	Federal regulations include additional language defining what maintenance includes and does not include and what constitutes emergency reconstruction.
Maintenance, emergency repair, or reconstruction of damaged parts of structures that are in use in a wetland	Ø	✓	The federal exemption would apply to the limited structures listed above. Federal regulations include additional language defining what maintenance includes and does not include and what constitutes emergency reconstruction.
Discharges located in an electronics and information technology manufacturing zone	Ø	✓	The state regulations include several conditions that must be followed to meet the exemption provision.
Discharges to a wetlands	NA	✓	This exemption only applies to wetlands where the USACE does not have jurisdiction.

6.2.3. Narrowing of Wetland PAA

Both federal and state regulations state that no discharges of dredged material or fill can be permitted if there is a practicable alternative which would have less adverse impact on the aquatic ecosystem. The agencies rely on a Practicable Alternatives Analysis (PAA) to thoroughly evaluate and verify the proposed project cannot avoid wetland impacts and that the selected project alternative minimizes wetland impacts to the maximum extent practicable while meeting the basic project purpose.

In federal regulations, practicable alternatives include: i) activities which do not involve a discharge dredge material or fill to WOTUS and ii) discharges of dredged or fill material at other locations in WOTUS (40 CFR §230.10) which requires applicants to evaluate other sites for their project.

For some specific types of projects, state regulations limit or narrow the PAA to the site of discharge or sites located adjacent to the project, without the requirement to examine other sites for the project. This narrowing of the PAA (s. 281.36(3n), Wis. Stats.) is applied to the following types of projects:

- projects that result in a demonstrable economic public benefit,
- projects necessary for the expansion of an existing industrial, commercial, agricultural or aquacultural facility,
- projects that occur within an industrial park,

and with some limitations for projects that affect fewer than 2 acres:

- construction or expansion of a single-family home and attendant features,
- construction or expansion of a barn or farm buildings,
- expansion of a small business project.

Under a state §404 program, the state would not limit or narrow the PAA for these projects and these projects would trigger an analysis of locating the project to another location.

6.2.4. Demonstrable Economic Public Benefit

As noted above, state wetland rules allow a narrowing of the PAA if the project results in demonstrable economic benefits, while federal rules do not. However, since "demonstrable economic public benefit" is a relatively new concept presented under the state law, it is covered in more detail here. Demonstrable economic public benefit means an economic benefit to the community or region that is measurable, such as increased access to natural resources, local spending by the proposed project, employment, or community investment (s. 281.36(1)(am), Wis. Stats.). State regulations require the WDNR to limit PAAs to discharges that are located at the site of, or adjacent to, the discharge if the applicant can demonstrate that the proposed project will result in a demonstrable economic public benefit.

It is not a requirement of the wetland permitting process to complete this analysis but is optional for applicants seeking a limited scope of the alternatives. This analysis does not affect other permit application requirements but can be beneficial for some applicants looking to streamline their review and avoid evaluating off-site locations. As stated in the statute, if the stakeholder chooses to pursue this option, the analysis needs to be a quantifiable analysis that demonstrates an increase in public economic benefits from the project that a practicable alternative review is sought. It is the responsibility of the requestor to make this demonstration and should submit the completed analysis with the permit application.

Overall, the WDNR also considers the functional benefits derived from the wetland and its economic value as limited PAA decisions are made. Ideally the project should improve the functional benefits derived from the wetland rather than diminish them. Generally, wetlands have some functional values that can be quantified economically. The functional values of a wetland include but are not limited to fish and wildlife habitat protection, water quality protection, flood control and shoreline protection.

Projects that seek to highlight an improvement of these wetland benefits will likely qualify for a limited or narrower PAA. In order for a project that diminishes a wetland's functional benefits to qualify for a limited PAA, the applicant must demonstrate that the long term (post-construction phase) public benefits from the project provide a net benefit to the community. This narrowing of the PAA would not be feasible for permits processed under §404 assumption.

6.2.5.Cranberry Operations

Cranberries are Wisconsin's largest fruit crop, harvested from approximately 21,000 acres of cranberry marshes across 20 Wisconsin counties. Wisconsin also leads the nation's harvest with 5.56 million barrels of fruit in 2020 which is more than half of the entire world's supply. Since the late 1880s and into the present, the prominence of cranberry operations has compelled specific state statutes and guidance development by both the USACE and WDNR.

In Wisconsin, cranberry operations were granted a defined set of exemptions from state laws beginning in 1867 conveyed in current day s. 94.26, Wis. Stats. This statute exempts the cranberry industry from the requirement to obtain permits for the construction and maintenance of dams, drains and ditches that may have impacts to navigable waterways if those dams, drains, and ditches are used for purposes specified in the statute. Wisconsin Supreme Court cases decided since the original law was enacted have affirmed that the cranberry industry may undertake certain activities to divert water without ch. 30 or 31 permit approval by the WDNR. While there are no specific cranberry industry wetland exemptions in Wisconsin statutes, the agricultural exemptions noted in section 6.2.2 of this report and the artificial exemption noted in section 6.2.1 do apply to cranberry operations. Similarly, the state law that narrows the PAA noted in section 6.2.3 of this report to on-site or adjacent properties also applies to cranberry operations.

The WDNR worked with the cranberry industry to develop a MOU to define a process by which issues and environmental impacts from cranberry culture operations are addressed collaboratively.

In 1995, the USACE took similar steps with the development and publication of their cranberry guidance document (USACE, 1995). The 1995 guidance document concluded that commercial cranberry operations are "water dependent" under §404 guidelines and cranberry beds are wetlands. Since cranberries are determined to be water dependent, the two rebuttable provisions in 40 CFR 230.10(a)(3) do not apply:

- A presumption that alternatives to discharges into special aquatic sites are available unless clearly demonstrated otherwise; and
- A presumption that alternatives involving discharges outside of special aquatic sites have less adverse impact on the aquatic ecosystem than do dischargers into special aquatic sites unless clearly demonstrated otherwise.

That stated, federal regulations require all discharges and fills must represent the least environmentally damaging practical alternative whether or not the project is wetland dependent under 40 CRF 230.10(a).

Under a state §404 permitting program, the WDNR would be required to be as stringent with all existing federal standards and would likely have to issue federal permits for dams and ditches that are currently exempt from state permitting. The provisions for narrowing of the PAA to on-site and adjacent locations would also not be available to the WDNR under a state §404 permitting program.

In 2017, the USACE-St. Paul District revoked Nationwide Permit 34 Cranberry Production Activities as a general permit for cranberry producers in Wisconsin, thereby requiring that these cranberry production activities to obtain an individual permit and §401 WQC from the WDNR.

6.2.6.Mining Laws

The development or expansion of existing metallic (ferrous (iron) and nonferrous) in Wisconsin typically involves significant public involvement including targeted legislation, public hearings and environmental impact statements or environmental analysis reports.

The 2017 Act 134 eliminated certain administrative code provisions that restricted wetland impacts caused by nonferrous metallic mining. Now, standard DNR permitting process previously described also apply to nonferrous metallic mining sites.

Section 295.60, Wis. Stats., provides for evaluating and permitting wetland impacts that are part of a ferrous metallic mining operation such that ferrous mining operations can be permitted by a general permit under s. 281.36(3g), Wis. Stats., or an individual permit issued under s. 295.60, Wis. Stats.

Under a state §404 permitting program, Wisconsin's existing presumption stated in s. 295.40(7), Wis. Stats., would be less stringent than the presumptions clearly stated in federal law. While the presumption is not a legally binding standard, the presumption apparently leads to a narrowing of the PAA. Under s. 295.60(4)(b), Wis. Stats., the WDNR is required to limit the PAA that are located at the site or adjacent to the site if the project will result in a demonstrable economic public benefit. The presumption seemingly also leads to a lessening of standards to avoid impacts in s. 295.60(5), Wis. Stats. While another section of state statute does require the PAA

to include alternatives that avoid and minimize adverse impact, the Wetland Water Quality Standards detailed in s. 295.60(5), Wis. Stats., only require minimization.

The WDNR decision is also confined by language that would allow significant adverse impacts to wetland functional values, which would not be allow under a state §404 permitting program that prohibits significant adverse impacts to wetlands. Section 295.60(6), Wis. Stats., requires the WDNR to issue a permit if significant adverse impacts to wetland functions that remain after avoidance and minimization are compensated for with mitigation.

Whether the wetland assessment requirements in s. 295.60(4)(d), Wis. Stats., may be less or more stringent than federal requirements and standards is unclear. For example, state law requires the comparison of functional values to wetlands located in the boundaries of the mining site or within the same water management unit as the mining site. This type of assessment is not prescribed by §404 or in USACE rules 33 CFR Chapter II (see Parts 320 to 233).

There are clearly less stringent requirements in Wisconsin law than what would be allowed under a state §404 permitting program. Most notable is the state law's presumption that significant adverse impacts are not avoidable. However, one part of the ferrous mining laws may be administratively more stringent than existing §404 standards Wisconsin law does not allow the applicant to proceed with discharges or fill under a general permit until a mining permit is issued under s. 295.60, Wis. Stats.

6.3. Wisconsin's More Stringent Standards and Scope

Section 404 assumption regulations allow for a state to have standards that are more stringent or operate a program with greater scope under 40 CFR 233.1(c). However, the additional coverage cannot be part of the federally approved program and would not be subject to federal oversight or enforcement. The WDNR would have to weigh the advantages and disadvantages of retaining more restrictive standards and operating with greater scope under a state §404 program.

6.3.1. Regulation of Non-Federal Wetlands

In 2001, the Wisconsin legislature became the first to pass laws that provided state permitting authority over small, isolated wetlands that were no longer regulated by §404 because of the SWANCC decision. The 2001 law granted the WDNR authority to apply water quality certification standards to non-jurisdictional projects under federal law to all Wisconsin wetlands – wetlands regulated by §404 known as federal wetlands and wetlands not regulated by §404 known as non-federal wetlands.

In 2012, the state program underwent a comprehensive rewrite and a stand-alone state permitting program with revised standards and procedures that applied to both federal and non-federal wetlands was created. The 2012 wetland permitting framework established the legal authority for the WDNR to issue general and individual permits and established that an issued state permit constitutes water quality certification as required by 33 USC 1341 (a). In recent years, the state wetland program has been revised to include several exemptions, specified general permits, and detailed PAA procedures to provide more permitting flexibility and streamlining including revisions discussed in this report.

These streamlining steps include two exemptions for wetlands. The first exemption is for discharges into a nonfederal wetland that occurs in an urban area if the discharge is not more than one acre, does not affect a rare and high quality wetland and stormwater is managed under existing state regulations (s. 281.36(4n)(b), Wis. Stats.). The second exemption is for discharges into a nonfederal wetland outside of an urban area if the discharge is not more than 3 acres and does not affect a rare and high-quality wetland and is related to a structure with an agricultural purpose.

For both exemptions, information from a qualified professional is required to confirm that the project will not affect rare or high-quality wetlands. Depending on whether the project will take place in an urban or rural area, there are different application and project requirements to receive the exemption. An urban area is defined as "an area that is incorporated or within one-half mile of an incorporated area, or an area in a town that is served by a

sewerage system. Areas that do not meet this definition are considered rural or non-urban areas." For urban projects specifically, projects with less than 1 acre per parcel of wetland impacts (temporary or permanent) are eligible. For rural projects, sites with less than 3 acres per parcel of wetland impacts (temporary or permanent) are eligible, but the project must be related to a structure with an agricultural purpose, i.e., nonfederal exemptions cannot be applied to commercial or residential rural projects. Wetland mitigation is required for urban projects affecting more than 10,000 square feet of wetlands, and for rural projects affecting more than 1.5 acres of wetlands. Even in consideration of these exemptions, the WDNR still regulates some wetlands under the state wetland permitting program, something that would not be jurisdictional under a state §404 program, and in order to continue jurisdiction, an exclusive state permitting regulatory framework would have to remain.

6.3.2. General Permits Eligibility Acreage

General permits are a common streamlining tool used across a variety of federal and state permitting programs. General permits typically apply to a defined set of minor or routine permitting activities and set a standard series of eligibility requirements and permits conditions. The USACE has three different types of GP categories including nationwide permits, regional permits, and special programmatic general permits. A comparison of these permits types and streamlining opportunities are discussed in Chapter 8.3 of this report. In this section discussing the difference in acreage eligibility it is important to recognize that the USACE has more than 50 NWPs and seven RGPs for available for use in Wisconsin. Nationwide permits available in Wisconsin have a maximum wetland impact threshold of 0.5 acres.

While s. 281.36(3g), Wis. Stats. requires general permits for activities that may affect up to 10,000 square feet of wetland (equivalent to 0.23 acres) the USACE may administer a general permit, when applicable, for activities that may affect up to 21,780 square feet (equivalent to 0.5 acres). Under a state §404 permitting program, the WDNR could be more stringent by continuing to use 10,000 square feet as a threshold between general and individual permits or, alternatively, could increase the maximum wetland impact threshold to 0.5 acres consistent with current federal permitting procedures.

Applying the current state acreage threshold to the state §404 program will continue the status of IP review at a lower acreage threshold – recognizing that IP review requires additional staffing and application project materials. If the WDNR chooses to apply the higher USACE threshold, more incoming projects would be eligible for a GP instead of an IP, thereby reducing WDNR and stakeholder workload but also reducing the level of project review and program revenue.

It is important to note that if the WDNR increased the wetland impact thresholds to align with federal thresholds, mitigation process and systems would also need to be updated. Currently, the state only requires wetland mitigation for wetland individual permits whereas USACE may require stream and/or wetland mitigation for projects covered under one of their general permit types.

Chapter 7. Federal and State Permit Processing, Staffing and Cost

One of the driving factors for states to assume the §404 program is the perception that state government can process permits more quickly and at a lower cost (i.e., fewer staff) than the federal government. Comparing USACE and WDNR permit review data and current fiscal and staffing resources for each agency contributes to an understanding of the differences related to how each agency implements their programs and can provide insight into what the state may anticipate upon assumption of the §404 program.

On January 21, 2020, the USACE provided the WDNR with two years of permit data from their database for the federal fiscal years (FFY) 2018-19. The data set included the number of permits and duration of permitting by activity type and staff levels. The database also flagged projects that required jurisdictional determinations (JD), and ESA and NHPA compliance actions. Draft database metrics were analyzed and shared with the USACE in three meetings in fall 2020 for comment and review. Based on USACE comments at each meeting, analyses were modified or refined to better represent comparisons between the two agencies. The full WDNR-USACE permit comparison report can be found in Appendix 2.

7.1. Permit Types

Although the federal and state fill and discharge regulatory programs are comparable, the differences in permitting mechanisms (e.g., GP, IP), non-reporting activities and exemptions affect how each agency records their regulatory activities. These differences become very evident when the permitting databases from both agencies are compared. For FFY 2018-2019, the USACE database recorded 1,300 permits. For the same period the WDNR database recorded 4,479 permit actions (Figure 2). Although technically self-certifying federal GPs (a.k.a. non-reporting activities) do not require any staff time, the total number of USACE and WDNR permit actions are much more similar if the 1,536 self-certifying federal GPs and added to the USACE number for a total of 2,836 permit actions.

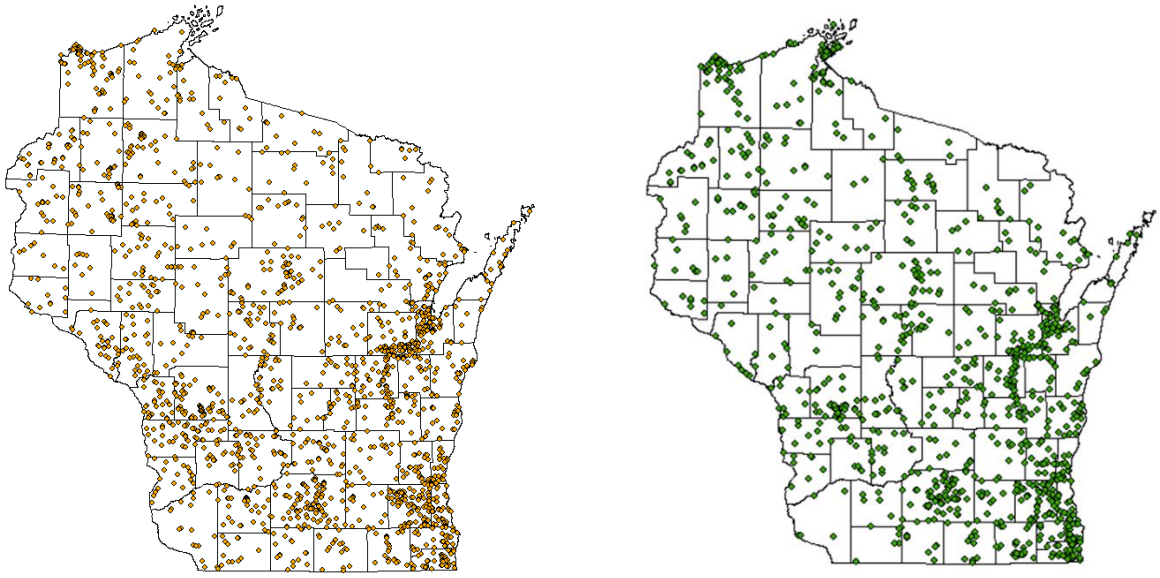


Figure 2. Geo-located recorded permit actions for the WDNR (left) and the USACE (right) for the 2018 and 2019 federal fiscal years timeframe

The differences between how each agency authorizes fill and discharge permits stand out even further when GP and IP numbers are compared. The USACE used GP processes (NWP, PGP and RGP) for 1,257 permits (not including the additional 1,536 non-reporting, self-certifying GPs mentioned above) and only used the IP processes (LOP, SP) for 43 permits. The WDNR used the GP process for 3,301 permits and the IP process for 1,178

permits (Table 2). The WDNR recorded 871 exemptions which are mixed between self-reporting exempt activities and mandatory reporting for artificial and nonfederal wetland exemptions. While exemptions may seem similar to self-certifying GPs, they differ because exemptions apply to an activity that is not regulated and not required to be recorded, while a self-certifying GP requires authorization and application of prescribed conditions.

Table 2. Comparison of General and Individual Permits Handled in FFYs 2018-2019

	USACE	WDNR
General Permits (USACE: NWP, PGP & RGP)	1257	3301
Individual Permits	43	1178
Total	1300	4479

The types of activities authorized by GPs and IPs also varied between agencies. Of the 1,257 USACE GP activities, transportation, development, and bank stabilization projects made up the largest percentages at 28%, 28%, and 20%, respectively. Of the 43 USACE IP activities, development and transportation made up the largest percentages at 46% and 19%, respectively.

Of the 3,301 WDNR GP activities, development, transportation, and structure activities made up the largest percentages at 32%, 23% and 15%, respectively. Of the 1,178 WDNR IP activities, structure, and bank stabilization made up the largest percentages at 32% and 31%, respectively.

Individual Permits generally result in a longer review process due to the increase in project complexity, pre-application meetings with applicants, and public comment periods. According to the USACE, "due to the development of new general permits in the last two years, 97% of activities are now authorized by general permits. That leaves only the most complex proposals to be covered by individual permit, which is reflected in the timeframes" (Graser, 2020).

The analysis of federal and state permit types used to authorize various §404 activities present a challenge in forecasting how the WDNR's workload would change under a state §404 program. Accordingly, the WDNR was unable to make a quantitative assessment of how much permitting work is duplicative between the WDNR and USACE. However, WDNR regulations cover a wide scope of permitted activities and it appears that the state permitting program duplicates a large share of the USACE program. This would be consistent with FDEP's conclusion that 80-85% of their state work duplicated federal permitting work.

7.2. Permit Processing Time

Another factor considered in the feasibility of §404 assumption is how permit processing times could be affected. Permit processing times were analyzed from both USACE and WDNR permit databases. Permit processing time was calculated from the date of completeness to the date of permit decision (approval or denial). Permit applications withdrawn or dismissed were not included in the analysis. Permit processing time is affected by the overall number of permitting options available. For example, diverse GP options led to fewer complex IP submittals. Differences in staffing levels, covered in Chapter 7.4, also directly affect permit durations and the difference in USACE permitting staff (~26) compared to WDNR (~58) influences the differences in permit processing time described below.

On average, the time required for the WDNR to process GPs and IPs was 70 days and 114 days shorter than the USACE, respectively (Table 3). Although the USACE had less than half of the number of GP reviews in FFY 2018-2019 (excluding self-certifying GPs), the WDNR reviewed permits approximately 10 weeks faster than the USACE. The USACE has a 45-day default review time for NWPs unless additional information and consultation is needed, however, data provided presents that only approximately 37% of NWPs were reviewed within 45 days. The WDNR, on the other hand, has a 30-day default review time for GPs, unless additional information and consultation is needed. Approximately 98% of WDNR GP applications were reviewed within the 30-day default period.

Table 3. USACE and WDNR Permit Processing Time (days)

		Review Days		
	# Permits	Average	Minimum	Maximum
USACE GP*	1,257	75	1	575
USACE IP	43	158	18	350
WDNR GP	3301	5	1	173
WDNR IP	1178	44	1	366
*** Excludes self-certifying GP**				

Approximately 57% of USACE NWPs that took longer than 45 days had an NHPA consultation, while approximately 40% of those permits did not have additional consultations. Of the NHPA consultations for GPs reviewed more than 45 days, the average review time for the permit was approximately 115 days. Therefore, although NHPAs make up the greatest amount of consultation activities for NWPs reviewed past 45 days, there were still 40% of the permits that did not have an additional consultation. These permits still had a review time past 45 days.

On average, the WDNR reviewed IPs more than 3 months faster than the USACE. The USACE authorizations require compliance with ESA and NHPA and while those federal acts do not apply to state regulatory actions, the state is required to comply with state endangered and threatened species laws.

USACE IPs are the agency's most complex projects that are received, resulting in significantly longer review time, on average compared to NWPs and other GPs. A high percentage (93%) of USACE IPs, had one type of "consultation," whether it be ESA compliance, jurisdictional determination, or NHPA compliance. NHPA consultations were the most common consult for IPs (approximately 56% of USACE IPs). The average review time of permits with NHPA consults was approximately 156 days. With that said, almost 30% of USACE IPs did not have additional consultations and an average review time of 186 days.

The database also allowed a comparison of how many days each agency had to wait for applicants to complete their application (Table 4). Keep in mind, the permit processing time discussed does not includes those days when the application was determined to be incomplete. The average waiting time for completed application materials was relatively similar for GPs between agencies, an average of 2-3 weeks. However, the WDNR waited an average of 20 days longer than the USACE for applicants to provide additional information for their IP applications.

Table 4. Average Time Permits are in Incomplete Status

	Average Permit Duration (days)	Average Time in Incomplete Status (days)
USACE GP	75	14
USACE IP	158	30
WDNR GP	5	22
WDNR IP	44	50

7.3. Side by Side Comparison of the Same Permits

After analyzing and comparing USACE and WDNR permitting data for the entire data set, there are clear indications that ESA and NHPA consultations affected USACE permit review timelines. However, there are permits that did not require consults, or still took additional time to review after a consultation decision. This realization led to a side-by-side comparison of permits for the same project to help understand differences in permit processing time.

The USACE prioritizes permit applications and has permitting staff with specific roles in the review process. The WDNR does not prioritize incoming permit applications, and reviews permits on a "first-come-first-serve" process, unless an applicant pays an expedited permit fee.

When an applicant submits their permit application, both agencies have their own permit identification number for their individual databases. However, there is no connecting permit identification that can link or align the permit between the two agencies, resulting in a tedious hand-sorting and matching method to align the same permit between agencies. USACE and WDNR permits from FFY 2018 and 2019 were "connected" via ArcMap 10.6.1 GIS (NAD83) and manually sorted to compare permits side-by-side between the agencies for further detailed permit review during analysis.

A total of 3,347 WDNR permits with coordinate information and 1,300 USACE permits were plotted using ArcMap. USACE and WDNR permits within a 0.1 mile radius were intersected. The intersected permits resulted in a list of approximately 935 overlapping permits, which were then manually aligned between the two agencies. Applicant names and information, as well as project descriptions were used to help align permits between agencies. Permit duplicates were removed and after sorting, 492 permits were confidently aligned as the same project handled by both agencies (Table 5).

The difference in duration of review for each permit was calculated between the agencies. Any permits that had a difference in review duration less than or equal to 14 days were considered to have "relatively equal review time". The remaining permits were sorted into categories of "WDNR reviewed faster" and "USACE reviewed faster". These 492 permits were also categorized by the different federal consultation requirements such as ESA, JD and NHPA.

Table 5. Permits processed timelines by category

	# Permits	# Permits with ESA Consult	# Permits with JD Consult	# Permits with NHPA Consult	Total Consults	% Permits with < 1+ Consults	# Permits with No Consults	% of Permits with No Consults
WDNR Faster	367	22	34	196	252	65.1%	175	45.2%
USACE Faster	26	1	1	6	8	30.8%	19	73.1%
Same Review Time	79	3	8	15	26	32.9%	45	57.0%
Total	492	26	43	217	386	58.1%	239	48.6%

USACE was required to consult on 65% of those projects that the WDNR processed faster and can partially explain how the WDNR is able to implement a faster permitting duration. For permits that the USACE was able to permit faster or in the same amount of time, the percentage of required consultation was lower, around 30%. Under a state §404 permitting program, the WDNR would have to conduct the same types of consultations and jurisdictional determinations and likely see similar longer permitting durations.

7.4. Staffing Levels

A direct comparison of staffing levels between the federal §404 program implemented by the USACE-St. Paul district with oversight by the USEPA Region 5 and the WDNR is difficult for several reasons. The USACE staff salaries are allocated by district and staffing resources spent in Wisconsin are not separated out from those spent in Minnesota. Program managers and enforcement staff from the USACE also work in both states and do not track hours spent in each state. The USACE does not generate a state specific work plan and like the WDNR, deals with vacancies and re-assignments within the program.

Table 6. Estimated Staffing Levels.

	USACE (FFY 2021)	**WDNR (FY 2021)**
Permitting staff	26 *	58**
***** USACE has 65 approved positions for WI/MN regulation, with maximum of 20% of these positions not filled: 65 staff x 20% = 52 staff for WI/MN. Assume equal allocation of resources for each state, therefore 26 staff members for WI review. ****** WDNR has 38 staff from Waterway and Wetland Bureau permitting team and 20 WDNR staff from Environmental Analysis and Sustainability (EAS) Bureau permitting team.		

The state would absorb responsibility for several new tasks immediately upon assumption and must maintain the level of staff necessary to handle the increase for work and administrative duties at a cost to the state. For Wisconsin, increased workload for the department would be expected for several program activities that are currently the primary responsibility of the USACE or the USEPA (Table 7).

While there may be some staff time efficiencies as a result of federal exemptions or non-reporting activities that require permits under the state program, these are estimated to be offset by the loss of state exemptions and streamlining efforts that would not be available under state §404 standards described in Chapters 6.2 and 6.3 of this report. A reasonable estimate of similar work completed by both agencies is 80%. In other words, the WDNR estimates an additional 8 staff (20% increase) would be required to undertake the activities in Table 7.

7.5. Enforcement Activities

Recent funding levels for the USACE St. Paul District have not been adequate to provide the service and responsiveness that the public expects. As a result, the USACE has been forced to prioritize non-discretionary work, namely permits, and de-prioritize discretionary work such as compliance and enforcement activities ((Graser, 2020). In recent years, it has become more common for the USACE to leverage and support the enforcement efforts undertaken by both Minnesota agencies and the WDNR.

WDNR Water Management Specialists (WMS) and Water Management Engineers (WME) are responsible for administering and enforcing chapters 30, 31, and s. 281, Wis. Stats. WDNR administers these statutes to protect the public interest and preserve all waters of the state. WDNR's duty is to ensure the rights of all to use and enjoy these resources fairly and safely. The main purposes of enforcement are to restore damaged waterways and wetlands, secure fines or forfeitures for unauthorized work or permit violations, deter unauthorized activities, and ensure and demonstrate that the WDNR's permit, and approval programs are administered fairly and consistently statewide.

The WDNR has a duty to enforce the state's waterway and wetland laws and that duty includes ensuring that the regulated community complies with the statutes and rules promulgated to implement them. Program integrity, whereby the regulated community, the public, and WDNR staff can be assured that WDNR applies the law fairly, consistently, efficiently, and effectively, is critical to gain compliance, and responding to complaints about potential violations in a timely, efficient, and appropriate manner is critical to maintaining program integrity.

Staff may discover or receive complaints of potential violations in many ways. Complaints received through the WDNR Hotline (1-800-TIP-WDNR) are relayed to Conservation Wardens, who use appropriate department staff to complete an investigation, assist with enforcement action, handle regulatory follow-up, etc. The WDNR has enforcement staff in the Division of Public Safety and Resource Protection that led complex and high level enforcement activities with the assistance of Waterway Program Staff on the specialized Enforcement Team.

USACE enforcement actions are taken by regional regulatory staff *in addition* to permit review responsibilities. Usually, USACE initially investigates an alleged wetland violation and will often coordinate with the USEPA, which has the sole legal authority to pursue penalties or file suit in court for unpermitted wetland fill. On large or complex cases, the USACE will coordinate with the USEPA early in the investigation, since §308 of the CWA

authorizes the USEPA to collect information regarding alleged violations, which can include accessing the property, collecting samples and evidence, and issuing information requests. The USEPA generally will be the lead enforcement agency for repeat or flagrant violations, or in situations when the USEPA decides to investigate a class of cases or a particular case or the USACE recommends that the USEPA impose an administrative penalty.

Under state assumption, the WDNR will need to apply federal enforcement and compliance regulations to permits issued under a state §404 program, which will increase the need for additional training, resources, and WDNR staff. Accordingly, state assumption would likely have a significant effect on the workload and scope of work for the state, especially on complicated significant enforcement cases, even with USEPA oversight. While an opportunity to act on violations with the fines equivalent to federal fines may bring more funding into the agency, the prosecution of federal violations also opens the state to the liability of reimbursing applicants for their attorney fees and expenses, something that is not presently provided for in state law.

Table 7. Additional Work Responsibilities

Additional Work Responsibilities Assigned to WDNR under §404 Assumption
Assuming jurisdictional determinations for Waters of the US for non-assumable waters
Processing permits for activities under Federal law that are currently exempt or eligible for general permits under State law
Responding to oversight and involvement on specific permits from the U**S**EPA and other federal agencies
Assuming lead responsibility for enforcement
Additional U**S**EPA annual reporting requirements and oversight for the §404 assumption program
Additional work to coordinate ESA and NHPA reviews
Lead determinations related to mitigation banking and project requirement
Training staff and updating forms and public information

7.6. State §404 Program Costs

Many states have conducted analyses of the costs associated with §404 assumption and often cite it as one of the disadvantages. Virginia, Oregon, and Minnesota, for example, have all pointed to lack of federal funding in the implementation phase as one of the major roadblocks to assumption (Carlos, 2014).

When Virginia examined assuming §404, its research found that the program would cost the state an additional $4 million per year beyond the cost of its existing wetlands program to increase its staff and administrative resources. Virginia would have had to more than double the size of its existing program, without including indirect costs like rent and equipment.

Because both local and state government handle wetland permitting in Minnesota, the fiscal impact estimates included an increased cost for State government (between $3.5M and $4.7M annually) due to the required shift in permitting authority from local governments to a state agency. While local governments would save program costs between $2.3m and $4.1m. Overall §404 Assumption costs in MN would increase $0.6M to $1.1M annually and 4.2 to 9.5 FTEs primarily due to the requirement to extend state regulatory program jurisdiction to additional waters (MNDNR, 2017).

More recently, FDEP has concluded that no additional resources are required for the implementation of §404 Assumption because of the robust state wetland permitting program. However, there was not a specific workload analysis developed and the conclusion was based on the input of veteran staff suggesting there is an 80% to 85% overlap with USACE work (Megan Seward, FDEP, pers. comm.) and the agency would “pull from existing resources” to make up the 15% of new work. While Florida has roughly twice as many wetlands as Wisconsin

and different amounts of other water resources, the FDEP also has roughly 4 times the resources to implement their state §404 and state permitting program.

Table 8. Comparison of wetland and waterway resources and program staffing and budget

	Wetland Acres	River Miles	Coastal or Great Lakes Shoreline	Permitting Staff	Annual Program Budget
Florida	11 million	26,000	8,436 miles	229	$15.1 million
Michigan	6.5 million	36,000	3,288 miles	82	$12.3 million
Wisconsin	5 million	84,000	820 miles	58	$4.8 million

Florida staffing and budget: http://publicfiles.dep.state.fl.us/dwrm/404_Assumption_Application/ (Section (d))
Michigan: https://www.aswm.org/pdf_lib/assumption_webinar/michigans_404_program_021820_garwood.pdf
Coastal Shoreline: https://en.wikipedia.org/wiki/List_of_U.S._states_and_territories_by_coastline

Although comparison of the existing USACE program including permit types, permit durations and staffing with the existing WDNR state program was limited by programmatic differences, the comparison highlighted the need for additional staff to undertake the program activities identified in Table 7. Estimating an 80% overlap of the existing state and federal program, existing staffing levels would need to be increased by 20%. Additional travel costs are not expected since the WDNR is likely already traveling to the same project sites especially considering the WDNR currently handles a larger number of permits than the USACE.

The primary cost associated with assuming the federal §404 program is additional staff. The WDNR estimated an initial need of 16.4 additional Full Time Employees (FTE) at a cost of $1.4 million over 4 years. After 4 years, the estimated staff need is reduced to 11.9 additional FTEs at a cost of $1.0 million for long-term permanent FTE support over current resources levels. The additional short-term staffing need over 4 years is for staff to coordinate public and stakeholder input, develop state statutes and administrative codes, prepare the assumption application, conduct training, and update permit applications and on-line information.

Table 9. Estimated Additional Staffing and Budget to Assume §404 Program

Program Component	Existing State Program FTE	State §404 Program Additional Staffing Need FTE
Public/Stakeholder Involvement Process*	0	1.0
Statute and Administrative Code Preparation*	0	2.0
Application Development*	0	0.5
Training for Staff*	0.5	0.5
Web and Permit Documents Updates*	0.5	0.5
E-permitting and Call Intake	4.0	0.8
Waterway & Wetland Permit Processing	24.0	4.8
Transportation Permit Processing	20.0	4.0
Mitigation and In-Lieu Fee Processing	4.0	0.8
Compliance/Enforcement	5.0	1.0
Annual Reporting	0	0.5
Total	58	Short-term Need 4.5 Long-term Need 11.9
Budget**	$4.9M	Short-term Need $0.4M/year Long-term Need $1.0M/year
* Short-term need reflects the first 4 years of increased work to develop the state §404 program and training staff ** Uses an estimated staff salary of $53,000 times a factor of 1.6 for overhead costs.		

Chapter 8. Streamlining Alternatives to §404 Assumption

One of the perceived key benefits of §404 assumption is to streamline discharge and fill permitting programs by reducing permit processing duplication by the state and federal agencies and creating a single state regulatory agency charged with implementation of standards and work with applicants. Through the course of evaluating the feasibility of §404 assumption, many states have determined that the lack of funding, the need for more staff and resources, and the stringent application process that requires USEPA approval, are disincentives to §404 assumption. The fact that many states have evaluated the feasibility of §404 and only three states have pursued and been approved by the USEPA to assume the federal program is reflective of the many different hurdles associated with assumption.

There are several alternatives to §404 assumption that have the potential to realize similar benefits associated with streamlined permitting, increased state and federal standard consistency and improved regulatory flexibility. This chapter discusses some of these alternatives in Wisconsin.

8.1. Wetland Identification and Delineations

A first step in both state and federal discharge of dredge material and fill permitting process is the identification and delineation of aquatic resources at the project site. The WDNR and the USACE rely on and require the same methodology described in the 1987 USACE manual and supplements (USACE, 1987) to be used for all wetland delineations. Once a delineation has been prepared and approved, the agencies determine regulatory jurisdiction based upon laws and guidance. Potential streamlining opportunities associated with the jurisdictional processes are explored below, in Section 8.2.

Delineations of the aquatic resources at the project site are typically accomplished by a trained professional delineator which is reviewed by WDNR staff. The WDNR offers a streamlined process for review and approval of wetland delineations with the pilot Wetland Delineation Professional Assurance Initiative. The goal of the initiative is to provide a high level of certainty for wetland boundaries and save time in the WDNR review and approval of boundaries. Under this program, the WDNR evaluates the work of professional delineators and once a qualified delineator is certified, wetland delineations submitted by that assured delineator do not require WDNR concurrence and reducing the steps necessary for state wetland delineation approval.

The WDNR also offers two services to help potential applicants to develop correct information related to the presence and boundary of wetlands on their site. To help potential applicants with the identification of wetlands on their property, the WDNR offers a wetland identification service that confirms whether the project site contains wetlands or not. This service also includes determining if located wetlands have wetland or stream history, which is an important factor in determining if a wetland is considered artificial under state law. The WDNR also provides a wetland confirmation service which confirms the wetland boundaries delineated by a non-assured professional consultant. While the WDNR offers these streamlining services for wetland identification and delineations, neither the WDNR nor the USACE have streamlining processes established for the identification and delineation of other aquatic resources such as navigable waters or Section 10 waters – those responsibilities are exclusively held by each agency.

Although the USACE does not have an official certified wetland delineator program and does not use the WDNR assured delineator designation to select delineations that required less rigorous review, the USACE does apply common sense to the reviews based on staff professional knowledge that an assured delineator does generally good work (Graser, USACE, pers. comm.).

There is potential for the state to evaluate increased use of a certified wetland delineator program to further streamline the review and approval of aquatic resource delineations prepared by professional consultants. Likewise, the USACE could evaluate developing formal guidance that allows for streamlining delineations by aa assured delineator.

8.2. Jurisdictional Determinations

As mentioned above, after the wetland delineation has been reviewed and approved by the USACE and the WDNR, the agencies make their jurisdictional determinations (JD). The uncertainties associated with which waters are regulated by §404 as a WOTUS is discussed in Section 5.2. Regardless of the controlling court case or administrative policies that define WOTUS, a determination of which waters and wetlands are regulated at a site still needs to be made.

Jurisdictional determinations establish which aquatic resources fall under the regulatory authority of the agencies. The USACE has two types of JDs, a preliminary jurisdictional determination (PJD) and an approved jurisdictional determination (AJD). A PJD treats all waters and wetlands in the review area as jurisdictional waters under §404. Since a PJD simply prescribes all delineated wetlands are jurisdictional, the applicant receives a quick turnaround time, but also at the same time may relinquish unnecessary jurisdiction to the USACE. An AJD is an official determination specifying jurisdictional WOTUS. This comprehensive jurisdictional review typically takes several months to a year or more to complete. The USACE also prioritizes AJDs associated with a submitted permit application, creating even longer delays for projects that request an AJD before the design and permit submittal stages.

The USACE has stated that Wisconsin Act 183 enacted in March 2018, led to a nearly a doubling of JD requests from applicants and published AJDs. The USACE processed 187, 232, and 340 AJDs, respectively in 2017, 2018 and 2019. This increase is likely due to WDNR wetland exemptions that were put in place. For example, a developer in Wisconsin is likely to decide to submit an AJD request before completing a permit application to identify the limits of their nonfederal exemption status. Several options listed in Table 10 could be examined in partnership with the USACE and stakeholders to improve AJD turnaround times in Wisconsin.

Table 10. Options to Improve AJD Turnaround Times

Approach	Description	Action Required	Advantages	Disadvantages
WDNR pre-certify JD for USACE under an MOU	WDNR completes upfront work for JDs and USACE issue concurrence for WDNR's decision under a MOU.	Secure state staff/funding dedicated to federal JD processing Develop MOU with USACE for JD procedures	Improved efficiency in processing of JDs Some state influence over prioritization Securing additional resources at state level may be more likely	USACE relies partially on state JD expertise Requires state increase in staffing and budget Workload may increase for staff
WDNR certify JD for USACE under an MOU	WDNR completes all JDs for USACE WDNR uses "certified staff experts and USACE audits	Secure staff/funding dedicated to federal JD processing Develop MOU with USACE for JD procedures	Improved efficiency in processing of JDs Some state influence over prioritization Securing additional resources at state level may be more likely	USACE relies partially on state JD expertise Requires state increase in staffing and budget Workload may increase for staff
WDNR funds cooperative position(s) at USACE to do JDs	Through a cooperative agreement, the WDNR would provide staff to the USACE to conduct JDs	Secure staff/funding dedicated to federal JD processing Develop cooperative agreement with USACE for JD procedures	Direct infusion of more staff at the federal level to work on JD without changing agency roles and responsibilities	Reallocation of state staffing resources to the USACE requires state increase in staffing and budget

USACE/WDNR develops an Assured JD program	Similar to Wisconsin Assured Wetland Delineator program, the agencies would train, audits and certify consultants	Develop standard operating procedures including training, certification, and auditing components	Applicants could hire assured JD consultants to conduct work normally falling on USACE	USACE relies partially on consultant JD expertise Uncertain legal authority to develop program Setting up the program requires staff and resources
USACE/WDNR develops tools to streamline JD reviews	Consultants completes upfront work for JDs to gather data and information to streamline USACE decision.	Develop standard operating procedures including training, certification, and auditing components USACE would need to develop prioritization strategy to integrate these streamlined reviews	Applicants could hire assured JD consultants to conduct work normally falling on USACE USACE still makes JD decision	USACE relies partially on consultant JD expertise Setting up the program requires staff and resources
USACE add additional staff to prioritize JDs	New or reallocated federal resources applied to increasing JD capacity	USACE/USEPA solicit additional resource through budget process	Responds directly to the increase customer need for AJD in Wisconsin	Given federal budget priorities, new or re-allocated resources unlikely.
Develop a JD prioritization framework for all staff	USACE prioritizing completion of JDs based upon certain criteria instead of JD typically being a low priority	USACE develop prioritization strategy with stakeholders	Applicants could design their projects based upon AJD issued pre-application	A portion of AJD efforts will not result in application Other USACE work lowered in priority

8.3. Opportunities for General Permit Streamlining

As mentioned above in Section 6.1 of this report, both the USACE and the WDNR use general permits to authorize a variety of different types of project. General permits are useful in streamlining the review and approval for similar project activities that meet specific size, design, and technical requirements. The application of USACE NWPs and state GPs by the agencies have evolved concurrently and while there is some overlap, the applications of general permits differ substantially.

The USACE-St. Paul District has 56 NWPs available for use in Wisconsin, 21 of which have been certified through the state water quality certification (WQC), eight that were partially denied WQC, 18 that were denied WQC and another nine NWPs that were either not applicable to Wisconsin or no action was taken (*see* Appendix 3 *for complete listing*).

There would be two approaches to streamlining the use of federal NWPs and state GPs across both agencies. One approach would for WDNR to certify the use of more NWPs by the USACE in the state. It's important to point out that while 18 NWPs were denied WQC by WDNR, eight of those NWPs were also revoked for use by the USACE-St. Paul District, including the NWP for cranberry operations, oil and gas pipelines and underground coal mining. On the first impression, the WDNR could consider authorizing 10 more NWPs or, in the case of partial WQC denials, consider issuing without additional conditions. That said, the WDNR justifies the denial or partial denial of these 26 NWPs due to the potential for projects authorized by the NWPs to violate state water quality standards. A systematic approach should be used to consider the potential environmental impacts of issuing WQC for NWPs balanced with the abbreviated agency review that occurs with all general permits.

Another approach would be to for both agencies to align available GPs for specific activities. While some of the regulated activities covered by certified NWPs have corresponding WDNR GPs, many do not (Appendix 3). Similarly, there are approximately 36 WDNR GPs that do not have a corresponding certified USACE NWP. For example, the WDNR has seven different types of dredging GPs, five different types of lake shoreline erosion control GPs and 11 different habitat structure GPs. These state GPs could be evaluated for development into

either regional or state programmatic GPs discussed below. Beyond considering a streamlining approach such that each regulatory program offers a GP for the same activity is the need to apply consistent size, design, and technical requirements. A clear divergence between the USACE and the WDNR is the affected size of a project. The USACE utilizes GPs for activities affecting up to 0.5 acres of a jurisdictional WOTUS, while state GPs generally have an upper limit of less than 10,000 square feet (0.23 acre). The higher threshold for USACE GPs is achieved, in part, through mitigation thresholds within their GPs. This opportunity is not legally available to the WDNR at this time.

8.4. Regional General Permits

The WDNR has approved WQC for three USACE RGPs for use in Wisconsin including 1) beach raking, 2) minor discharges and 3) pier and docks. The WQC approval has standard construction time-of-year limitations to protect fish and aquatic life and requires the filing of a joint state/federal permit application. The WDNR has partially denied WQC for four other USACE RGPs including 1) Utilities, 2) Transportation, 3) Beach Creation and Nourishment and 4) Wildlife Ponds. In some cases, the partial denials place the condition for pre-construction notification (PCN) during certain times of the year or require a subsequent navigable water, or stream history or other determinations by the WDNR (USACE, 2021). Comparatively, Minnesota approved WQC for the USACE RGP exemption to exclude designated Outstanding Resource Values Waters (ORVW).

With the partial WQC denials, the WDNR precludes the use of the RGP by the USACE under specific locational or seasonal situations. For these projects, the USACE must require either a Letter of Permission (LOP) or a Standard Permit which typically results in a more comprehensive and lengthier permit review. The WDNR could consider a similar approach to Minnesota, where the state approved WQC certifications for all the USACE permits (outside of ORVW) and placed specific locational, best management practices (BMP) and design conditions in the WQC. This approach would appear to expand the opportunity for applicants to design project to meet the state's conditions and the USACE to utilize the streamlined RGP.

8.5. Utilize State Programmatic General Permits (SPGP)

Alternatively, state programmatic general permits (SPGP or PGP) do not require the state to take on additional costs to the extent of state assumption; SPGP's are built upon an existing state program where funding is already in place or requires minimal additional funding to comply with federal regulations. With a defined application and evaluation process, a state can be authorized to make permitting decisions in the place of the USACE for activities covered under a SPGP. SPGPs are issued as part of an already existing state program, reducing the funding needs and state resources that would be necessary to assume §404. Unlike state assumption, SPGPs are limited by the permit activity, which allows for a quicker processing time, processing predictability, and a more transparent application process for the applicant. Ideally, applicants would apply through the state permitting system, and depending on the activity and conditions, may "receive the benefit of the federal approval process for activities covered by SPGP" (Stetson, 2008). In the eyes of the public, there would not need to be federal involvement unless more information is requested by the agency. SPGP use across the United States varies from USACE district to district and state to state. Most USACE districts utilize only one or two SPGP, a few have established four to seven and the Savanah USACE district has 28 SPGPs.

Keep in mind, the USACE utilizes GPs for 97% of the authorizations in Wisconsin, including both NWPs and RGPs. A SPGP is a type of GP that is issued by the USACE and designed to eliminate duplication of effort between the federal and state regulatory program that provide similar protection to aquatic resources. A SPGP must be based on a state or local evaluation that is at least as stringent as the USACE review. A PGP could not be issued for an activity that is not regulated by the state or is eligible for a state permit exemption. A SPGP is also not an effective tool when it creates uncertainty, such as for categories of activities that require a case-by-case assessment of whether the activity is exempt from state regulation, or the waters are exempt from state regulation, or the location obviates the need for a state permit (e.g., on tribal nation lands).

USACE authorizations require compliance with the ESA and NHPA and while Wisconsin may have similar consultation requirements, those likely do not meet the requirements of these acts. PGPs are less efficient if the

USACE is required to conduct case-by-case ESA and NHPA reviews for activities otherwise authorized. For this report, input from the USACE suggests that SPGPs may not be beneficial in streamlining permit review in Wisconsin.

That said, SPGPs may be considered in the future. SPGPs are flexible and can be developed individually for different activities and gradually, providing more autonomy state authority over permitting decisions.

Wisconsin does not have any state programmatic general permits that would delegate application review and processing authority to the state without the duplicate federal application.

Moving forward, the state of Wisconsin can consider implementing state programmatic general permits, instead of regional general permits, that would align with current waterway and wetland programs in the state. Pilot studies could be introduced on a watershed or county-wide scale, with regular review and feedback from the department and public. Through the continuous improvement process of reviewing, updating, and applying SPGPs, Wisconsin can slowly increase the type, size, and amount of SPGPs within the state.

8.6. Expand Self-Certification General Permits

Both the USACE and the WDNR use self-certification GPs where applicants determine if they are eligible for the general permit and their project meets the location, design, and technical requirements of the agency's GP. The USACE currently authorizes many minor activities using self-certifying general permits, meaning applicants do not need to contact the USACE provided they comply with the conditions of the general permit. Accordingly, self-certification GPs are streamlined to the maximum extent possible and other streamlining steps (such as regional or state programmatic general permits) are not necessary.

WDNR staff still reviews the self-certified GPs for NHI, SHPO and wetland impact and if the project clears those reviews, the GP is issued at the base level by permit intake staff without a review by field staff. Wisconsin has used a self-certification GP process since 2016 as a mechanism to streamline workload for low risk regulated activities for more than a dozen GP activities. This approach has been very successful to manage workload and prioritize its level of review based on environmental concern. Available compliance monitoring data suggests that projects covered under a self-certification GP has the same or higher compliance rate as GPs that received more scrutiny.

In 2019-2020, WDNR expanded the self-certification GP process to include three additional activities given demonstrated project consistency and low environmental risk.

- Public boat ramp (new)
- Fish and Wildlife habitat structures (lake)
- Lake Shore Erosion Control – Riprap (Government Sponsored/designed – Counties or State)

Since this sub-team has formed, the Waterways Program received additional resource manager feedback which provided further detail and clarification on which regulated activities are considered low risk for resource managers and is considering the self-certification list be updated to include the following additional activities since they were considered low-risk by resource managers:

- Boat Shelters
- Grading
- Stream habitat structures and crossings for improving stream habitat for government agencies
- USDA Forest Service Chequamegon-Nicolet National Forest
- Waterway and Wetland GP for Certain Ag WQ Activities
- Weed rake
- Wetland conservation- Federal

For continued permitting streamlining, both the WDNR and the USACE could continue to evaluate the applicability of self-certification to activities that are currently regulated by a GP and ideal situation, align self-certifications across both agencies.

In additional to self-certification, the WDNR also has the ability to waive permit application for certain wetland GPs (s. 281.36(3g)(h)4., Wis. Stat.). This approach is similar to USACE non-reporting GPs. While available, WDNR has used this authority in limited circumstances, in preference of the self-certification approach to screen for NHI and SHPO. WDNR could consider expanding the use of the application waiver process in stronger alignment with USACE GPs. It is noted that insufficient statutory authority is available to consider this for waterway GPs or certain wetland GPs at this time.

Chapter 9. Wetland Mitigation

The effect of §404 Assumption on wetland mitigation in Wisconsin can best be evaluated by considering the potential changes to mitigation thresholds and requirements for permittees and the potential changes to requirements, development, and oversight of mitigation banks, permittee-responsible mitigation (PRM) projects, and the Wisconsin Wetland Conservation Trust, which is the WDNR's in-lieu fee mitigation program.

Currently the WDNR requires wetland mitigation for all individual permits, meaning any permitted impacts that do not qualify for a GP including those that impact greater than 10,000 sq. ft. (0.23 acres) of wetlands, and for nonfederal exemptions that impact greater than 10,000 sq. ft. (0.23 acres) in urban areas or greater than 1.5 acres in rural areas. As noted in section 6.3.2 of this report, the USACE allows general permits for projects with wetland impacts of 0.5 acres or less. Under a state §404 program, the WDNR would be able to change its permitting structure to allow GPs for wetland impacts up to 0.5 acres, thus reducing the number of IPs and projects that require mitigation.

The WDNR and the USACE currently make joint decisions for projects that require wetland mitigation. The 2008 federal mitigation rule (33 CFR part 332), s. 281.36, Wis. Stats., and the 2013 Wisconsin Guidelines for Mitigation (Joint Guidelines) together create a preference for mitigation requirements to be fulfilled first by available mitigation bank credits in the same service area, followed by ILF (WWCT) credits in the service area, and finally a PRM project may be proposed and pursued dependent on agency approval. Section 281.36, Wis. Stats., further prescribes that if the WDNR directs a permittee to use available mitigation bank credits, a mitigation bank in the same HUC 8 watershed where the impacts are to occur should be used first, if applicable. Under a state §404 program, this mitigation hierarchy would likely remain unchanged.

The WDNR and the USACE also jointly oversee mitigation banks and permittee-responsible sites in Wisconsin as members of the Interagency Review Team (IRT). The IRT also currently includes the USEPA Region 5, which reviews most mitigation sites in the state. The agencies apply the Joint Guidelines to mitigation bank development and requirements, oversight of bank operation and credit releases, and PRM project site selection, implementation, and monitoring. Currently all mitigation impacts are treated as federal impacts, and all mitigation banks are approved by the IRT.

Under a state §404 program, it is possible that most wetland impacts requiring mitigation will not be federally jurisdictional. This would raise uncertainty in how the current Interagency Review Team would approach oversight of wetland mitigation banks and PRM projects. The USACE and the USEPA may prefer to continue to oversee all mitigation or prefer that the WDNR operate its own exclusive oversight for the significantly expanded nonfederal wetland impacts requiring mitigation. Under the latter, two mitigation "systems" would have to coexist, and each mitigation bank would have to choose whether to seek approval under the federal process (to receive approval to sell credits for impacts to retained and assumed wetlands) or to only seek approval from the WDNR to sell credits exclusively for impacts to assumed wetlands.

The WDNR may not find benefit to operating a large mitigation program under assumed §404 due to the requirement that the state program be at least as stringent as the federal program. This would likely require the same type and degree standards and requirements for all mitigation banks and PRM sites. These include financial assurances for the life of the project, long-term management funding, baseline scientific data, performance standards, monitoring methods and years, crediting types and ratios, and requirements for each submittal and report.

The WWCT, operated by the WDNR as an in-lieu fee mitigation program, is currently approved and overseen by the IRT including the USACE and the USEPA. Under a state §404 program, a second WWCT program would have to be developed for creating credits available for impacts to assumed wetlands. Similar to mitigation banks, the requirements, and standards for a separate WWCT program would have to be at least as stringent as currently written in the WWCT Instrument. An additional issue is the s. 281.36 (3r) (e), Wis, Stats., states that an in-lieu fee mitigation subprogram operated by the WDNR must be consistent with federal regulations. This may further limit any flexibility that an in-lieu fee program could have under §404 Assumption.

A final consideration for a state §404 mitigation program is that mitigation sites, many of which are large and complex construction projects, trigger federal review including listed species review under section 7 of the ESA, tribal consultation, and cultural and historic preservation review under section 106 under SHPA. Currently, these reviews are completed by the USACE and in some cases add several months or longer than a year to the approval process. A state §404 program would necessitate agreements with the USACE for roles and responsibilities for completing these reviews for mitigation banks, WWCT projects, and PRM projects that are implemented solely under the state program.

9.1. Section 404 Assumption and Mitigation, from a Banker's Perspective

State assumption develops a new type of stakeholder: mitigation bankers. These mitigation bankers encompass a diverse group of people with different interests, for example, nationwide companies, non-profits, local community mitigation consultants, and farmers. Mitigation bankers recommend that "specifically providing opportunities to collaborate on assumption to mitigation providers will improve states and tribes' ultimate framework by providing insights to help encourage a robust mitigation banking ecosystem, improve project approval efficiency, and improve mitigation outcomes" (William, 2020).

Prior to submitting their §404 application materials, Florida had reached out to the Florida Association of Mitigation Bankers requesting feedback on their mitigation banking plans. Collaboration between stakeholders, specifically mitigation bankers, is recommended to states pursuing §404 assumption to improve environmental, economic, program efficiency, and investment opportunities.

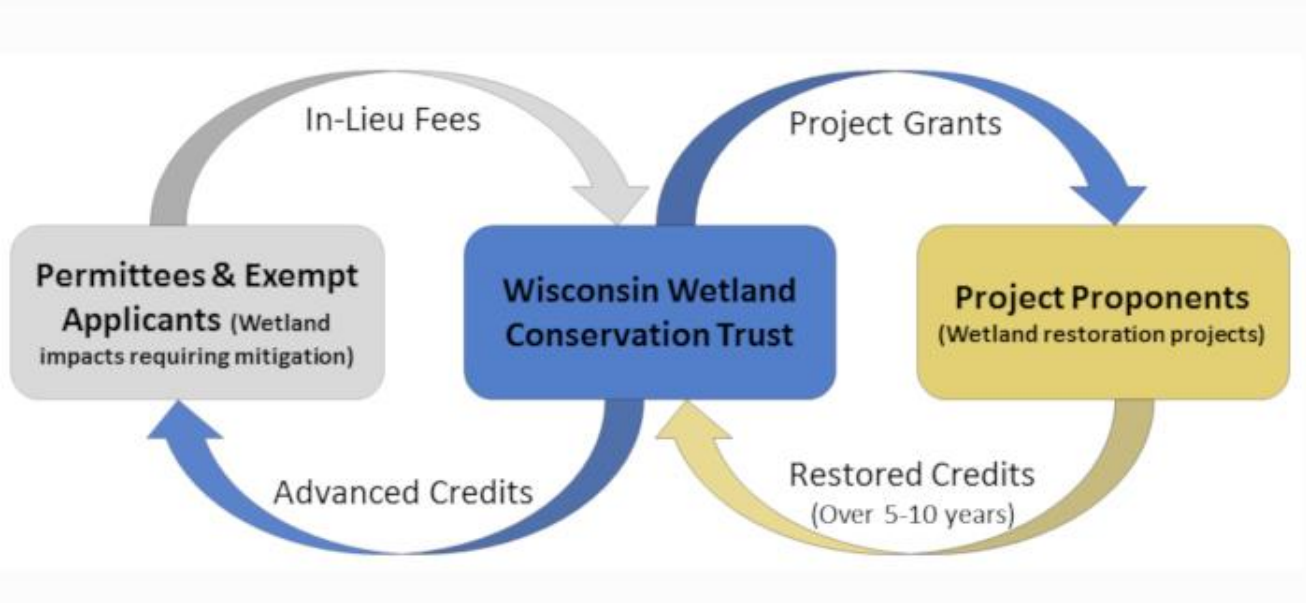
9.2. Wisconsin Wetland Conservation Trust

The Wisconsin Wetland Conservation Trust (WWCT) is a statewide wetland mitigation in-lieu fee (ILF) program sponsored and administered by the WDNR. The purpose of establishing the WWCT was to provide an additional method of compensatory mitigation to offset unavoidable adverse impacts to wetland resources. The WWCT's goal is to complete wetland mitigation projects using a watershed approach.

Operational since November 2014, the WWCT allows permittees or exempt project proponents with unavoidable wetland impacts to mitigate through the purchase of credits. Through the sale of credits, the WWCT accepts the legal responsibility to satisfy wetland compensatory mitigation requirements specified by USACE-St. Paul District permits authorized under §404, §10 of the River and Harbors Act, and WDNR Wetland Individual Permits pursuant to Chapter 281.36, Wis. Stats. The WWCT may also collect separate non-credit related funds including, but not limited to, those resulting from supplemental environmental projects, donations, and WDNR Wetland General Permit surcharge fees. The program is available in all watersheds in Wisconsin (WDNR, 2019).

Fiscal Year 2019 Program Summary

The WWCT program has proven to be a successful method for permit applicants and exempt project proponents to satisfy their wetland compensatory mitigation obligations, enabling projects to move forward. After 4.5 years of operation, the WWCT is selling credits where mitigation bank credits are unavailable, meeting the need for permittees to acquire permits. Funds from permits have been allocated to 12 projects, six entering the monitoring phase and six planned for construction in 2020 (WDNR, 2021)

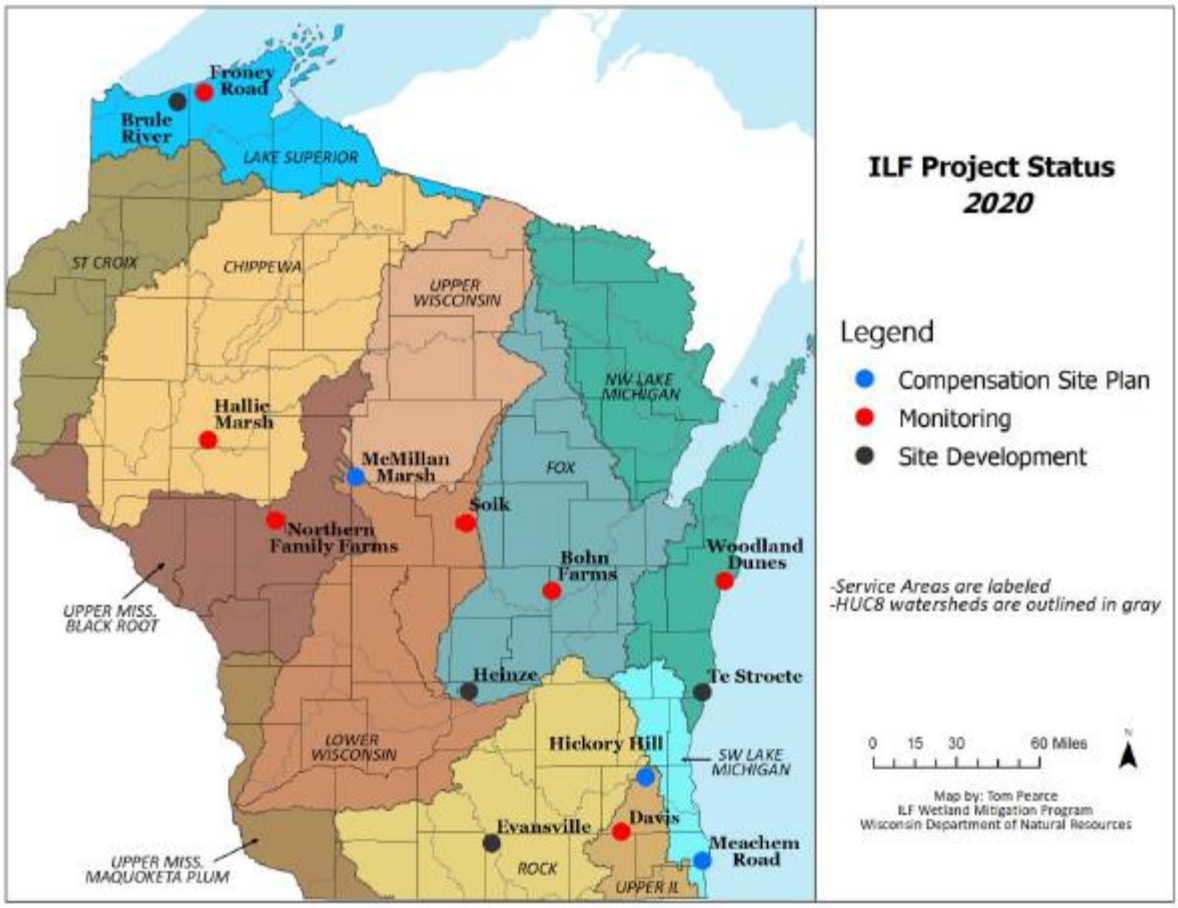


Since establishment in 2014, applicants for permits impacting 415.61 acres have paid into the WWCT to fund projects that restore, enhance, create, and preserve wetlands. The program has encumbered funds to 12 projects in 10 different service areas, which are in the planning stages for the restoration of 650 acres of wetlands.

During Fiscal Year 2019 (FY2019), the WWCT received In-Lieu fees from 27 projects permitted by state and/or federal agencies. The largest percentage of fees (37.0%) were from projects in the Southwestern Lake Michigan Service Area. When combined with the percentage of fees from Upper Illinois (22.2%), these two service areas account for over 59% of all credit sales. There were also fees received from the Fox, Lake Superior, Northwestern Lake Michigan, and Upper Mississippi Black Root Service Areas. The WWCT did not receive fees from the remaining six service areas: Rock, Chippewa, St. Croix, Upper Wisconsin, Lower Wisconsin, Upper Mississippi Maquoketa Plum.

The 27 projects resulted in 27.09 acres of impacts to wetland resources. The most impacted wetland cover types were Fresh Meadow at 51% of impacts, Wooded Swamp at 20% of impacts, and Deep and Shallow Marshes at 13% of impacts. A total of 42.68 credits were sold, which was less than the totals from the previous two fiscal years (70.19 and 101.06, respectively). After these sales, the WWCT program had a program liability of 362.64 credits and 417.36 credits available for purchase.

During FY2019, four new contracts were signed for WWCT projects, allocating $4,353,933 to project partners. Total allocated funds for projects at the end of FY2019 was $12,226,190. Of these allocated funds, $1,798,500 was planned to be held for an endowment for long-term management for 10 projects (WDNR, 2019).



(WDNR, 2019)

9.3. Mitigation Bank Instrument

Mitigation bank instruments serve as a guidance document for ILF program operations and is approved by the USACE (WNDR, 2020). This document is not a permit, nor a contract, which leads to some uncertainty how this program will be implemented and enforced by a state after assumption. Bankers have offered that there may be opportunities to update, expand, or modify the current methods presented within the mitigation bank instrument. For example, Minnesota is "considering a unique method that includes a mitigation plan and the fact that it holds conservation easements on the mitigation banks. Minnesota's ability to assess fees on mitigation banks creates an environment where the state can play a larger role in mitigation bank operation—such as holding easements—than may be feasible in other states or tribal lands" (William, 2020)

Restoration Plan

"The restoration plan is the most basic component of a mitigation bank;" the purpose of a bank is to "provide functional gains to waters that can be used to offset impacts to jurisdictional waters" The restoration plan outlines the tasks that are required to acquire these "functional gains." There is opportunity for a state or tribe to enhance its coordination, reduce redundancies, and strengthen their restoration standards, which in turn, may attract bankers with higher standards and create a more competitive "ecosystem marketplace:"

> "High quality restoration and true ecological uplift will often cost more, so it is important that high standards and cost-intensive efforts to create, recreate, restore, or enhance wetlands are applied equally

and efforts are commensurately rewarded so that a mitigation banker who creates more quality habitat uplift is not penalized by competing with other banks that can charge very low prices due to getting many credits without much effort, such as preservation" (Williams, 2020).

Site Protection Mechanism

Implementing conservation easements and protecting mitigation banks long term is another mitigation topic: "traditionally, conservation easements are held and enforced by a third party. However, one benefit to §404 assumption is the states' ability to hold conservation easements. This mechanism can be used to help enforce conditions of bank authorization," (Williams, 2020) as seen in Minnesota.

Performance Standards, Monitoring, and Reporting

"Performance standards, and the concomitant monitoring and reporting regime plays a big role that unfolds over many years. States and tribes will need to think about how they structure this framework and what they want to encourage. Some pieces to consider are:

1. Should a credit release come before construction to help bankers pay for construction, or should credit release lag construction so the state maintains some "financial assurances" to ensure the project is implemented properly
2. What time frame is needed to ensure the site is successful before transitioning to long term stewardship? This can range from simply meeting specific performance metrics to a time frame of 10 or more years. What are the actual important milestones to meet so the state or tribe is reasonably confident in long term success?
3. How should adaptive management, especially in dynamic ecosystems should be viewed? Are we driving toward a specific apex habitat or toward a healthy cyclical habitat? How are invasive species viewed? Is there zero tolerance? I know it is controversial, but does an invasive species ever become native?
4. What happens when a metric can be construed to contain both a timeframe and a specific milestone like tree height—should credit release come when the milestone is met or does the full amount of time need to pass before the metric is met?" (Williams, 2020)

Financial Assurances

As one banker's perspective, "financial assurances are a key benefit to the state assuming the mitigation program. The USACE is caught between the desire to control financial assurances to correct any issues that arise that are not effectively corrected by the mitigation sponsor and the Miscellaneous Receipts Statute, that precludes the federal agencies from receiving monies or directly controlling funds.

The USACE has worked around the issue a few ways, such as through third party control of letters of credits, surety bonds, and escrow funds or through casualty insurance products. Some states, such as Florida, play a larger role in financial assurances by holding the funds themselves through an MOU with the USACE. Florida does this through their Division of Financial Services, although the USACE wants to have more involvement in how and when financial assurances are drawn upon.

State implementation of the mitigation program as part of §404 assumption sidesteps the whole issue and gives mitigation bankers a lot more clarity and consistency for financial assurances and breaks through what has proven to be very significant roadblocks to keeping mitigation credits available on the market, so impact permits are able to move forward smoothly. Further, the state has more control over how much, and even if financial assurances are required.

Minnesota and the St. Paul USACE, for instance, currently do not require financial assurances because of the structure of credit releases. The point is, there are currently variable financial assurance regimes—from double financial assurances to cover both the state and the USACE, to no financial assurances required.

These differences have a major effect on if, who, and how investments in environmental restoration happen, and the state should think through how to balance fostering the mitigation ecosystem it wants with what it needs and can legally require by way of financial assurances" (Williams, 2020)

Long-Term Stewardship

"Once a mitigation project meets its stated objective and performance standards, the project will need to move into a new phase of long term stewardship. Like easements, long term stewardship is traditionally implemented by a third party—often an NGO like a land trust. However, unlike the USACE, states and tribes can hold land and/or take on the long term stewardship themselves to reduce risk of long term restoration failure.

States and tribes also have a variety of ways to think about how to fund long term stewardship, whether it is through fees, an endowment that is seeded concurrently with credit sales, or other methods. Bankers may be especially interested in how a functional assessment methodology converts into the credit currency, and specifically how state and federal waters are credited since there is overlap between them.

Again, Minnesota and Florida provide contrasting examples. Minnesota has one crediting system that is maintained by the state. Depending on the waters that were part of the uplift that generated credits, not all of the credits might be certified by the USACE. Louisiana has a reverse framework, where all credits are federal credits, but some are certified by the state to satisfy their coastal use permit mitigation requirements. Florida by contrast has two separate credit ledgers—one for state and one for federal credits. This regime makes sense in this environment where one jurisdiction does not fully subsume the jurisdiction waters of the other.

In this example, the USACE considers secondary impacts, and the state claims jurisdiction over waters like isolated wetlands. Many impacts need "dual" credits, and then perhaps a handful of credits from one agency or the other" (Williams, 2020)

Crediting

"How credits are generated and thereafter applied to permits is very important to a banker and can cause real distortions on what type of restoration that happens under a mitigation program.

A couple example are:

1. If riparian areas are given too much credit, then expensive in-channel stream restoration will not be common.
2. Difficult habitats or waters that take a long time to develop—like bogs—will not be restored in favor of easier habitats like bottomland hardwoods

Other associated issues with crediting are:

1. Credit release schedule
2. Various unique credit types in the market

Regarding credit types, states and tribes will likely want to encourage the mitigation of impacts with similar habitats, but it is also important to maintain flexibility in order to ensure credit availability so as to avoid pushing permittees to doing their own mitigation over using a mitigation solution that has a successful track record" (Williams, 2020).

Service Areas

"Likewise, service areas play an important role in promoting the watershed approach—where impacts are mitigated within the same watershed but have mechanisms to balance credit availability with perfect mitigation siting should be a consideration.

Minnesota's mechanism, for example, which allows for out of service area impacts at a higher ratio does a good job promoting this balance. Another good way of handling service areas and credit availability is illustrated in West Virginia, where a secondary service area, which is subordinate to mitigation bank credits where it is a primary service area, can include adjacent HUC 8s or the rest of the HUC 6.

Flexibility, while still encouraging mitigation from the watershed, is a great way to keep mitigation credits available for agency staff and permittees, and provide regulatory ease that attracts mitigation bankers to state or tribal jurisdictions" (Williams, 2020)

9.4. Benefits and Challenges of Mitigation

"Overall, some bankers may believe that the goals of assuming a mitigation program as part of §404 assumption should be to create the most efficient bank approval process that maintains high standards and works with mitigation providers to keep enough mitigation credits available for permittees—in short, to keep bank authorizations and credit releases, and the permits that depend on them, moving forward.

State implementation of the mitigation program can be more efficient if implemented with the right framework. Submitting one set of documents to one agency that directly works with other sister agencies and is closer to the regulated community will likely lead to a more efficient process. Also, as the Assumed Waters Workgroup highlighted in their report, states, and tribes, like Michigan, often take the lead on mitigation due to a robust existing mitigation program, the ability to own property, hold conservation easements, and hold financial instruments, which the USACE cannot.

There are some challenges to overcome, however. Some bankers have been frustrated by not having the same transparency into the mitigation market data that is afforded by the USACE given the importance to careful understand the market area want to enter. When there is not readily available information, or bankers must request information through open records or they have piece together data from various documents, it can make it difficult to make a positive investment decision.

Another challenge can be when banks are proposed on a site that contains both assumed and unassumed waters. The planning document should clearly contemplate if the USACE plays a role on authorizing banks in unassumed waters or if they only play a role when an NWP 27 is issued in unassumed waters.

Finally, in cases like Florida, how are parallel wetland jurisdictions handled. Florida decided to leave bank authorization to the USACE, but if they hadn't, would the normal environmental resource permit process authorize the bank for both state and federal purposes? What does this mean for permitting efficiency? Perhaps a way to turn this into a benefit is if, over time, a state in this situation can merge these frameworks through state legislation and rulemaking.

Further, mitigation banks can provide more market-based solutions beyond that of just §404 mitigation, which could be hamper if there is no direct federal involvement with authorization.

Mitigation banks can appropriately—through separate areas of a bank or through bundled credits—provide other environmental currencies including endangered species habitat, water quality, and NRDA credits. There has been a lot of discussion recently about Section 7 vs. Section 10 consultation with the USFWS, but states and tribes should think through early about how to best align an assumed mitigation program with these other environmental restoration needs within their jurisdiction" (Williams, 2020).

9.5. Wetland Mitigation Under §404 Assumption

As mentioned previously, "a goal in this process is for the state to foster a its mitigation community—and to consider how the framework encourages or discourages mitigation bank development.

A non-exclusive list of these framework considerations includes:

1) Consistent implementation of the mitigation hierarchy
    a) Banks are preferred as they are approved and built in advance of impacts
    b) ILF programs are second in preferences as they are programs approved in advance of projects, but mitigation is built within an agreed-to timeframe after credit sales
    c) Permittee responsible mitigation is the last preferred method because they are permitted and built concurrently with impacts. Although PRM projects can be sited closer to impacts, the problem comes

with ensuring these projects meet performance standards—both in terms of enforcement mechanism and staff time issues

2) Equivalency between mitigation solutions
    a) Banks take on a lot of risk and capital expenditures – including financial assurances. All mitigation solutions should meet the same requirements for authorization that I discussed earlier. This will encourage more permittees to use mitigation credits and providing no net loss due to the level playing field.
3) How are existing banks grandfathered in after assumption, functional assessment methodology, loss of jurisdiction (for example on wetlands).
4) What is the authorization timeline and how is it enforced? When does legal review happen? What level of interagency coordination? Is consensus required?
5) How are bad mitigation proposals denied? Can they be outright denied?
6) What happens when the state authorizes mitigation projects, but also has its own mitigation projects through in-lieu fee projects or mitigation banks (specifically DOTs) that compete, or at least dilute, the mitigation marketplace?

There are clearly many facets to §404 assumption, but the mitigation component is an important one, as it is the balance to the impacts. It is important to be thought out and implemented in way that provides pathways for permittees to efficiently meet their permit mitigation requirements.

If the State begin to consider §404 assumption in the future, bankers, and wetland developers under the ILF must be engage in conversation with the state and other stakeholders. If USEPA continues with their efforts to review the assumption laws, more opportunities for partial assumption could be realized and other flexibilities to make the implementation framework – including the mitigation program – work better based on local policy, environment, and culture (William, 2020).

Appendix 1 **USACE and WDNR Programmatic Comparison Table**

Program Component	USACE §404 Program	WDNR State Program	State §404 Program
Jurisdictional Determination (JD)			
Jurisdictional Waters	All WOTUS[1]	WOTUS, any wetland that is disconnected from navigable waters, and any wetland not regulated by the COE, except artificial wetlands	All WOTUS except Section 10 waters including an administrative boundary area
Assumable Water Determination	Not applicable	Not applicable	To be defined in MOU WDNR would likely have increased responsibilities in determining what waters are assumable and how projects with both assumable and non-assumable waters are handled
Preliminary Jurisdictional Determination (PJD)	For purposes of calculating impacts and determining compensatory mitigation requirements, a permit decision made based on a preliminary jurisdictional determination will treat all waters and wetlands in the review area as jurisdictional waters of the United States.[1]	Not performed by WDNR for Federal Jurisdiction. WDNR does determination jurisdiction once USACE has identified wetlands	To be defined in MOU. WDNR would likely have the increased responsibility to conduct PJD associated with State §404 permits
Approved Jurisdictional Determination (AJD)	Official USACE determination that jurisdictional waters of the United States, navigable waters of the United States, or both, are either present or absent in a review area. An approved jurisdictional determination precisely identifies the limits of those waters determined to be jurisdictional under the Clean Water Act or Rivers and Harbors Act.[1]	Not performed by WDNR for Federal Jurisdiction. WDNR does determination jurisdiction wetlands	To be defined in MOU with COE. WDNR would likely have the additional responsibility to conduct AJD associated with State §404 permits
Appeals – JD	The consolidated rule for the administrative appeal process published March 28, 2000 provides for the administrative appeal, within the USACE, of an approved JD, a denial with prejudice by the district engineer of a Department of the Army permit application, and/or a declined	Not performed by WDNR	To be defined in MOU with COE. WDNR would likely have the responsibility to defend JD associated with State §404 permits.

	individual permit (i.e., an individual permit refused by the applicant because of objections to the terms or special conditions of the proffered permit).[8]		
Fees - JD	None	Not performed by WDNR	With legislative action, the WDNR could require fees to conduct PJD and JD.
Permit Process			
Exemptions, Applicability	Certain discharges for some farm, forestry, maintenance, and other purposes are exempt from Section 404 regulation.[2]	Artificial wetlands	Would require law changes since some exemptions would no longer be available and other new exemption added
Permit Types	Regional General Permits (RGP); Nationwide Permits (NWP); Standard Permits (SPs); Letters of Permission (LOPs) and Exemptions	General Permits, Individual Permits, Exemptions	The permits framework would likely change to mirror existing federal permits (Exemptions, RGP, NWP, SPs and LOPs)
Public Notice and Participation – General Permit	Public notice when GPs are renewed/reissued every five years[1]	Public notice when GPs are renewed/reissued every five years[1]	Likely no change due to similar responsibilities
Renewals / Extensions	If an NWP is not modified or reissued within five years of its effective date, it automatically expires and becomes null and void.	Expired state general permits are continued to be used until a new general permit has been issued	The state would have to adopt §404 approach to expiring NWP
Public Notice and Participation – Individual Permit	LOPs may require a 30-day agency and public review process and individual permits typically require a 30-day agency and public review. Public notice may happen prior to complete application.	Individual permits require a 30 day public notice period for public comment. A complete application is required prior to going to public notice and the state must also publish a preliminary permit approval or denial statement.	The state would have to select a consistent approach to issuing public notices based upon a complete application or not and if a preliminary approval/denial would be included.
Timeframes – General Permits	Average timeframe for GPs: 75 days	Average timeframe for GPs: 5 days Reviews completed within 30 days of receipt	The capacity of WDNR to maintain an average timeframe of 5 days will depend on adequate staffing levels.

Timeframes – Individual Permits	Average timeframe for IPs: 158 days	Average timeframe for IPs: 44 days	The capacity of WDNR to maintain an average timeframe of 5 days will depend on adequate staffing levels.
Fees – General Permit	None	The department shall charge a fee for reviewing, investigating, and making decisions on applications to proceed under wetland general permits under sub. (3g) and on applications for wetland individual permits under sub. (3m). For an authorization to proceed under a wetland general permit, the application fee shall be $500	With legislative approval, the state may develop a fee schedule for federal permitting activities assumed
Fees – Individual Permit	$10 for non-commercial activities $100 for commercial activities Public entities are exempt from fees[1]	The department shall charge a fee for reviewing, investigating, and making decisions on applications to proceed under wetland general permits under sub. (3g) and on applications for wetland individual permits under sub. (3m). For a wetland individual permit, the application fee shall be $800[6]	With legislative approval, the state may develop a fee schedule for federal permitting activities assumed
Program Implementation			
Avoidance, Minimization, Alternatives Analysis, Significant Degradation, and other restrictions on discharge	In general, the guidelines require that the activity be the least environmentally damaging alternative that is feasible, and that adverse impacts are avoided, then minimized, and then compensated for (such as creating or restoring wetlands to replace those that would be filled). Activities also must not be contrary to the public interest, as determined by the USACE.[1] Public interest review refers to the evaluation of a proposed activity to determine whether issuance of the permit is in the public interest. Expected benefits are balanced against reasonably foreseeable detriments. All relevant public interest factors are weighed. The USACE policy is to provide each applicant with a timely	An applicant shall include in an application submitted under par. (a) an analysis of the practicable alternatives that will avoid and minimize the adverse impacts of the discharge on wetland functional values and that will not result in any other significant adverse environmental consequences, subject to the limitations in sub. WDNR limits practicable alternatives analysis (PAA) to the site of discharge for projects with less than 2 acres of disturbance and the construction of single-family homes, farm-based buildings, and small businesses. For projects related to facility expansions, industrial parks, and projects with demonstrable economic benefit,	The §404 would not include the less stringent limitations currently in place for State permitting (see Chapter 6.2).

	and carefully weighed decision which reflects the public interest.[3]	WDNR requires PAA for the site of discharge and its adjacent parcels.[6]	
Endangered Species Act	The ESA requires Federal agencies to consult with the USFWS and the National Marine Fisheries Service, as appropriate, if an activity that requires Federal authorization (such as a USACE permit) may affect endangered or threatened species or critical habitat. As a result of the consultation process, the USACE may add special conditions to the permit to ensure that the activity does not jeopardize endangered or threatened species or destroy or adversely modify critical habitat.[3]	WDNR has responsibility to ensure that all authorizations comply with Section 7 of the Federal ESA, s. 29.604, Wis. Stats and applicable State Laws. No DNR authorization will be granted for projects found not to comply with these Acts/laws. No activity is authorized which is likely to jeopardize the continued existence of a threatened or endangered species or a species proposed for such designation, as identified under the Federal ESA and/or State law or which is likely to destroy or adversely modify the critical habitat of a species as identified under the Federal ESA.[11]	Under a MOU with the USFWS, the state would have to consult with FWS would likely increase work for the state and increase permitting timelines
Cultural and Historic Resources	Section 106 of the NHPA requires the USACE to take into account the effects that activities authorized by Department of the Army permits are likely to have on historical properties listed in, or eligible for listing in, the National Register of Historic Places. State Historic Preservation Officers and Tribal Historic Preservation Officers are provided the opportunity to review and comment on all individual permit activities and certain general permit activities. The Advisory Council on Historic Preservation may review certain proposed activities that require a USACE permit.[3]	WDNR has responsibility to ensure that all authorizations comply with Section 106 of the National Historic Preservation Act and s. 44.40, Wis. Stats. No DNR authorization under will be granted for projects found not to comply with these Acts/laws. Information on the location and existence of historic resources can be obtained from the State Historic Preservation Office and the National Register of Historic Places.[11]	Under a MOU with the SHPO, the state would have to consult on historic sites likely increasing work for the state and increase permitting timelines
Tribal Resource Protection	Federal trust responsibility requirements for consultation ensures, to extent permitted by law, that tribal concerns and interests are considered whenever federal actions and/or decisions may affect Indian Country or other tribal interests. If USACE does not address tribal concerns, the permits may be elevated to processing by the USEPA.	WDNR has responsibility to consult with Tribes under existing treaties, court cases and executive orders. The State may consider Tribal input but is not required to modify permit decisions. Tribal may appeal permit decision if in disagreement	While the State currently consults with Tribes under existing court cases and treaty requirements, there is likely a higher bar for consultation under federal rules.

Public Interest Determination	Activities also must not be contrary to the public interest, as determined by the USACE.[1]	A public trust decision is required for waterway permit decisions but is not is not a requirement of the wetland permitting process to complete this analysis but is optional for applicants seeking a limited scope of the alternatives analysis.	No change since existing processes are similar
Compensatory Mitigation			
Interagency Review Team (IRT)	An IRT is convened and includes representatives of the USACE, EPA, U.S. Fish and Wildlife Service (FWS), and other state, tribal, or local agencies, as appropriate. The USACE will serve as the lead IRT agency. The primary role of the IRT is to facilitate review and approval of the banking proposal. The IRT will visit each proposed bank site, review the proposed design of the site, and determine the expected credits for the site. At various specified stages after construction of the bank site, the IRT will determine the creditable acreage of compensation established[1]	WDNR ILF team	No anticipated changes from current state program
Mitigation Vehicles	The USACE are issuing regulations governing compensatory mitigation for activities authorized the regulations establish performance standards and criteria for the use of permittee-responsible compensatory mitigation, mitigation banks, and in-lieu programs to improve the quality and success of compensatory mitigation projects for activities authorized by Department of the Army permits.[1]	Except as provided in subd. 2., the department shall require mitigation under the program established under sub. (3r) for wetland individual permits it issues under this subsection and for a discharge that is exempt from permitting requirements under sub. (4n) (b) that affects more than 10,000 square feet of wetland or under sub. (4n) (c) that affects more than 1.5 acres of wetland. A wetland individual permit applicant or exempt project proponent can purchase credits from an approved and open mitigation bank. A wetland individual permit applicant or exempt project proponent can purchase credits from	Likely little change in responsibility and workload since the USACE and State handle mitigation together

		the DNR Wisconsin Wetland Conservation Trust (WWCT). A wetland individual permit applicant can satisfy their compensatory mitigation requirement by completing a mitigation project in the same watershed service area or within a half-mile of the permitted wetland impact. A nonfederal exempt project proponent can complete a mitigation project within the same compensation search area, which includes the geographic management unit (GMU), the county, and within a 20-mile radius of the impacted wetland.[6]	
Mitigation Ratios	If the district engineer determines that compensatory mitigation is necessary to offset unavoidable impacts to aquatic resources, the amount of required compensatory mitigation must be, to the extent practicable, sufficient to replace lost aquatic resource functions. In cases where appropriate functional or condition assessment methods or other suitable metrics are available, these methods should be used where practicable to determine how much compensatory mitigation is required. If a functional or condition assessment or other suitable metric is not used, a minimum one-to-one acreage or linear foot compensation ratio must be used.[10]	The department shall establish under the mitigation program mitigation ratios that are consistent, to the greatest extent possible, with the federal regulations that apply to mitigation and mitigation banks but, unless subd. 2. applies, the minimum ratio shall be at least 1.2 acres for each acre affected by the discharge. For mitigation that occurs within the same watershed in which the discharge is located or within one-half mile of the site of the discharge, the ratio established by the department shall equal 90 percent of the ratio that would apply if the mitigation were to occur outside the watershed or were to occur one-half mile or more from the site of the discharge, but the ratio established under this subdivision may be no less than 1.2 acres for each acre affected by the discharge.[6]	Likely little change in responsibility and workload since the USACE and State handle mitigation together
Functional Assessment	Functional assessments will be used to determine compensatory mitigation amounts in cases where such methods are available, appropriate, and practicable for use. There are on-going	The U.S. Environmental Protection Agency's National Wetlands Monitoring Workgroup has endorsed the concept of a Level 1, 2, 3 approach to monitoring. Level 1,	Likely little change in responsibility and workload since the USACE and State

	efforts to develop and refine functional assessment methods and other science based assessment tools. If appropriate functional assessment methods are not available, or if it is not practicable to use the appropriate and available functional assessment method for a particular project, then other appropriate metrics are to be used. We have modified § 332.3(f)(1) [§ 230.93(f)(1)] to include the use of condition assessment methods and other appropriate metrics for determining the amount of compensatory mitigation that is to be required for DA permits.[1]	"landscape assessment," relies on coarse, landscape scale inventory information, typically gathered through remote sensing and preferably stored in, or convertible to, a geographic information system (GIS) format. Level 2 is "rapid assessment" at the specific wetland site scale, using relatively simple, rapid protocols. Level 2 assessment protocols are to be validated by and calibrated to Level 3 assessments. Level 3 is "intensive site assessment," and uses intensive research–derived, multi–metric indices of biological integrity. All these methods have been developed with grants from EPA, Region V.	handle mitigation together
Self-Monitoring / Reporting	Monitoring requirements, including the frequency for providing monitoring reports to the district engineer and the IRT, will be determined on a case-by case basis and specified in either the instrument or approved mitigation plans. As stated in § 332.6(c)(3) [§ 230.96(c)(3)], monitoring reports must be provided to interested agencies and the public upon request. Failure to submit required monitoring reports may result in suspension of credit sales or termination of the instrument (see § 332.8(o)(10) [§ 230.98(o)(10)]). The required content of monitoring reports for mitigation banks and in-lieu fee projects will be determined by district engineers, in consultation with the IRTs. Monitoring report templates can be developed by district engineers, to provide a standard format for those documents.[1]	Any comparable component under S281?	Likely little change in responsibility and workload since the USACE and State handle mitigation together
MISCELLANEOUS			
EPA Oversight	The general rule is that for an activity to receive a §404 permit it must comply with the EPA's Section 404(b)(1) guidelines.[1] The USACE may request EPA assistance, or the EPA may assume permitting in special instances	The EPA has not oversight capacity for the existing state waterway and wetland permitting process, except if there is potential non-compliance with §401 water quality standards	EPA manages and monitors state assumption program and the state would be held responsible for reporting

Inspections	The USACE and EPA will conduct routine field investigations of unauthorized discharges and prepare field reports, in accordance with established enforcement procedures, necessary to determine the nature, extent, and circumstances surrounding the unauthorized activity[4]	Wis. Code 30.291 Inspections for certain exemptions and permitted activities. (1) For purposes of determining whether an exemption is appropriate under s. 30.12 (2m) or (2r), 30.123 (6m) or (6r), or 30.20 (1m) or (1r), whether a general permit is appropriate under s. 30.206 (3), or whether authorization to proceed under a general permit is appropriate under s. 30.206 (3r), any employee or other representative of the department, upon presenting his or her credentials, may enter the site and inspect any property on the site[7]	The state or tribe may impose more stringent requirements, but not less stringent requirements.
Enforcement	The USACE leads enforcement actions for cases involving a first time violator with no previous involvement in the §404 programs. Repeat or flagrant violators or violations involving substantial environmental harm will be discussed with EPA to determine the lead enforcement agency[4]	The Department is a regulatory agency responsible for ensuring compliance with Wisconsin environmental and natural resource laws and administrative rules.[7]	The state would be the lead enforcement agency for all waterway and wetland activities on assumable waters, in partnership with EPA. This role will likely increase workload.
Application Submittal	Online through WDNR website, copy of application automatically sent to USACE	Online through WDNR website, copy of application automatically sent to USACE	On-line applications for State §404 would need to be developed if different from existing state forms.
Artificial Wetland Exemption	Not performed by COE	Wisconsin Act 183 (2017) creates new permitting exemptions for certain types of artificially created wetlands that become effective July 1, 2018. This exemption is specifically for landscape features where hydrophytic vegetation may be present because of human modification to the landscape or hydrology, which lacks definitive evidence of a wetland or stream history prior to August 1, 1991.[5]	Not available with state assumption program

Nonfederal Wetland Exemption	Not performed by COE	Wisconsin Act 183 (2017) created a new permitting exemption for certain types of nonfederal wetlands. This exemption may be particularly beneficial for stakeholders that have received a U.S. Army USACE of Engineers jurisdictional determination indicating that the impacted wetlands are not federally regulated.[5]	Not available with state assumption program

Appendix 2 **USACE and WDNR Staffing & Permit Data**

SECTION ONE: DATA ANALYSIS METHODOLOGY

Data Source: USACE data from FFYs 2018 – 2019 was provided by the Corps via email in January 2020 for analysis; see Appendices A and B for additional information. WDNR data was provided by department staff in a data export file from the Waterway and Wetland Permit database (also known as Turtle Database). Data analysis was performed on provided data sources and therefore may vary from other analyses performed by other individuals.

Quality Assurance and Professional Judgement: Throughout the data analysis process, tables, figures, and spreadsheets were regularly and consistently reviewed to ensure that data was represented accurately. Professional judgment was applied throughout the data analysis process. Data analysis may vary from other analyses performed by other individuals.

Statistical Analysis: Averages, minimum, and maximum values were calculated using excel formulas "AVERAGE," "MIN," and "MAX." Some calculations of simple percentages or values were summarized and therefore may not found in project spreadsheets.

Date of Data: The USACE Federal Fiscal Years (FFYs) 2018 and 2019 is October 1, 2017- September 30, 2019. Only data provided from the USACE and WDNR within this date range were selected and further analyzed. The USACE data column "Fed Comp Date" and WDNR data column "APPLICATION_COMPLETE_DATE" were sorted to select October 1, 2017 – September 30, 2019 data. These columns may not necessarily represent when the agencies received the original application. The USACE data column "End Date" and WDNR data column "DECISION_DATE" were also sorted to select the October 1, 2017 – September 30, 2019 data.

Note: Data titles should be assumed to include FFYs 2018-2019 if not already mentioned.

Note: ENF reviews provided by the WDNR's Turtle Database are not representative of the work and reviews the department completed within FFYs 2018-2019, as stated by a department enforcement coordinator. Enforcement data will be excluded from analysis involving work type, duration, and additional figures/tables with documentation.

Data Clean-Up and Removal of Duplicates: The tables below summarize the steps taken to "clean up" and sort USACE and WDNR data. After the initial data analysis was shared with USACE in September, November and December 2020, the department discovered that certain data analysis processes required modifications, based on direct input from the Corps. For example, the Corps has provided in written comments that "not removing duplicates creates an issue when looking at projects with multiple crossing which were permitted under one DA number but would probably be considered one project. Say you compare a road project between the Corps and DNR. The Corps may have 20 separate crossings with different actions in the data while DNR may just call this one project. This could lead to the Corps numbers appearing inflated…Suggest removing duplicate values that have the same end date" (Graser, 2020).

Table A2-1. WDNR Steps Taken to Clean up Data		
	Action	**Number of Permits Remaining after Action**
0	WDNR Provided Data	14089
1	Filter Application Complete Date 10/1/17-9/30/19	7107
2	Filter Decision Date 10/1/17-9/30/19	6333
3	Removed 160 negative durations	6173
4	Removed 523 withdrawals	5650
5	Removed one remaining ENF	5649
6	*For permit comparison with USACE, permits without lat/long data or lat/long "error message" removed*	*3347*

Table A2-2. USACE Steps Taken for to Clean up Data		
	Action	**Number of Permits Remaining after Action**
0	USACE Provided Data	6352
1	Filtered Action Type for LOP, SP, NWP, NPR, RGP, PGP*	5831
2	Fed Comp Date 10/1/17-9/30/19 selected	4134
3	End Date before 10/1/19 selected	4134
4	Removed all types of withdrawals	3959
5	Removed Section 10-Only Authority	3845
6	Removed the remaining NPR Permit	3844
7	Removed PCN = "N" (pre-construction notification, "self-certifying" GPs that do not require Corps review)	1528
8	Removed duplicates by selecting for permits with same DA number, same end date, same PNN**	1300
* This removed USACE action types APPEAL, COMPCERT, CONGRINQA, DANGERZONE, DEVMBA, EIS, FOIAA, MOD, NONCOMPLY, PERMITMOD, PERMTRANS, PREAPPCONS, STRMOD, UNAUTHACT ** This action removes duplicate GPs that were issued on the same date, under the same DA number, and with the same specific action.		

DA Number and Docket_ID: The "DA Number" provided in USACE data is the Agency's file number and was also the tracking name linked to specific correspondence. Duplicate permit DA numbers were removed following the steps presented above. Like the USACE duplicate removal process, WDNR permits with the same Docket_ID and Decision_Date were selected, however, no duplicates were found. WDNR has different permitting processes compared to the Corps, for example, as it relates to transportation projects with multiple crossings. An example provided by the Corps: "say you compare a road project between the Corps and DNR. The Corps may have 20 separate crossings with different actions in the data while DNR may just call this one project. This could lead to the Corps numbers appearing inflated" (personal communication). Therefore, if a Docket_ID number was found to be documented more than once, no action was taken to remove the "duplicate" file name. Each file number was considered an independent action, regardless of repeated file name.

Action Type: The USACE used the term "action type" to correspond to the review type; this does not necessarily mean that a permit was issued, but the action that was pursued by the Agency. The term "action" may be used within this analysis to represent a review or permit action taken by the Corps. The terms "action," "review," or "permit" may be used interchangeably throughout the analysis.

Table A2-3. USACE and WDNR Action/Permit Type Descriptions

	USACE	WDNR
Enforcement Actions	-	ENF
Exemptions (includes artificial wetlands, non-federal wetlands)	-	EXE
General Permits	NWP, RGP, and PGP combined	GP
Individual Permits	SP and LOP combined	IP
Jurisdictional Determinations	JD	-
Jurisdictional Determinations or other Informal Actions	-	INF
Letters of Permission	LOP	-
Miscellaneous Formal Findings or Determinations	-	FOR
No Permit Required	NPR	-
Programmatic General Permits	PGP	-
Regional General Permits	RGP	-
Standard Permit	SP	-
Wetland Identifications and Confirmations	-	WIC

Note: The individual permit (IP) term used in USACE analysis demonstrates the combination of standard permits (SP) and letters of permission (LOP). Additionally, the general permit (GP) term used in USACE analysis

demonstrates the combination of nationwide permits (NWP), regional general permits (RGP), and programmatic general permits (PGP). These actions were based on professional judgment and for this specific data analysis.

Letter of Permission: "Letters of permission are abbreviated individual permits. Once a process for their evaluation is established and published, they do not need to be changed unless conditions warrant…Each LOP issued is supported by an abbreviated environmental assessment, public interest review and Section 404(b)(1) guidelines concurrence determination…Once the District has determined that the application is complete, a description of the proposal will be posted on the District's web site…Notification of postings will be emailed to [federal and state agencies]...These agencies will have 10 days from being notified to inform the District that they wish to provide comments. In those cases where the agencies have informed the District that they wish to provide comments, they will have an additional 20 days to provide those comments to the designated project manager."

Standard Permit: "Regulated work under either Section 10 or Section 404 that is not covered by general permit or LOP procedures requires authorization under the Corps' standard individual permit process…Standard individual permits typically require a 30-day agency and public review and take 60 to 120 days or more." (from USACE website: https://www.mvp.usace.army.mil/Missions/Regulatory/Permitting-Process-Procedures/)

Work Type: USACE data provided "Worktype" which describes the category of the agency's action or review. Data was sorted by the first label of the work type, for example, "\Development \Industrial" was placed in the "Development" work type category. "\Transportation \Utility\Aerial" was placed in the "Transportation" work type category. This method condensed 220 individual work type labels provided by the Corps to 10 categories: Agriculture, Bank Stabilization, Dams, Development, Dredging, Energy/Mining, Mitigation/Restoration, Other, Structure, and Transportation. WDNR data did not originally include a "work type" category, therefore one was created (see Appendix C). The above method was also be applied to WDNR data using professional judgement and comparing the work type and categorical sorting methods presented in USACE data.

Days Old and Duration: USACE data for NHPA, ESA, and JD included a column labeled "Days Old" or "Duration" that represented the amount of time (in days) between the "Fed Comp Date" when the agency received the completed application request and when the agency took their final action ("End Date"). For a "Fed Comp Date" and "End Date" having the same date, the "Days Old" or "Duration" would be "1." For the USACE data sheet labeled "Corps Activity Data FFY18 and 19," which is a separate activity spreadsheet that does not include specific NHPA, ESA, or JD actions, a column representing "Days Old" or "Duration" was not provided and was therefore created using the formula [("End Date" – "Fed Comp Date") + 1] to account for same day decisions to be calculated as "1". This was also created for WDNR data, using the same formula of [("DECISION_DATE" – "APPLICATION_DATE") + 1].

Coordinates: Latitude and longitude coordinate data was provided by the USACE and WDNR. Coordinates were formatted (NAD83) to be successfully imported into ArcMap 10.6.1. Coordinates were plotted on a state county layer provided by the WDNR GIS Portal. Note: Not all WDNR data provided coordinates and were therefore not included within the final coordinate maps.

Side-by-Side Permit Comparisons: For additional analysis, permit application metrics were compared between the agencies. Using ArcMap 10.6.1 for intersecting permit coordinates (NAD83), followed by manual sorting, a list of approximately 492 permits were confidently "aligned." These permits serve to provide more information on the permit processes between agencies, and do not represent all permit applications.

When an applicant submits their permit application, both agencies have their own permit identification number for their database. However, there is no connecting permit identification that can link or align the permit between the two agencies, resulting in a tedious hand-sorting and matching method to align the same permit between agencies. USACE and WDNR permit ID numbers were connected via ArcMap GIS and manual sorting to compare permits side-by-side between the agencies for further detailed permit review during analysis. Sorting exclusions included permits that did not align and all duplicate permits.

3347 WDNR permits with coordinate information and 1300 USACE permits were plotted within ArcMap. USACE and WDNR permits within a 0.1 mile radius were intersected on ArcMap. The intersected permits resulted in a list of approximately 935 overlapping permits, which were then manually aligned between the two

agencies. Applicant names and information, as well as project descriptions were used to help align permits between agencies. Permit duplicates were removed by selecting permits with duplicate Docket_ID and Decision_Date (WDNR) and DA_Number and End_Date (USACE). After sorting, approximately 492 permits were confidently aligned (see Figure 4).

The difference in duration of review for each permit was calculated between the agencies. Any permits that had a difference in review duration less than or equal to 14 days were considered to have "relatively equal review time". The remaining permits were sorted into categories of "WDNR reviewed faster" and "USACE reviewed faster".

Note: Permit alignment between agencies was conducted using professional judgement, results may vary between analysts.

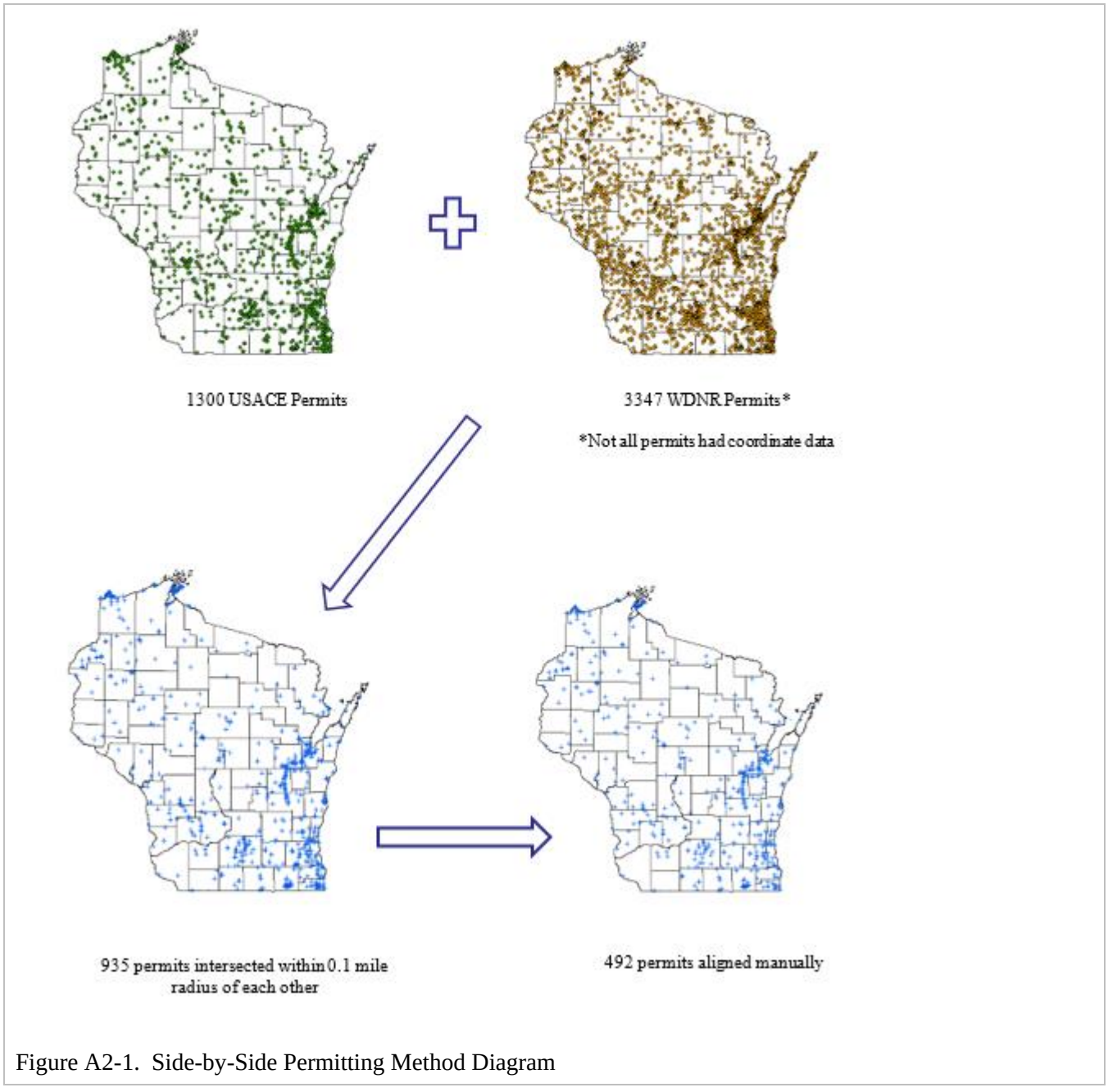


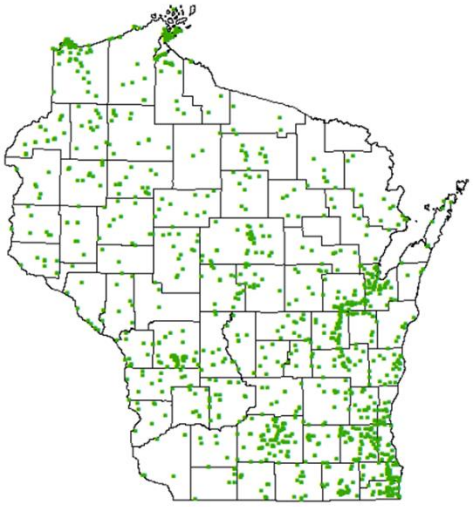
Figure A2-1. Side-by-Side Permitting Method Diagram

SECTION TWO: USACE PERMIT DATA ANALYSIS

USACE Data Criteria (see Appendix 2, Section Six)

Two years of permit data was requested, including project name, location, activity type, permit type, receipt date, incomplete date, complete date, and decision date. The request included similar information for exemption determinations, enforcement actions, and activities which do not require preconstruction notification (self-certifying activities) to the Corps. In addition to the points below, please refer to the enclosed "Action Data Information.pdf" (Appendix 2B), which explains the data fields.

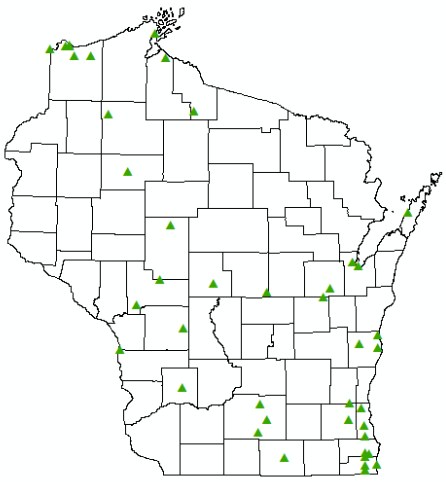
- The data provided includes actions that were ultimately withdrawn. It also includes multiple permits for a single project. For instance, for linear projects like transportation or utilities, national procedures require that each separate wetland or waterway impact be recorded in the database as a separate permit action. It is important to understand how these facts affect data interpretation such as averages or totals.
- The timeframes shown include time required to ensure compliance with other federal laws, including ESA and NHPA. It also includes time outside Corps control, such as waiting for information from an applicant, which is often the largest component of a permit timeframe. Timeframes vary widely due to varying requirements for federal, state, or tribal consultations. Timeframes also reflect varying priorities on the part of applicants; the Corps considers applicants' schedules when prioritizing evaluations.
- Many authorizations are not recorded in the database. In the last year, the Corps implemented a new streamlining procedure that includes contacting applicants by phone to determine if they want a written response when their proposal is authorized by a self-certifying general permit. Most applicants do not request a response and those authorizations are not recorded in the database. This eliminates more than 1,000 of the most timely and efficient authorizations from the data each year, which influences any data roll-ups.
- The timeline for a Corps decision varies widely based on the level of review required. Individual Permits (including standard permits and letters of permission) involve the most rigorous review and include many additional actions to reach a permit decision. Due to the development of new general permits in the last two years, 97% of activities are now authorized by general permits. That leaves only the most complex proposals to be covered by individual permit, which is reflected in the timeframes.
- Corps exemptions never require confirmation from our agency and the Corps uses a strategy similar to that for self- certifying permits; that is, calling the requestor to determine if they would like a written response. Most decline a written response and those actions are not reflected in the data.
- Aggregating the data for the previous two years masks the effects of numerous streamlining efforts implemented during that time, many of which are just now taking effect. Funding constraints and staffing shortages would be expected to increase permit timeframes. However, streamlining measures have resulted in a 30% reduction in the number of written permit authorizations, and resulted in timeframes being reduced by 13% for general permits, 18% for letters of permission, and 30% for standard individual permits. Additional streamlining measures currently being implemented are expected to reduce timeframes further. This reduction in permit timeframes is more notable considering that over 1,000 of the most timely and efficient authorizations are self-certifying and not included in the data. Were those authorizations included timeframe comparisons to prior years would reveal much more dramatic decreases.



Counties with the most USACE GPs Reviews in FFYs 2018-2019

1) Ashland – 118
2) Dane – 69
3) Monroe – 66
4) Brown – 62
5) Waukesha - 53

Figure A2-2. USACE GPs (n-1257)



Counties with the most USACE IPs Reviews in FFYs 2018-2019

1) Douglas - 6
2) Kenosha - 4
3) Racine - 4

Figure A2-3. USACE IPs (n-43)

USACE Permit Review Types (not including self-certified GPs)			
	Type	Count	Total
GP	NWP	783	1257
	PGP	5	
	RGP	469	
IP	LOP	28	43
	SP	15	
Total		1300	

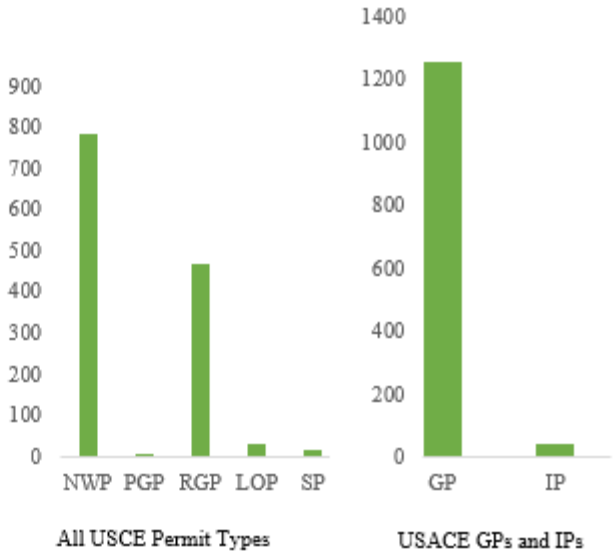


Figure A2-4. Break down of the different USACE permit types for FFYs 2018-2019

USACE GP Reviews, Self-Certifying		
	Excludes "self-certifying" GP's	Includes "self-certifying" GP's
Total GP	1257	2793*
Total IP	43	43
Total	1300	2836

* 1536 self-certifying GP's

Self-Certifying GPs: a pre-construction notification (PCN) was not required for the general permit and did not require Corps review

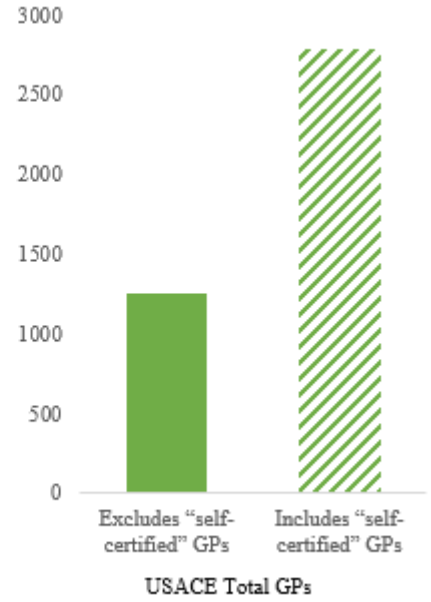


Figure A2-5. USACE General Permits and General Permits including "self-certified" permits.

USACE Duration of Review (Days)					
	Type	Average	Median	Minimum	Maximum
GP*	NWP	74	62	1	575
	PGP	12	14	1	17
	RGP	76	60	1	419
IP	LOP	138	139	18	260
	SP	194	161	104	350
* excludes self-certifying GPs					

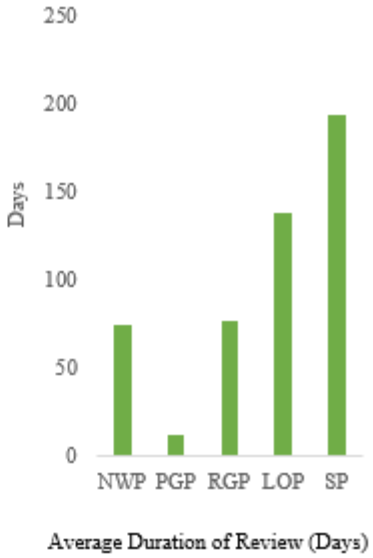


Figure A2-6. Detailed Table and Graph of USACE Permit Processing Times (i.e., Duration)

USACE Duration of Review (Days)				
	Average	Median	Minimum	Maximum
GP*	75	60	1	575
IP	158	142	18	350
* excludes self-certifying GPs				

Figure A2-7. USACE permit processing duration for GPs and IPs

Distribution of GP Review Duration		
Duration	Count	%
1-30	259	20.6%
31-60	371	29.5%
61-90	235	18.7%
91-120	189	15.0%
121-180	149	11.9%
181-240	28	2.2%
241-365	21	1.7%
365+	5	0.4%
Total*	1257	

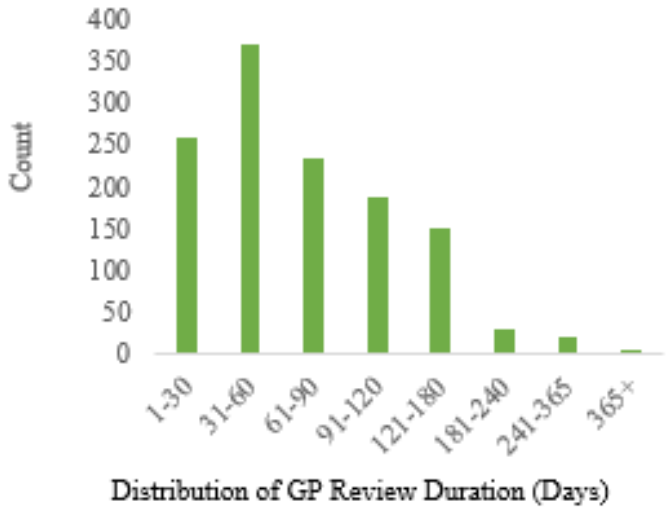


Figure A2-8. USACE distribution of GP permit review duration (days)

Distribution of IP Review Duration		
Duration	Count	%
1-30	1	2.3%
31-60	1	2.3%
61-90	4	9.3%
91-120	10	23.3%
121-180	15	34.9%
181-240	6	14.0%
241-365	6	14.0%
365+	0	0.0%
Total*	43	

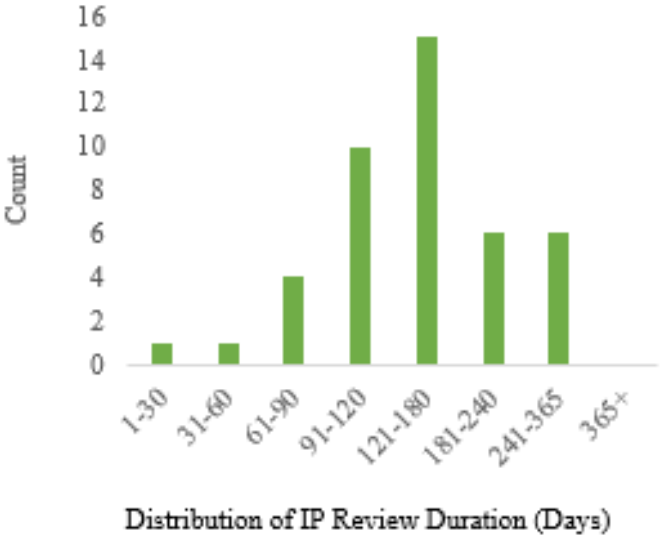


Figure A2-9. USACE distribution of IP permit review durations (days)

USACE NWP 45-Day Review	
	Count
NWPs reviewed within 45 days	287
NWPs reviewed outside of 45 days	496
Total USACE NWP Reviews*	**783**

*excludes self-certifying GPs

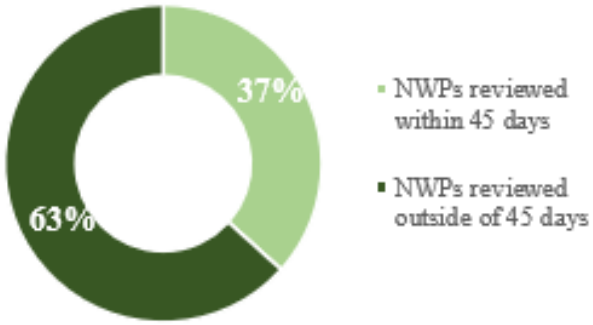


Figure A2-10. The number and percentage of USACE GP processed withing 45 days

Table A2-4. GP Permits and Consultations							
	Count[1]	**%[2]**	**Average Permit Review Duration (days)**	**Average Duration of Consult (days)**	**Difference (days)[3]**	**Average Duration (days) to Complete One Permit Review[4]**	**Average Amount of Permit Reviews Reviewed per day[5]**
ESA Consultation	61	4.9%	86	57	29	1.4	0.7
JD Consultation	106	8.4%	82	82	1	0.8	1.3
NHPA Consultation	508	40.4%	103	83	20	0.2	4.9
No Additional Consultation	694	55.2%	55	-	-	0.1	12.6
Total[6]	**1369**						

Table A2-5. IP Permits and Consultations							
	Count	**%[2]**	**Average Permit Review Duration (days)**	**Average Duration of Consult (days)**	**Difference (days)[3]**	**Average Duration (days) to Complete One Permit Review[4]**	**Average Amount of Permit Reviews Reviewed per day[5]**
ESA Consultation	8	18.6%	111	68	43	13.9	0.1
JD Consultation	8	18.6%	105	104	1	13.1	0.1
NHPA Consultation	24	55.8%	156	97	59	6.5	0.2
No Additional Consultation	12	27.9%	186	-	-	15.5	0.1
Total[6]	**52**						

[1] excludes self-certifying GPs
[2] Count / 1257 GPs and Count / 43 IPs
[3] Average Permit Review Duration – Average Duration of Consult
[4] Average Permit Review Duration / Count
[5] Count / Average Permit Review Duration
[6] Includes permits with multiple consultations

Note: Only FFY 2018 ESA data provided by USACE for analysis

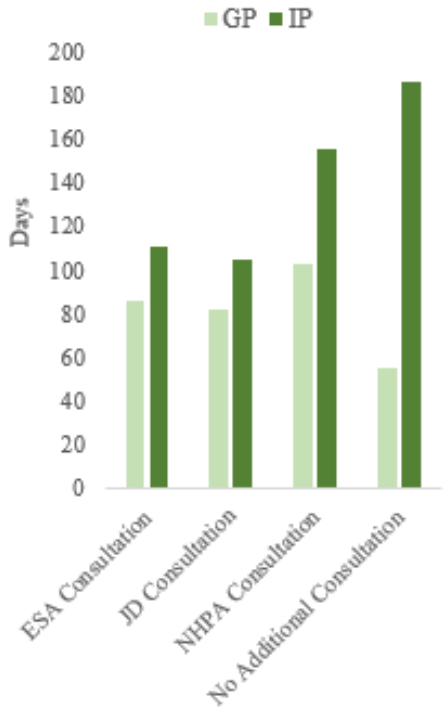


Figure A2-11. Comparing Average Permit Review Duration (days) by Permit Type

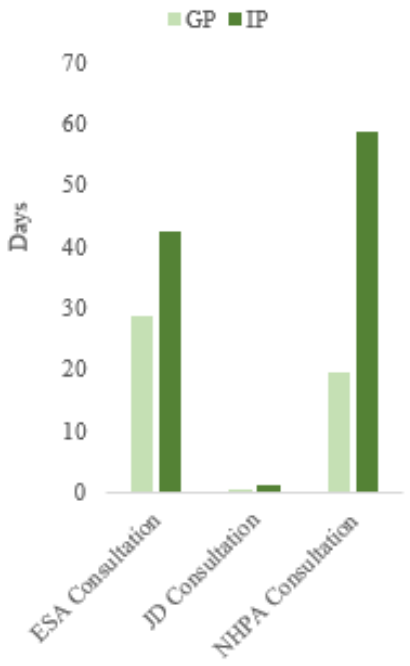


Figure A2-12. Comparing Difference in Average Permit Review Duration and Average Consult Duration (Permit Review Duration Outside of Consult Period)

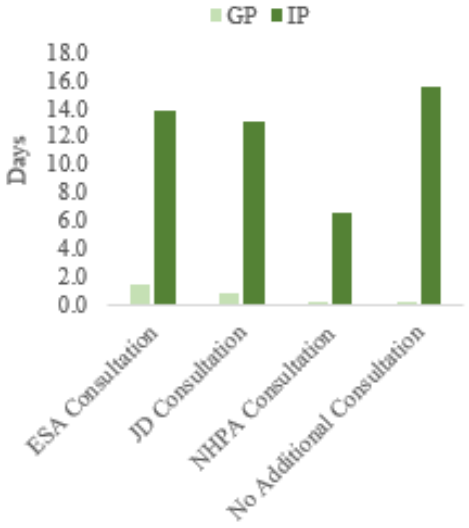


Figure A2-13. Comparing Average Duration (days) to Complete One Permit Review

Table A2-6. Consultations for NWPs Reviewed within 45 days			
	Count	**%****	**Average Permit Review Duration (Days)**
ESA Consultation	5	1.7%	22
JD Consultation	21	7.3%	24
NHPA Consultation	48	16.7%	29
No Additional Consultation	222	77.4%	28
Total*	**296**		
*Includes permits with multiple consultations, excludes self-certifying GPs **Count/287 NWPs reviewed within 45 days			

Table A2-7. Consultations for NWPs Reviewed outside of 45 days			
	Count	**%****	**Average Permit Review Duration (Days)**
ESA Consultation	32	6.5%	107
JD Consultation	43	8.67%	110
NHPA Consultation	283	57.1%	115
No Additional Consultation	200	40.3%	82
Total	**558***		
* Includes permits with multiple consultations, excludes self-certifying GPs **Count/496 NWPs reviewed outside of 45 days			

Table A2-8. USACE GP Work Type	
	Count
Agriculture	7
Bank Stabilization	250
Dams	7
Development	347
Dredging	8
Energy/Mining	2
Mitigation/Restoration	162
Other	2
Structure	123
Transportation	349
Grand Total	**1257**

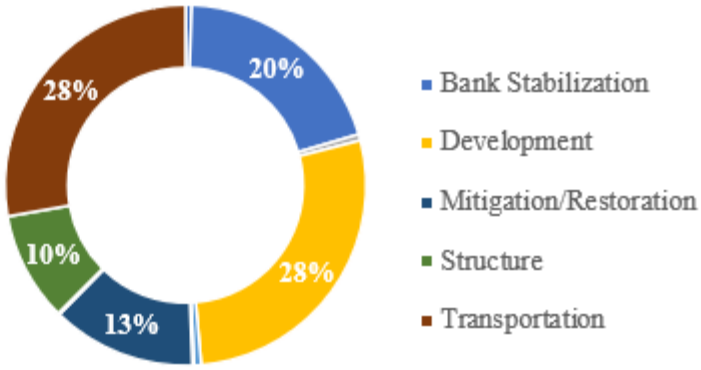


Figure A2-14

Table A2-9. USACE IP Work Type	
	Count
Bank Stabilization	3
Dams	2
Development	20
Dredging	4
Mitigation/Restoration	3
Other	1
Structure	2
Transportation	8
Grand Total	**43**

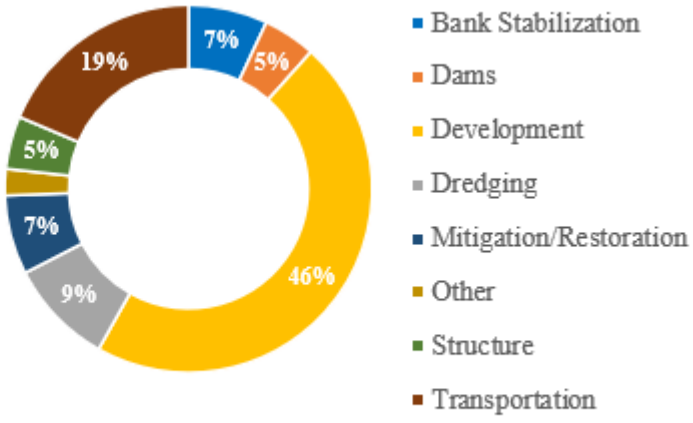
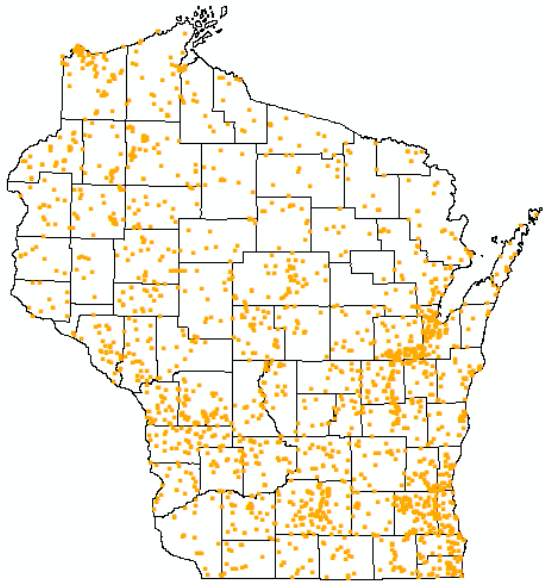


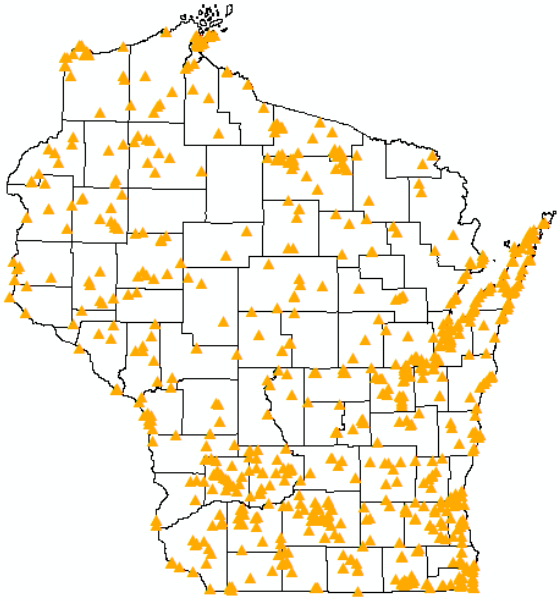
Figure A2-15



Counties with the most WDNR GPs Reviews in FFYs 2018-2019

1) Dane – 157
2) Douglas – 152
3) Brown – 129
4) Waukesha – 109
5) Outagamie - 109

Figure A2-16. DNR GPs (n-1257)



Counties with the most WDNR GPs Reviews in FFYs 2018-2019

1) Door – 119
2) Dane – 60
3) Brown – 53
4) Walworth – 51
5) Ashland - 46

Figure A2-17. DNR Individual Permits with lat/long coordinates in the data base (n-890)

WDNR Permit Reviews Type		
	Count	**%**
EXE	871	15.4%
FOR	2	0.035%
GP	3301	58.4%
INF	4	0.071%
IP	1178	20.9%
WIC	293	5.19%
Total	**5649**	

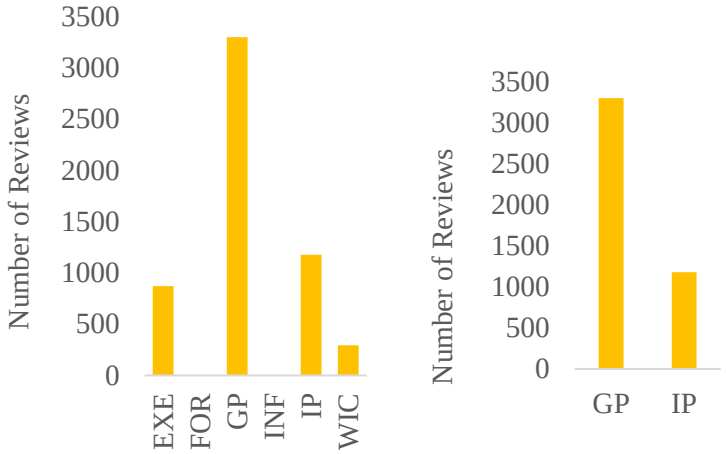
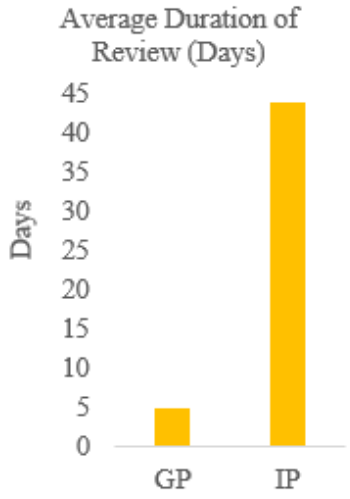


Figure A2-18. Break down of the different DNR permit types for FFYs 2018-2019



WDNR Duration of Review (Days)					
	Count	**Average**	**Median**	**Minimum**	**Maximum**
GP	3301	5	1	1	173
IP	1178	44	42	1	366

Figure A2-19. WDNR permit processing duration for GPs and IPs

Distribution of GP Review Duration		
Duration	**Count**	**%**
1-30	3222	97.6%
31-60	70	2.12%
61-90	3	0.091%
91-120	3	0.091%
121-180	3	0.091%
181-240	0	0.00%
241-365	0	0.00%
365+	0	0.00%
Total	**3301**	

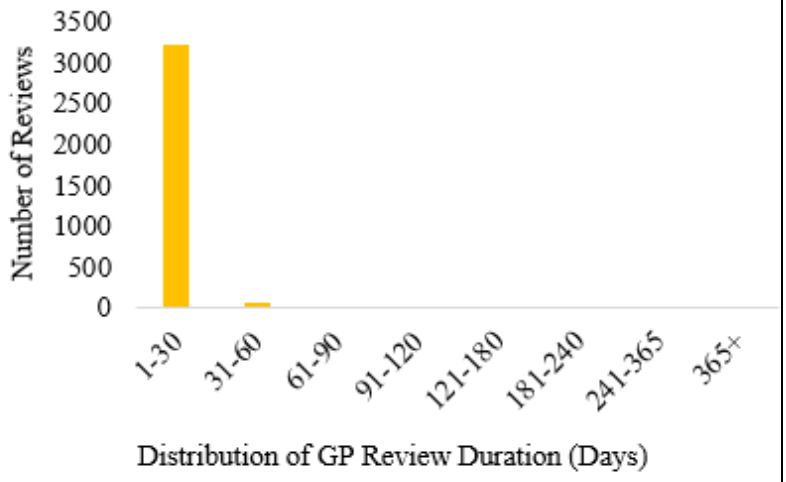


Figure A2-20. WDNR distribution of GP permit review duration (days)

Distribution of IP Review Duration		
Duration	**Count**	**%**
1-30	226	19.2%
31-60	703	59.7%
61-90	194	16.5%
91-120	36	3.06%
121-180	15	1.27%
181-240	1	0.085%
241-365	2	0.170%
365+	1	0.085%
Total	**1178**	

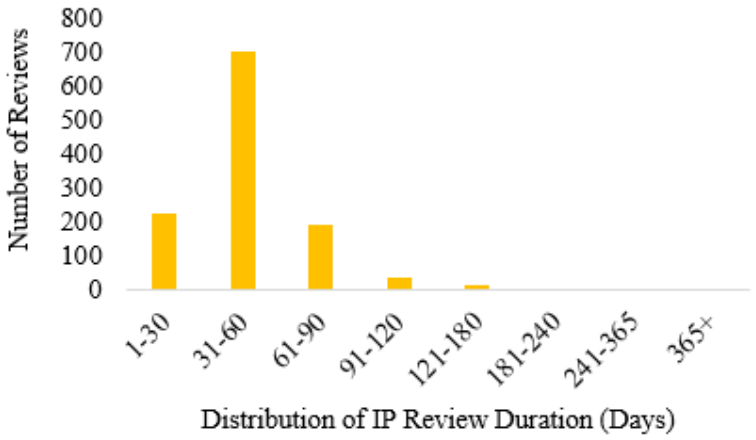


Figure A2-21. WDNR distribution of IP permit review duration (days)

WDNR GP Work Type		
	Count	%
Bank Stabilization	381	11.5%
Dam	12	0.364%
Development	1050	31.8%
Dredging	136	4.12%
Mitigation/Restoration	455	13.8%
NA (Wetland Fill Superior-SAMP)	10	0.303%
Other	3	0.091%
Structure	483	14.6%
Transportation	771	23.4%
Grand Total	**3301**	

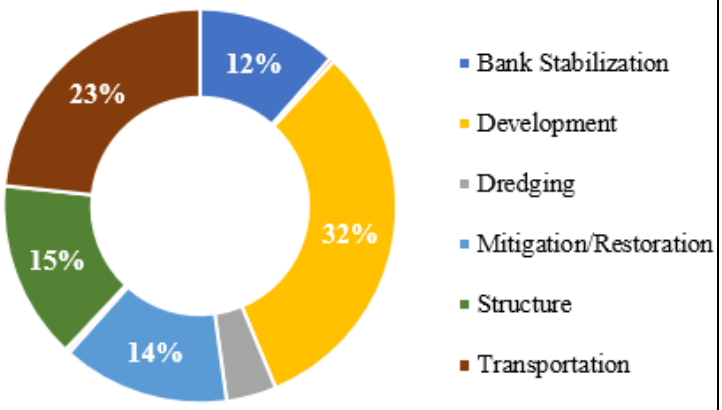


Figure A2-22

WDNR IP Work Type		
	Count	%
Bank Stabilization	368	31.2%
Dam	31	2.63%
Development	110	9.34%
Dredging	126	10.7%
Mitigation/Restoration	22	1.87%
NA (114 Wetland IP, 5 WQC)	118	10.0%
Structure	374	31.7%
Transportation	29	2.46%
Grand Total	**1178**	

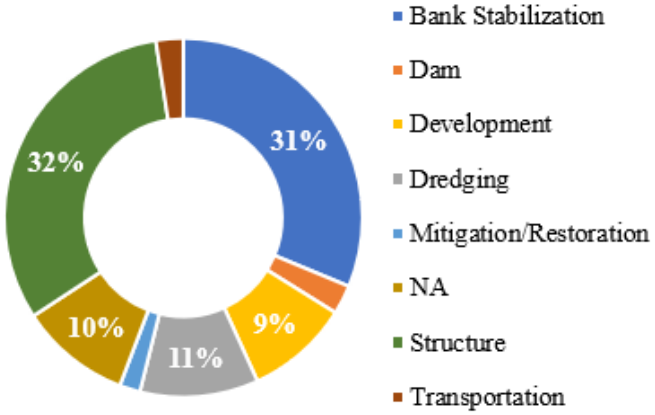


Figure A2-23

Comparing USACE & WDNR GPs and IPs			
	GP	IP	Total Count
USACE	1257*	43	1300
WDNR	3301	1178	4479

*Excludes self-certifying GPs

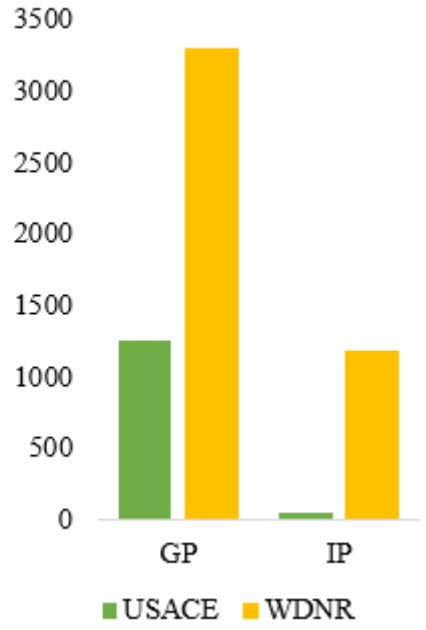
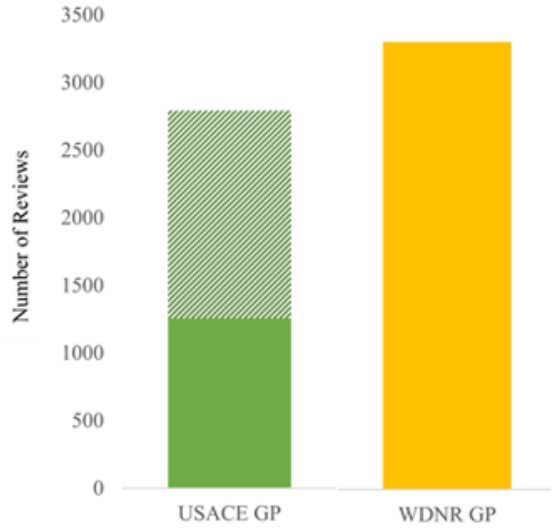


Figure A2 – 24. Comparison of USACE and WDNR Permit Numbers for FFYs 2018-2019



Comparing Types of GPs		
	GP (excluding self-certifying GPs)	GP (including self-certifying GPs)
USACE	1257	2793*
WDNR	3301	NA

*1536 self-certifying GPs

Figure A2-25. WDNR and USACE GP Permit Numbers with USACE self-certifying GPs

Comparing Duration of Review (Days)					
	Count	Average	Median	Minimum	Maximum
USACE GP	1257*	75	60	1	575
USACE IP	43	158	142	18	350
WDNR GP	3301	5	1	1	173
WDNR IP	1178	44	42	1	366

*Excludes self-certifying GPs

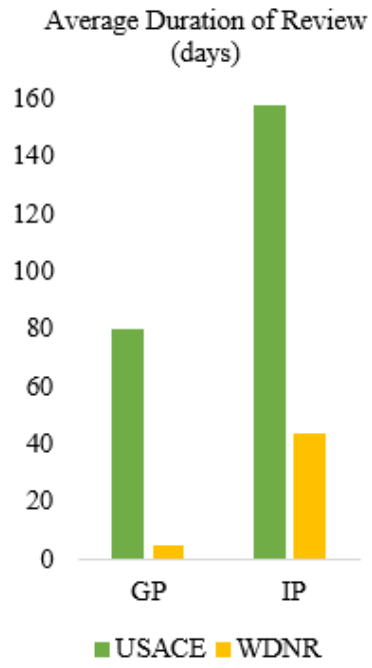
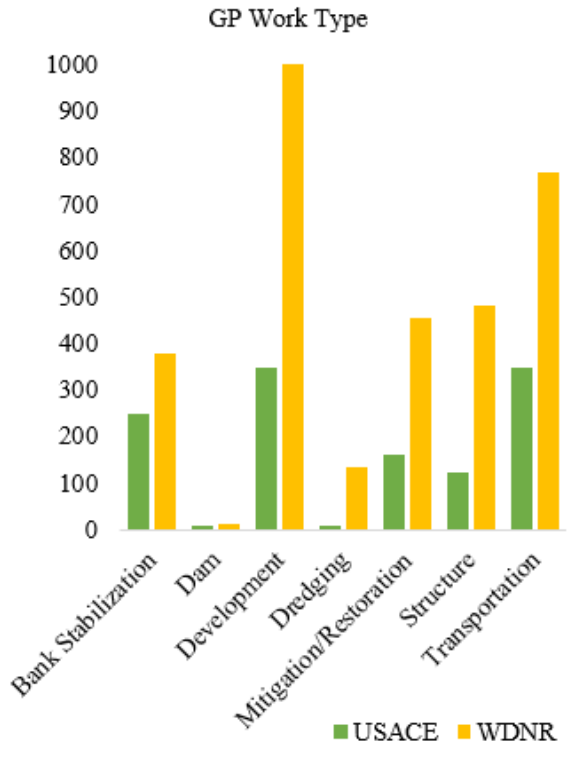


Figure A2-26. Comparison of USACE and WDNR Permit Review Duration (days) for FFYs 2018 - 2019



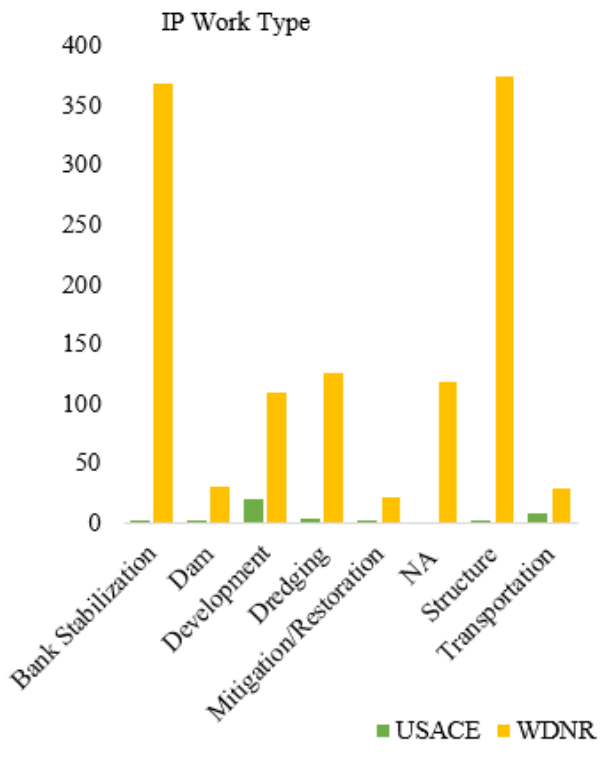


Figure A2-27. Comparison of USACE and WDNR number of GP and IP permit types for FFYs 2018-2019.

Table A2 – 8. Comparing Current Staff Numbers	**USACE**	**WDNR**
Estimated Number of Agency Staff Assigned to Review Section 404 Permit Applications	26*	42.5**

* USACE has 65 approved positions for WI/MN regulation, with maximum of 20% of these positions not filled: 65 staff x 20% = 52 staff for WI/MN. Assume equal allocation of resources for each state, therefore 26 staff members for WI review

** 22.5 WDNR staff from Waterway and Wetland Bureau permitting team, 20 WDNR staff from Environmental Analysis and Sustainability (EAS) Bureau permitting team. Excludes ENF staff numbers.

Review Duration by Agency		
	Count	%
WDNR Faster Review Time	387	78.7%
USACE Faster Review Time	26	5.28%
Relatively Equal Review Time (within 14 days)	79	16.1%
Total Side-by-Side Permits	492	

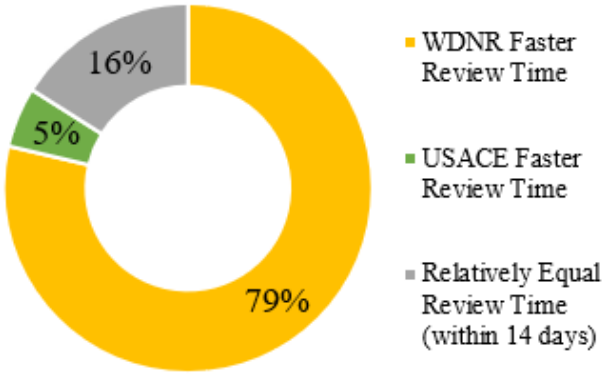


Figure A2-28. Comparison of USACE and WDNR Permit Processing Duration for the same projects

WDNR Faster Review by Agency Definition		
	WDNR Permit	USACE Permit
GP	292	372
IP	86	15
Total	378*	387

* Omits 7 WIC permits, 2 EXE permits

USACE Faster Review by Agency Definition		
	WDNR Permit	USACE Permit
GP	1	25
IP	25	1
Total	26	26

Relatively Equal Review Time by Agency		
	WDNR Permit	USACE Permit
GP	41	77
IP	38	2
Total	79	79

Figure A2-29. Detailed breakdown by permit type of the permit categories based upon processing duration.

Table A2 – 9. Comparing Permits with Consultations for Side-by-Side Permits

	Total Permit Count	ESA	JD	NHPA	Total Number of Consults*	% Permit will have a Consult[2]	Permits with No Additional Consult	% Permit with No Additional Consult[3]
WDNR Faster	387	22	34	196	252	65.1%	175	45.2%
USACE Faster	26	1	1	6	8	30.8%	19	73.1%
Relatively Equal Review Time	79	3	8	15	26	32.9%	60	75.9
Total Side-by-Side Permits	**492**	**26**	**43**	**217**	**286**	**58.1%**	**254**	**51.6%**

* Includes permits with multiple consultations
Note: Only FFY 2018 ESA USACE data was available
[2] Total Number of Consults / Total Permit Count
3 Permits with No Additional Consult / Total Permit Count

Table A2-10. Comparing NHPA Consultations for Side-by-Side Permits

	Total Permit Count	Total Number of Consults*	Total Number of Permits with NHPA Consultations	% of Consults with NHPA[2]	Average NHPA Consultation Duration (days)	Average Duration to Complete NHPA Consultation (days)[3]	Average Amount of NHPA Consultations Reviewed per Day[4]
WDNR Faster	387	252	196	77.8%	83	0.4	2.4
USACE Faster	26	8	6	75.0%	34	5.7	0.2
Relatively Equal Review Time	79	26	15	57.7%	77	5.1	0.2
Total Side-by-Side Permits	**492**	**286**	**217**	-	-	-	-

* Includes permits with multiple consultations
[2] Total Number of Permits with NHPA Consultations / Total Number of Consults
[3]Average NHPA Consultation Duration (days) / Total Number of Permits with NHPA Consultations
[4] Total Number of Permits with NHPA Consultations / Average NHPA Consultation Duration (days)

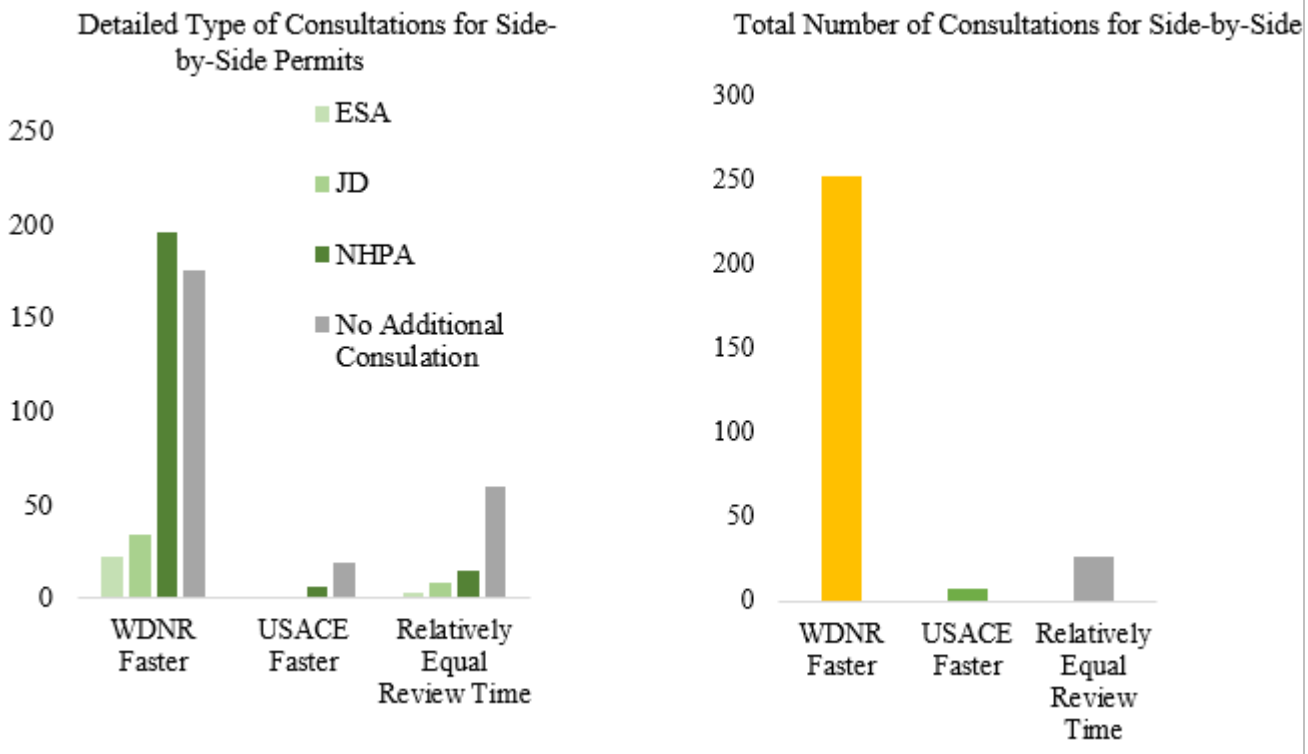


Figure A2-30. Break down of Permit Processing Duration for different types of USACE consultations for side-by-side permits.

SECTION SIX: USACE §404 Feasibility Response January 21, 2020

DEPARTMENT OF THE ARMY
ST. PAUL DISTRICT, CORPS OF ENGINEERS
180 FIFTH STREET EAST, SUITE 700
ST. PAUL, MN 55101-1678

REPLY TO ATTENTION OF
REGULATORY BRANCH

21 January 2020

Dear Ms. Minks:

Enclosed is the information requested by the Wisconsin Department of Natural Resources (WDNR) to support a feasibility study (study) regarding assumption of the Corps of Engineers (Corps) Section 404 Clean Water Act (§404) program in Wisconsin.

RETAINED WATERS: Information on retained waters was not part of the request made to our agency; however, the extent of retained §404 waters is integral to any consideration of assumption.

Under federal law, there are certain waters over which the Corps retains §404 permit jurisdiction in the event of a state or tribal assumption of the §404 program. Waters retained by the Corps are "those waters which are presently used, or are susceptible to use in their natural condition or by reasonable improvement as a means to transport interstate or foreign commerce shoreward to their ordinary high water mark, including all waters which are subject to the ebb and flow of the tide shoreward to their mean high water mark, or mean higher high water mark on the west coast, including wetlands adjacent thereto".[1] We acknowledge that additional clarity is critical to determine the extent of these waters. The United States Environmental Protection Agency (USEPA) is promulgating regulations to provide more clarity, but absent further 404(g) proceedings, the limit of retained waters is subject to existing regulation, case law and memoranda. The latter of these tools offers a good starting point for evaluating the extent of retained waters, but do not carry the force of law and do not replace interagency coordination required between our agencies to agree upon the extent of waters retained.[2] We request that the study clarify that the extent of retained waters was derived independently by the WDNR, and is subject to refinement based on future coordination with the Corps, as appropriate.

CORPS REGULATORY OPERATING BUDGET AND STAFF: Work planning documents for two years were requested, including staff, budgets, administrative support and training. Ultimately, this request was distilled to information about the time and money necessary to run the Corps Wisconsin program annually.

The Department of the Army (DA) regulatory program is one of the oldest in the Federal Government. Time, changing public needs, evolving policy, case law, and new statutory mandates have changed the complexion of the program, adding to its breadth and complexity. Our agency remains committed to protecting Wisconsin's aquatic resources and navigation capacity, while allowing reasonable development through fair and balanced decisions.

- Historically, the Corps devotes roughly 80% of its resources to permit related activities, with approximately 10% to enforcement, and 10% to compliance. When funding is limited, as it has been in recent years, these percentages skew to favor permit related activities. Training varies from year to year and is based on need. On average, training constitutes approximately 5% of our resources.
- The Corps regulatory program has received an operating budget ranging between 7.6 and 8.5 million dollars in each of the last six fiscal years. The Corps regulatory program covers all of Minnesota and Wisconsin. Resources are not allocated by state, but are

[1] 33 USC Section 1344(g)(1).
[2] See note at 40 CFR S233.11 – "Note, States should obtain from the Secretary an identification of those waters of the U.S. within the State over which the Corps retains authority under section 404(g) of the Act."

roughly distributed evenly between the two states. However, that level of funding is not adequate to provide the service and responsiveness that the public expects and that we were able to provide in the past.

- The Corps has 65 approved positions to implement the regulatory program in Wisconsin and Minnesota. However, resource constraints in recent years have prevented 10% to 20% of those positions from being filled.

JURISDICTIONAL DETERMINATIONS (JDs): Information about JDs was requested, including the JD request date and assigned project managers or location.

The enclosed spreadsheet "WI_final_jds_FY18and19.xlsx" provides the requested information. The JD data includes all formal, approved JDs, and many of the preliminary JDs and wetland delineation reviews completed in FY18 and FY19. The following points are important to understanding the JD data provided:

- Approved jurisdictional determinations (AJDs) are tools used by the Corps to help implement §404. AJDs specify what geographic areas will be subject to regulation by the Corps.
- The preparation of JDs is discretionary and Corps regulations do not create a right to a JD. Corps Districts set reasonable priorities based on workload and available regulatory resources. The primary value of an AJD is to identify resources that are not subject to Corps regulation, thereby reducing, expediting, or eliminating a Corps permit process. Because an AJD is not required to support a permit decision, only those that simplify a Corps permit process are prioritized.
- The JD data provided does not represent all the work our agency completes to assess jurisdiction. Jurisdiction is evaluated as part of every permit review, but only formally documented in an AJD when it simplifies the permit process for the applicant. Because the vast majority of permits do not include a formal AJD, the majority of work associated with evaluating jurisdiction is not represented in the JD data.
- The JD data does not include reasons for the duration of the reviews. Duration is influenced by the size and complexity of the site, informational needs, need for a field inspection, seasonal constraints, and the urgency of the project to the applicant. The duration shown also includes time outside the Corps control.
- In early 2018, the Corps documented a tripling in the number of AJD requests in WI, as a result of 2017 Wisconsin Act 183. To address that unanticipated and unfunded workload, Corps project managers began contacting each requestor to discuss their submittal and advise if an AJD is likely to reduce, expedite, or eliminate the Corps regulatory process. If so, the Corps would complete an AJD. If not, the requestor would generally retract their request in order to expedite permitting. In the cases where the request was retracted, it was not recorded in our database.
- Many of the AJDs shown in the JD data identify the waters type (column "O") as upland, yet there are 1 or more waters listed in column "L." This is not a discrepancy or error, but a result of database limitations. In these cases, "upland" may represent a wetland that is not subject to Corps regulation, such as prior converted cropland designated by NRCS.
- The JD data shows a continued trend to reduce the number of wetland delineations that our agency completes. This decline is a result of the need to strategically prioritize which services we provide to the public. The Corps has increasingly leveraged the work of the WDNR Wetland Identification program. As a general rule, we accept boundaries that have been field reviewed by WDNR staff, allowing our agency to focus on permitting.

- When jurisdictional evaluations are performed on multiple waters on site, they are consolidated into a single entry in the Corps database if the evaluation outcome is the same. Therefore, many entries in the JD data represent more than one evaluation. Refer to column "L" to see how many waters were reviewed for each action entered.

ACTIVITY DATA: Two years of permit data was requested, including project name, location, activity type, permit type, receipt date, incomplete date, complete date and decision date. The request included similar information for exemption determinations, enforcement actions, and activities which do not require preconstruction notification (self-certifying activities) to the Corps.

The enclosed spreadsheet "Corps Activity Data FY18 and 19.xlsx" provides the requested information. In addition to the points below, please refer to the enclosed "Action Data Information.pdf", which explains the data fields.

- The data provided includes actions that were ultimately withdrawn. It also includes multiple permits for a single project. For instance, for linear projects like transportation or utilities, national procedures require that each separate wetland or waterway impact be recorded in the database as a separate permit action. It is important to understand how these facts affect data interpretation such as averages or totals.
- The timeframes shown include time required to ensure compliance with other federal laws, including ESA and NHPA. It also includes time outside Corps control, such as waiting for information from an applicant, which is often the largest component of a permit timeframe. Timeframes vary widely due to varying requirements for federal, state, or tribal consultations. Timeframes also reflect varying priorities on the part of applicants; the Corps considers applicants' schedules when prioritizing evaluations.
- Many authorizations are not recorded in the database. In the last year, the Corps implemented a new streamlining procedure that includes contacting applicants by phone to determine if they want a written response when their proposal is authorized by a self-certifying general permit. Most applicants do not request a response and those authorizations are not recorded in the database. This eliminates more than 1,000 of the most timely and efficient authorizations from the data each year, which influences any data roll-ups.
- The timeline for a Corps decision varies widely based on the level of review required. Individual Permits (including standard permits and letters of permission) involve the most rigorous review and include many additional actions to reach a permit decision. Due to the development of new general permits in the last two years, 97% of activities are now authorized by general permits. That leaves only the most complex proposals to be covered by individual permit, which is reflected in the timeframes.
- Corps exemptions never require confirmation from our agency and the Corps uses a strategy similar to that for self-certifying permits; that is, calling the requestor to determine if they would like a written response. Most decline a written response and those actions are not reflected in the data.
- Aggregating the data for the previous two years masks the effects of numerous streamlining efforts implemented during that time, many of which are just now taking effect. Funding constraints and staffing shortages would be expected to increase permit timeframes. However, streamlining measures have resulted in a 30% reduction in the number of written permit authorizations, and resulted in timeframes being reduced by 13% for general permits, 18% for letters of permission, and 30% for standard individual

permits. Additional streamlining measures currently being implemented are expected to reduce timeframes further. This reduction in permit timeframes is more notable considering that over 1,000 of the most timely and efficient authorizations are self-certifying and not included in the data. Were those authorizations included, timeframe comparisons to prior years would reveal much more dramatic decreases.

ENDANGERED SPECIES ACT (ESA) COMPLIANCE: A list of projects and labor hours or cost spent to comply with the ESA was requested.

Section 7 of the ESA requires federal agencies to ensure that actions they authorize, fund, or carry out do not jeopardize the existence of any species listed under the ESA, or destroy or adversely modify designated critical habitat of any listed species. This requires that our agency determine effects of proposed actions and consult with the U.S. Fish & Wildlife Service (USFWS), which often extends Corps review timeframes.

The data shown in the enclosed spreadsheet "WI_ESA_FY17 and 18.xlsx" provides information about the number of consultations completed between 1 October 2016 and 30 September 2018 (the most recent time period for which cost information is available). The data includes information on the start and end date of consultation, the project subject to consultation, and location information. It does not include species data, and does not differentiate projects which required consultation for multiple species unless there were different outcomes.

- Cost information is not available for WI only. Cost per action varies widely based on the determination of effect and level of consultation completed, when required. The costs to comply with the ESA were approximately $178,330.00 in FY17, and $90,928 in FY18, with those costs believed to be divided equally between MN and WI.
- The data shown does not represent all the work completed by the Corps to comply with the ESA. Evaluations are done for all projects for which written authorization is required. However, the data only reflects those actions where coordination was required to ensure compliance.
- The durations shown reflect not only Corps processing times, but also timeframes the Corps is unable to influence, such as the time project sponsors required to collect information and prepare documents necessary for consultation, or USFWS review and response. All consultation actions listed include mandatory USFWS review timelines, the shortest being 30 days after sufficient information is available to assess effects.

NATIONAL HISTORIC PRESERVATION ACT (NHPA): The request included information about actions required to comply with the NHPA.

Section 106 of the NHPA requires the Corps take into account the effect of our permit on any district, site, building, structure, or object that is included in or eligible for inclusion in the National Register of Historic Places. The Corps is also required to consult with any Indian tribe that attaches religious and cultural significance to properties which may be affected by our regulatory action. The data on spreadsheet "NHPA WI FY18 and 19.xlsx" only reflects those actions where higher level coordination or consultation was required as part of our NHPA compliance procedures.

- The data shown does not track all the work completed by the Corps to comply with the NHPA. Similar to ESA, the Corps screens all projects which for which written

authorization is required. The data provided only reflects those actions where screening identified the need for higher level coordination or consultation to ensure compliance.

- The processing timeframes shown include time the Corps is unable to influence, such as the time project sponsors spend collecting information and preparing documents necessary for State or Tribal Historic Preservation Office review and response. When consultation is required, a minimum of 30 days is allowed for the external partner to respond. When the action requires preparation of a Memorandum of Agreement (MOA), the timeline also includes the days spent in developing and obtaining MOA approval.

PROGRAMMATIC GENERAL PERMIT OPPORTUNITIES: The request included a list of State Programmatic General Permits (PGPs) that the Corps anticipates would be useful in Wisconsin.

The Corps utilizes general permits for 97% of the authorizations in WI, including Nationwide General Permits (NWP), Regional General Permits (RGP), and PGPs. A PGP is a type of general permit that is issued by the Corps and designed to eliminate duplication of effort between Corps districts and other state or local regulatory programs that provide similar protection to aquatic resources.

A PGP must be based on a state or local evaluation that is at least as stringent as the Corps review. A PGP could not be issued for an activity that is not regulated by the state or is eligible for a State permit exemption. A PGP is also not an effective tool when it creates uncertainty, such as for categories of activities that require a case-by-case assessment of whether the activity is exempt from state regulation, or the waters are exempt from state regulation, or the location obviates the need for a state permit (e.g. on Native American reservations).

Corps authorizations require compliance with the ESA and NHPA. State regulation does not require compliance with these acts. PGPs are less efficient if the Corps has to conduct case-by-case ESA and NHPA reviews for activities otherwise authorized by a PGP.

The Corps currently authorizes many minor activities using self-certifying general permits, meaning applicants do not need to contact the Corps provided they comply with the conditions of the general permit. Developing a PGP for these activities would not increase efficiency.

The Corps continually looks for additional ways to streamline our processes and simplify authorizations for applicants. We will continue to work with WDNR staff to explore opportunities for developing PGPs. The current regulatory framework is such that there are opportunities for the State to leverage permit evaluations conducted by the Corps. The Corps utilizes general permits for activities affecting up to 0.5 acre, while state general permits generally have an upper limit of 10,000 square feet (0.23 acre). This provides an opportunity for the state to leverage the reviews conducted by the Corps for activities between 0.23 and 0.5 acre, which currently require an individual permit from the state.

ENFORCEMENT: Enforcement data including actions, labor hours or cost spent was requested. Action data is included in the spreadsheet "Corps Activity Data FY18 and 19.xlsx."

- Recent funding levels have not been adequate to provide the service and responsiveness that the public expects and that the Corps was able to provide in the past. As a result, the Corps has been forced to prioritize non-discretionary work, namely permits, and de-prioritize discretionary work such as compliance and enforcement activities.

Operations - Regulatory

- The cost of our Wisconsin enforcement program in each of FY18 and FY19 (including overhead, leave, labor, and benefits) is estimated to have been less than $20,000 per year. This is considerably less than the general target of approximately 10% of our operating budget.
- In recent years, it has become more common for our agency to leverage and support the enforcement efforts undertaken by both MN and WI.
- The durations shown reflect not only Corps processing times, but also timeframes the Corps is unable to influence, such as seasonal constraints for investigations and the time project sponsors expend to collect information.

Thank you for the opportunity to provide information regarding the Corps regulatory program in Wisconsin. We look forward to continuing to work with Wisconsin to identify opportunities to improve service to stakeholders while protecting Wisconsin's wetlands and waterways. If you have any questions, please do not hesitate to contact me at (651) 290-5728, or via email at rebecca.m.graser@usace.army.mil.

Sincerely,

Rebecca Graser
Chief, Northeast Section

Enclosures:
WI_final_jds_FY18and19.xlsx
Corps Activity Data FY18 and 19.xlsx
Action Data Information.pdf
WI_ESA_FY17 and 18.xlsx
NHPA WI FY18 and 19.xlsx

SECTION SIX: Action Data Information for USACE Activity Data

Source: USACE email attachment, relating to spreadsheet "Corps Activity Data FFY18 and 19.xlsx

Action Data: FFY 18 and FFY 19.

The spreadsheet lists finalized actions during fiscal years FFY18 and FFY19 (Oct 1, 2017 to Sept 30, 2019). The spreadsheet shows several columns, below is some added detail on what each column means to assist with data interpretation:

Column A: DA number – this is our file number; it is also the tracking name specified in our correspondence.

Column B: Action type – this is the review type (doesn't mean that we issued the permit for example, but it is the action type we pursued). We have several abbreviations for action types as follows:

1. APPEAL = Appeal of our final agency decision (can apply to standard permits, letters of permission, or approved JDs)

2. COMPCERT = compliance inspections completed to document (non‐exhaustive) as‐built conditions, satisfaction of permit special conditions, and compensatory mitigation site success (field or report review)

3. CONGRINQA = Congressional inquiry regarding action, no entry is generated for activities which otherwise do not require Corps action

4. DANGERZONE = Authorization required for expansion of "restricted areas" impacting navigation channels

5. DEVMBA = develop mitigation bank

6. EIS = Environmental Impact Statement process (can include us as a cooperating agency)

7. FOIAA = Freedom of Information Act request

8. LOP = letter of permission

9. MOD = modification to the ILF program (site additions)

10. NONCOMPLY = non‐compliance

11. NPR = no permit required, can include: delineation reviews, discharge not within a WOTUS (ex. upland cut ditch), upland activity, or no regulated action in a WOTUS (for example, clean excavation with no discharge). This does not correspond to AJDs completed where we establish a resource a non‐WOTUS. But it does include our exemption confirmations – sort based on column K (closure method), which specifies "activity exempt."

12. NWP = nationwide permit (following column specifies which NWP was used for the review)

13. PERMITMOD = modification of either a letter of permission or standard permit

14. PERMTRANS = transfer of permit (LOP or SP)

15. PGP = programmatic general permits (includes the SAMP permits, following column

specifies which type of permit was used for review)

16. PREAPPCONS = pre‐application consultation

17. RGP = regional general permit (following column is used to specify which one was used for review)

18. SP = standard permit

19. STRMOD = streamlined bank modification process

20. UNAUTHACT = unauthorized activity (process may confirm, or not confirm violation)

Column C: PNN – this is used to qualify which specific programmatic/regional/nationwide general permit was used to review the action (for example, not just a nationwide permit, but nationwide permit 29). This field has no meaning or entry for non‐general permit action types.

Column D: PCN – this is also only useful for general permits, it indicates "Y" if a pre-construction notification (PCN) was required, and "N" if PCN was not required. Activities with an "N" in this field are self-certifying general permits which do not require Corps review.

E: Project Name

F: Authority – This category identifies the regulatory authority (Section 10, Section 404, both or none). There are actions where there is a "-" entered, typically these represent non-permit actions. If there is a "none" – it is because we determined that there is no authority. This is most commonly associated with an NPR action type (column B) but may also be the result we uncover during review (ex. if a pond is proposed in a wetland and is initially entered as a Wildlife Ponds RGP, we may figure out after initial data entry that there is no discharge, it is clean excavation). When the latter occurs, column K (closure method) should show a notation to that effect.

G: Worktype – this generally describes the category of the activity, for example transportation, commercial development, etc.

H: Begin date – this is the day we received the request, complete or not.

I: Fed Comp – this is the day it was first complete, not the date we determined it complete. If received complete, the Begin date and the Fed Comp date are the same, even if it took additional days after receipt to make this determination. A gap between the Begin date and Fed Comp date are interpreted to be days spent in an incomplete status.

J: End Date – this is the date we took our final action; may be the date we concluded the pre-application process as well (including follow up info).

K: Closure Method – this is how we resolved the action type (Column B). It is specific, for example there are several types of reasons shown for a withdrawal (perhaps to become another permit type, because the requestor changed their mind, etc.).

L – R: location information, respectively – County, GNIS waterway, HUC 8, HUC 10, HUC 12, Latitude, and Longitude.

S: Proposed Project Description – This is a field where our staff has the opportunity to add a little more information about what the project is or describe some detail.

Appendix 3 **Nationwide Permits Granted/Denied Water Quality Certification**

Presently there are two sets of Nationwide Permits (NWP) used in Wisconsin. Forty of the NWP were issued by final order on September 15, 2017 and 16 reissued or new NWP were issued by final order on January 13, 2021. WDNR has certified or partial certified 27 of the NWP and denied certification for 15 of the NWP ((USACE, 2021).

Table 11. USACE Nationwide Permit Status and Comparable WDNR General Permit

USACE Nationwide Permit	WDNR WQC[1]	WDNR GP[2]
1. Aids to Navigation	NA-Section 10	
2 Structures in Artificial Canals	NA-Section 10	
3 Maintenance	Certified	
4 Fish and Wildlife Harvesting, Enhancement, and Attraction Devices and Activities	Certified	Ch 30 Fish and Wildlife Habitat Structures GP15 Stream habitat projects designed by government agencies
5 Scientific Measurement Devices	Certified	
6 Survey Activities	Certified	
7 Outfall Structures and Associated Intake Structures	Partially Denied	Ch30 Intake or Outfall Structures
8 Oil & Gas Structures on the Outer Continental Shelf [3]	Denied	
9 Structures in Fleeting and Anchorage Areas	NA-Section 10	
10 Mooring Buoys	NA-Section 10	
11 Temporary Recreational Structures	NA-Section 10	
12 Oil or Natural Gas Pipeline Activities [3]	Denied	
13 Bank Stabilization	Certified	
14 Linear Transportation Projects [3]	Denied	
15 U.S. Coast Guard Approved Bridges [3]	Denied/Certified	
16 Return Water from Upland Contained Disposal Areas	Certified	
17 Hydropower Projects	Denied	
18 Minor Discharges	Certified	
19 Minor Dredging	Denied	Ch 30 Dredging (10 activities) GP3 Utility wetland, bridge, structure, dredging, driving on bed
20 Response Operations for Oil or Hazardous Substances	Certified	
21 Surface Coal Mining Activities [3]	Denied	
22 Removal of Vessels	Certified	
23 Approved Categorical Exclusions [3]	Denied	
24 Indian Tribe or State Administered §404 Program [3]	Denied	
25 Structural Discharges	Certified	
26 --		
27 Aquatic Habitat Restoration, Establishment, and Enhancement Activities	Certified	Ch30 Fish and Wildlife Habitat Structures GP15 Stream habitat projects designed by government agencies
28 Modifications of Existing Marinas	Certified NA-Section 10	
29 Residential Developments	Denied	GP1 Residential/Industrial/Commercial Development
30 Moist Soil Management for Wildlife	Certified	
31 Maintenance of Existing Flood Control Facilities	Certified	GP10 Dam Repair/Reconstruction

32	Completed Enforcement Action	Partially Denied		
33	Temporary Construction, Access, and Dewatering	Denied		
34	Cranberry Production Activities [3]	Denied		
35	Maintenance Dredging of Existing Basins	Certified NA-Section 10		
36	Boat Ramps	Certified	Ch30	Public Boat Ramp
37	Emergency Watershed Protection and Rehabilitation	Certified		
38	Cleanup of Hazardous and Toxic Waste	Certified		
39	Commercial and Institutional Developments	Partially Denied	GP1	Residential/Industrial/Commercial Development
40	Agricultural Activities	Denied	GP18	Water Quality Conservation Activities
41	Reshaping Existing Drainage and Irrigation Ditches	Partially Denied		
42	Recreational Facilities	Partially Denied	GP4	Recreational Development
43	Stormwater Management Facilities	Denied		
44	Mining Activities	Partially Denied		
45	Repair of Uplands Damaged by Discrete Events	Certified		
46	Discharges in Ditches	Partially Denied		
47	--			
48	Commercial Shellfish Mariculture Activities	Denied		
49	Coal Remining Activities [3]	Denied		
50	Underground Coal Mining Activities [3]	Denied		
51	Land-Based Renewable Energy Generation Facilities	Partially Denied		
52	Water-Based Renewable Energy Generation Pilot Projects	Denied		
53	Removal of Low-Head Dams	Certified		
54	Living Shoreline	Certified		
55	Seaweed Mariculture Activities	No Action		
56	Finfish Mariculture Activities	No Action		
57	Electric Utility Line and Telecommunications Activities	No Action		
58	Utility Line Activities for Water and Other Substances	No Action	GP3	Utility wetland, bridge, structure, dredging, driving on bed

Notes:

White Rows – NWP issued in 2017 and expiring in 2022, Gray Rows – NWP reissued or new in 2021 and expiring in 2026

(1) WDNR Partial and granted WQC approvals include additional project conditions to be eligible for certification.

(2) General permit eligibility requirements and permit conditions may differ

(3) USACE St Paul District revoked this NWP for use in Wisconsin

Regional General Permits

USACE Regional General Permit	WDNR WQC (1)	WDNR GP*
Beach Creation & Nourishment	Partially Certified	Pea Gravel
Beach Raking	Certified	None
Minor Discharges	Certified	
Piers and Docks	Certified	None
Transportation	Partially Certified	DOT follow cooperative agreement
Utilities	Partially Certified	DOT projects cooperative agreement
Wildlife Ponds	Partially Certified	
Notes: WDNR Partial and granted WQC approvals include additional project conditions to be eligible for certification.		

State Programmatic Permits under USACE §404 Authority

USACE District	Number of SPGP's
Baltimore	2
Chicago	1
Detroit	1
Ft. Worth	1
Jacksonville	7
Louisville	1
Mobile	6
Nashville	1
New Orleans	1
New York	2
Norfolk	2
Omaha	1
Philadelphia	5
Pittsburgh	1
Sacramento	2
Savannah	28
St. Louis	1
St. Paul	4
Vicksburg	1

References

ASMW. (2021, August 30). *404 Assumption*. Retrieved from Association of State Wetland Managers: https://aswm.org/wetland-programs/s-404-assumption

ASWM. (2011). *Section 404 program assumption, a handbook for State and Tribes.* Windham, ME: Association of State Wetland Managers and Environmental Council of States.

AZDEQ. (2020, April 9). *Clean Water Act Section 404 Assumption*. Retrieved from https://azdeq.gov/cwa-404

Carlos, A. (2014). *The trouble with assumption: An analysis of the ongoing struggles with 404 assumption.* Eugene, Oregon: Master's Thesis, Conflict and Dispute Resolution Program, University of Oregon.

ECOS. (2020). *Proposed Amendments to Improve State Assumption Under Clean Water Act Section 404.* Washington, DC: Environmental Council of States.

EO13175. (2000, November 9). *Consultation and Coordination with Indian Tribal Governments.* Retrieved from Govinfo: https://www.govinfo.gov/content/pkg/FR-2000-11-09/pdf/00-29003.pdf

FDEP. (2018). *Draft MOA between FDEP and COE for §404 Assumption.* Tallahassee, FL: Florida Department of Environmental Protection .

FDEP. (2020). *Florida's Assumption Application, Appendix 2, MOU with USFWS.* Tallahassee, FL: Florida Dept of Environmental Protection.

FDEP. (2021, February 10). *State 404 Program*. Retrieved from Retained Waters Screening Tool: https://floridadep.gov/water/submerged-lands-environmental-resources-coordination/content/state-404-program

Fletcher, K. (2000). States assuming responsibility over wetlands: State assumption as a reglatory option. *Proceedings of a Conference on Sustainability of Wetlands and Water Resources*, (pp. 57-64). Oxford, Mississippi.

Graser, R. (2020). pers. comm.

Institute for Water Resources. (2020). *Strengthening USACE Collaboration with Tribal Nations for Water Resources Management.* Institute for Water Resources, USACE. Alexandria, VA 22315: USACE Institute for Water Resources. Retrieved from https://www.spa.usace.army.mil/Portals/16/docs/TNTCX/Strengthening%20USACE%20Collaboration%20With%20Tribal%20Nations%20Report_final_2020-09-15_508C.pdf

James, R. (2018). *Clean Water Act Section 404(g) -- Non-Assumable Waters.* Washington D.C.: Office of the Assistant Secretary, Civil Works, Department of the Army .

Kathy Hurld, E. (2021). pers. comm.

MNBWSR. (2020). *Development of the Minnesota Application for Clean Water Act Section 404 Assumption - Project Work Plan.* Minneapolis, MN: Board of Water and Soil Resources.

MNBWSR. (2020). *Development of the Minnesota Application for Clean Water Act Section 404 Assumption - Project Work Plan.* Minneapolis, MN: Minnesota Board of Water and Soil Resources.

MNDNR. (2017). *Minnesota Federal Clean Water Act Section 404 Permit Program Feasibility Study - Report to the Legislature.* St. Paul, Minnesota: Minnesota Department of Natural Resources and Minnesota Board of Water and Soil Resources. Retrieved from http://www.bwsr.state.mn.us/wetlands/cwa_404/Minn_Section_404_Assumption_Feasibility_Study_Report_Final.pdf

NACEPT. (2017). *Final Report of the Assumbable Waters Subcommittee.* National Advisory Council for Environmental Policy and Technology (NACEPT).

ORDSL. (2020). *Partial 404 Assumption Legislative Update.* Salem, Oregon: Oregon Department of State Lands.

Pasqua Yaqui Tribe et al., v USEPA et al. , 4:20-cv-00266-RM (US Arizona District Court August 30, 2021).

Thompson pers. comm., M. (2021, September 10). Personal Communication, Director, Waterways and Wetland Program. *Wisconsin Department of Natural Resources*.

USACE. (1987). *Corps of Engineers Wetland Delineation Manual, Wetland Research Program Technical Report Y-87-1*. Vicksburg, MS: US Army Corps of Engineers, Waterways Experiment Station.

USACE. (1995). *St. Paul District Analysis Regarding Section 404 Review of Commercial Cranberry Operations.* St. Paul, MN: United States Army Corps of Engineers, Regulatory Division.

USACE. (2021, September 10). *Nationwide Permits*. Retrieved from USACE St. Paul District Regulatory: https://www.mvp.usace.army.mil/missions/regulatory/nwp/

USACE. (2021, September 13). *Regional General Permits available for use in Minnesota and Wisconsin*. Retrieved from USACE Regulatory St. Paul District : https://www.mvp.usace.army.mil/missions/regulatory/rgp/

USEAP. (2021, August 30). *Current Efforts Regarding Assumption under CWA Section 404*. Retrieved from United State Environmental Protection Agency: https://www.epa.gov/cwa404g/current-efforts-regarding-assumption-under-cwa-section-404

USEPA. (2020). *ESA Biological Evaluation for Clean Water Act Section 404 Assumption by the State of Florida.* Atlanta, GA: US Environmental Protection Agency - Region 4.

USEPA. (2020, August 3). *State and Tribal Assumpton of Section 404 of the Clean Water Act*. Retrieved from Current Efforts Regarding Assumption under CWA Section 404: https://www.epa.gov/cwa404g/current-efforts-regarding-assumption-under-cwa-section-404

USEPA. (2021, February). *Exemptions to Permit Requirements under CWA Section 404*. Retrieved from Section 404 of the Clean Water Act: https://www.epa.gov/cwa-404/exemptions-permit-requirements-under-cwa-section-404

USEPA. (2021, February). *Memorandum: Clean Water Act Section 404 Regulatory Program and Agricultural Activities*. Retrieved from Section 404 of the Clean Water Act: https://www.epa.gov/cwa-404/memorandum-clean-water-act-section-404-regulatory-program-and-agricultural-activities

VDEQ. (2012). *Study and the costs of benefits of state assumption of the Federal §404 clean water act permitting program.* Richmond, VA: Viriginia Department of Environmental Quality.

WDNR. (1993). *An Assessment of Wisconsin's Wetland Protection Programs. Should the State Assume the Federal Wetland Fill Permit Program?* Madison, WI: Wisconsin Department of Natural Resources, Bureau of Water Regulation and Zoning.

WDNR. (2001). *Section 404 Assumption Program Evaluation Update.* Madison, WI: Wisconsin Department of Natural Resources.

WDNR. (2005). *WDNR Policy Regarding Consultation with Wisconsin's Indian Tribes.* Madison, WI: Wisconsin Department of Natural Resources.

WDNR. (2019). *Wisconsin Wetland Conservation Trust Annual Report for Fiscal Year 2019.* Madison, WI: Waterways and Wetland Program, Wisconsin Department of Natural Resources.

WDNR. (2021, September 12). *Program Overview - Wisconsin Wetland Conservation Trust*. Retrieved from Wiscons Department of Natural Resources: https://dnr.wisconsin.gov/topic/Wetlands/wwct/program.html

WDNR. (2021, February 23). *Wetland Study Council*. Retrieved from Wetland Study Council: https://dnr.wisconsin.gov/topic/Wetlands/studyCouncil.html

William, J. (2020). Mitigation banking considerations for states and Tribes exploring assumption of the CWA Section 404 Program. *Association of State Wetland Managers*, (p. Webinar). Windham, ME.