

Clean Water Act Section 404 Program Assumption Investigation Report



Photo Credit: Warner Wetland Lincoln, NE by Josh Wilhelm, NDEE



**Permitting and Engineering Division – CWA 404 Section
December 2021**

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Executive Summary

The Nebraska Department of Environment and Energy (Department) was granted the authority to pursue assumption of the Clean Water Act (CWA) Section 404 Program by Nebraska Legislature with the passage of LB302 in July 2019 (Neb. Rev. Stat. 81-1504 - 81-1506). An assumed 404 Program allows the state to administer the federal dredge and fill permit program for activities that impact Waters of the United States (WOTUS). The United States Army Corps of Engineers (Corps) retains jurisdiction over all Section 10 waters to protect the navigability of these resources under the Rivers and Harbors Act of 1899 as well as WOTUS that are within tribal lands. In Nebraska, the only Section 10 water is the Missouri River however there are several tribal lands, most of which are also located along the Missouri River (Figure ES1).

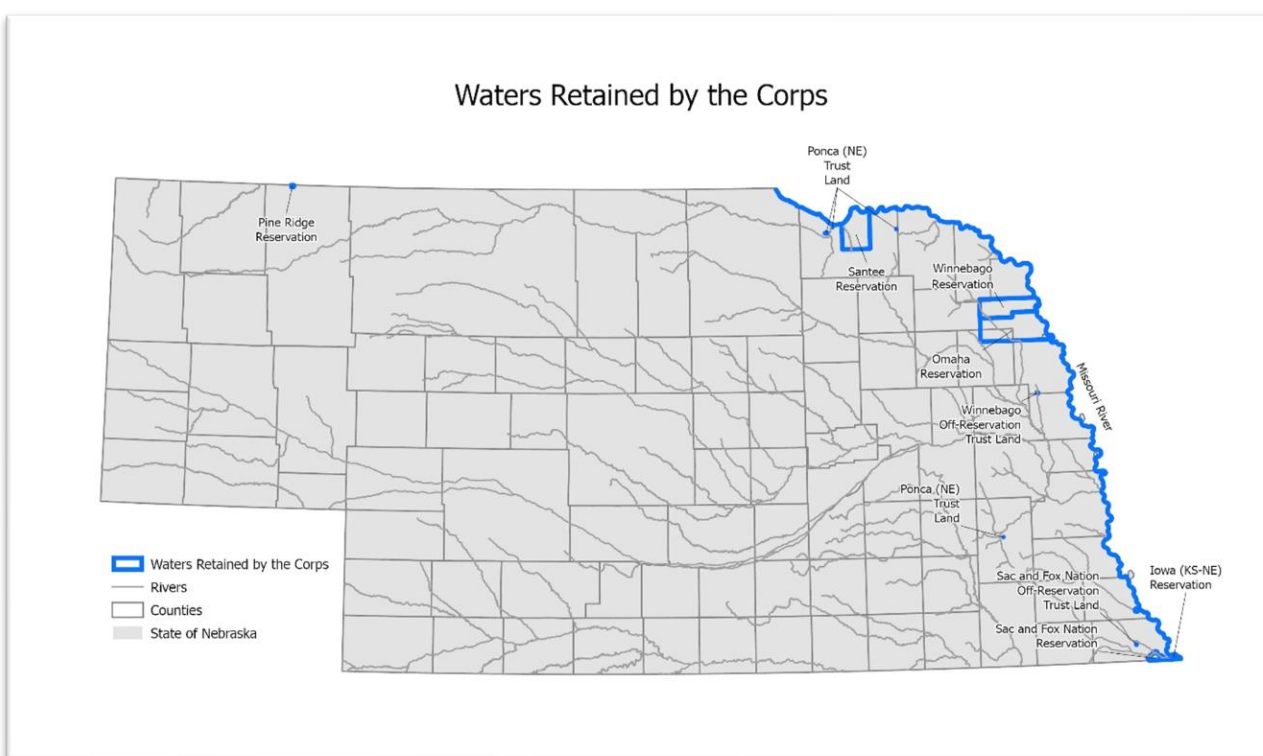


Figure ES1: Retained Waters and Tribal Areas

An administrative line between the state's jurisdiction for assumed waters and the Corp's jurisdiction for retained waters must be established early in the assumption process. The current CWA Section 404(g) Rule allows for full assumption only, meaning all waters outside of the section 10 or tribal waters must be covered under the state's assumed program. EPA intends to propose Partial Assumption in a new 404(g) Rule by the end of 2021 and is projected to finalize that rule by December 2022. In addition, during the state's investigation phase, there was three different definitions of WOTUS utilized which created significant fluctuations in the estimated assumable workload, staffing levels, and overall costs.

The Department completed an analysis of 10 years of 404 permitting activities within Nebraska, from 2010 through 2019. During the assumption investigation, the Navigable Waters Protection Rule (NWPR) went into effect and reduced federal permitting authority by decreasing the amount of waters considered to be WOTUS. In August 2021, the U.S. District Court for the District of Arizona issued an order to vacate and remand the NWPR. As a result of this order, EPA and the Corps halted implementation of the NWPR and began interpreting WOTUS consistent with the pre-2015 regulations. Therefore, the Department's analysis was conducted utilizing the pre-2015 scope of WOTUS. It was determined that full assumption resulted in 99.6% of the permitting activities being assumed by the state.

The 10 years of permitting data provided by the Corps included average processing times for all their permitting activities. The annual program hours required to process the estimated assumable permitting workload was estimated to be 23,128 hours by multiplying the assumable permit types and quantities by the median of the annual average processing times over the last 5 years. The Department considered its other CWA permitting program's staffing needs along with the hours required to process the assumed permitting workload, to estimate a total of 30.7 full-time employees (FTE) needed to administer the program.

The Department used an FTE Model which calculates the average cost of FTEs in both management and non-management positions across the Department. On average the Department calculates the administration cost of implementing a program to be 25% more than the total of the direct and indirect cost of each FTE working within that program. The total cost to administer the assumed 404 Program is estimated at \$2,585,157 annually.

Sustainable funding is a required element of the state's program application for assumption. LB302 did not require the state to assume the 404 Program nor did it come with a fiscal note to fund assumption efforts nor program administration. The Corps 404 Program is funded by the Department of Defense and stems from the Rivers and Harbors Act of 1899. When a state assumes the 404 Program, the funds do not transfer to the assumed state. The Department developed five sustainable funding options to cover the annual program cost of \$2,585,157. The funding options can be adjusted in the event that funds are appropriated by the Nebraska Legislature. In the summary of funding options below, the Department provided estimated fees to cover the entire program cost as well as 75% of the total program cost as an example of permitting rates the state could offer if the program received annual appropriated funds.

Funding Option	Base	Annual Total	Unit	Fee per unit (75% Program Cost)	Fee per unit (100% Program Cost)
Chargeable Impact	\$ -	8710	acre/linear feet	\$ 222.60	\$ 296.80
Hourly Rate	\$ -	38547	hours	\$ 50.30	\$ 67.07
Hybrid Base + Hourly Rate	\$ 800.00	38547	hours	\$ 32.22	\$ 48.99
Pay Per Service (IP)	\$ -	8	Individual Permit	\$ 24,478.96	\$ 32,638.61
Pay Per Service (GP)	\$ -	448	General Permit	\$ 3,245.87	\$ 4,327.83
Pay Per Service (JD)	\$ -	415	Jurisdictional Determinations	\$ 700.80	\$ 934.39
Hybrid Base + Project Cost	\$ 800.00	Program Cost - Base	1% project cost	\$ 1,426.03	\$ 2,168.03

Table ES1: Summary of Funding Options

Table ES2 provides additional details regarding the cost determinations for each type of permit outlined in Table ES1. For example, an Individual Permit takes on average 292 hours to complete and the Department expects to issue eight each year, making the workload for all Individual Permits 10% of the expected annual workload. The cost for an Individual Permit was calculated to be \$32,448 by taking 10% of the cost to administer the program and dividing by the estimated annual individual permit workload. If the assumed 404 Program were to receive appropriated program funds of 25% of the estimated administration cost, the cost of an individual permit would be reduced to \$24,336.

Nearly 75% of permit applications expected will be for projects that fall into the General Permit category as they are routine in nature and take an average of 39 hours to process. The last category is for Jurisdictional Determinations (JD) which are not actual permits. When a permit application is received, an initial review must be completed to determine if the project impacts a WOTUS and who has permitting authority. If the project impacts a WOTUS and is within the states' assumed jurisdiction, NDEE will issue an approved JD and review the application's completeness before processing the permit.

Pay Per Service	D+I Cost	Administration Cost	Permit	Annual	Hours	% of Total	D+I Cost	Administration Cost
	75% of Program	100% of Program	Type	Permits	each	Workload	75% of Program	100% of Program
Individual Permit	\$ 1,938,867.84	\$ 2,585,157.12	IP	8	292	10%	\$ 24,335.86	\$ 32,447.81
General Permit	\$ 1,938,867.84	\$ 2,585,157.12	GP	448	39	75%	\$ 3,250.34	\$ 4,333.78
Jurisdictional Determination	\$ 1,938,867.84	\$ 2,585,157.12	JD	415	8	15%	\$ 700.80	\$ 934.39

Table ES2: Pay Per Service Funding Option

IP = Individual Permit, GP = Regional General Permit, Program General Permit, and Nationwide Permit, JD = Jurisdictional Determination

1.0 Introduction and Background

The Nebraska Legislature passed LB302 in July 2019 giving the Nebraska Department of Environment and Energy (Department) the authority to pursue assumption of the Clean Water Act (CWA) Section 404 Program (404 Program) (Neb. Rev. Stat. 81-1504 - 81-1506). An assumed 404 Program means the state would administer an individual and general permit program for the discharge of dredged or fill material into Waters of the United States (WOTUS), not waters of the state. Typical activities that require a 404 permit range from large infrastructure development projects such as highways and levees to local water resource projects like boat docks and dams. LB302 does not require the state to assume the 404 Program nor does it come with a fiscal note to fund assumption efforts nor administration once assumed. In order to assume the 404 Program, the state must develop and submit to EPA a 404 Program Application that is as stringent as the current federal 404 Program and has sustainable funding (Table 1).

404 Program Application		
Element	40 CFR Section	Element Description
A		Governor letter requesting program approval
B	§233.11	Complete program description
	a	Scope and structure of state program
	b	Permitting, administration, & judicial review procedures
	c	State agency organization
	d	Funding and staffing description
	e	Estimated workload
	f	Permit application form, permit template, & reporting forms
	g	Description of compliance & enforcement & Coordination with EPA & Corps
	h	Description of waters in State vs. Corps jurisdiction
	i	BMPs for exempt provisions in 404(f)(1)(E)
C	§233.12	Attorney General's Statement
	a	Laws & Regulations provide proper authority
	b	Acknowledgement that tribal land is not a state assumption option
	c	Legal analysis of prohibition of taking private property without just compensation
	d	Multiple agency responsibility and authorities
D	§233.13	MOA with EPA Regional Administrator
	a	Identify permit applications which EPA will waive federal review
	b	Reports & files to be submitted to EPA
	c	Roles & coordination for compliance monitoring & enforcement
E	§233.14	MOA with Secretary of the Army
	a	Description of waters the Corps maintains jurisdiction over
	b	Procedures to transfer pending permit applications upon program approval
	c	Existing Corps general permits & how the state will administer them
F		Copies of all applicable state statutes and regulations

Table 1: Required Elements of a 404 Program Application

The United States Army Corps of Engineers (Corps) retains all Section 10 waters and adjacent wetlands to protect the navigability of these resources under the Rivers and Harbors Act of 1899 as well as WOTUS within tribal lands. Partial assumption is not permitted under the current regulations so states must assume permitting authority over all WOTUS aside from those retained by the Corps. In Nebraska, the only Section 10 water is the Missouri River however there are several tribal lands adjacent to the Missouri river which must also be retained by the Corps (Figure 1).

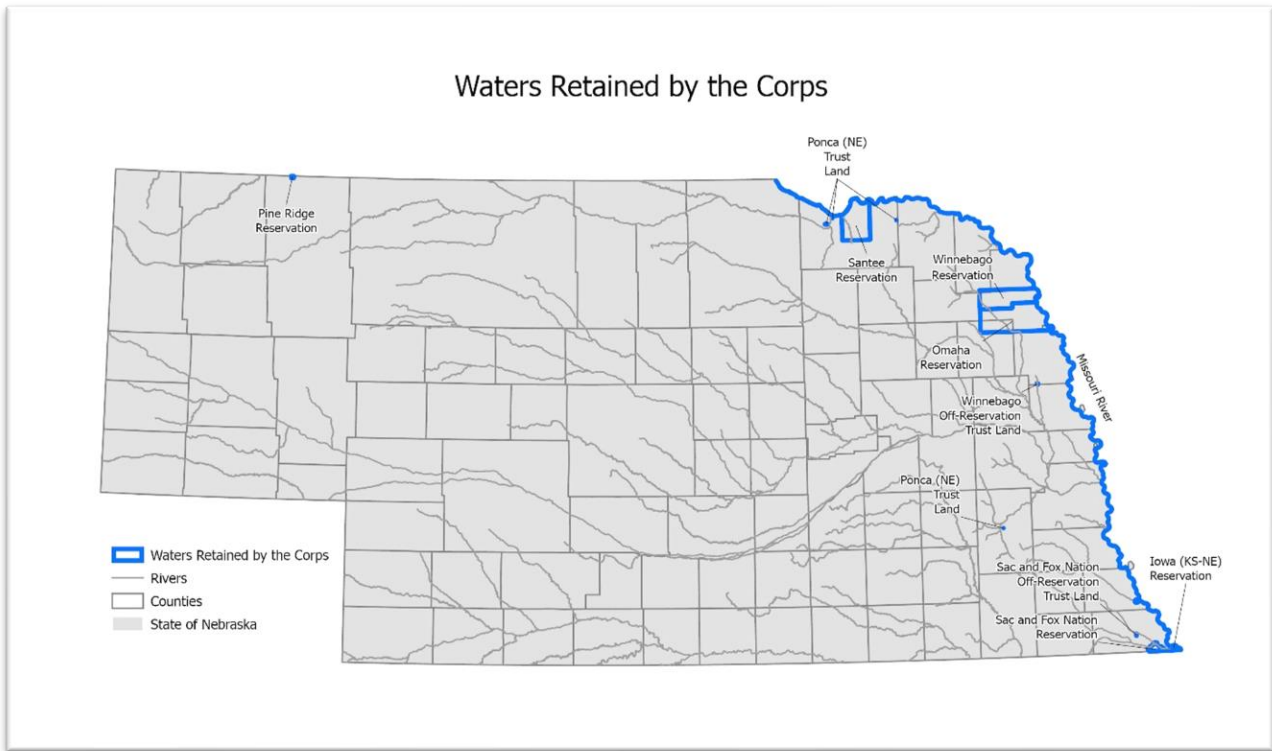


Figure 1: Waters Retained by the Corps

1.1 History of Nebraska's CWA Section 404 Assumption Efforts

The State of Nebraska has examined the feasibility of assuming the CWA Section 404 program several times in the past. In 1982 the Department drafted an assumption report, *Report on Feasibility Study of State 404 Assumption* (DEC, 1982). The study analyzed the legal, technical, financial, and managerial feasibility of assuming the 404 Program. The conclusions indicated that NDEE, the Department of Environmental Control (DEC) at the time, was the logical state agency to assume the 404 Program as all other CWA programs except for 404 were already administered by the Department. A review of the Nebraska Environmental Protection Act indicated that statutory authority already existed for the Department to assume the 404 Program and that protections could extend beyond the 404 Program to cover state resources.

The permit workload during the study timeframe of 1977-1981 was considerably lower than it is today with an average of 140 permit actions processed per year. It was estimated that NDEE would expend approximately \$94,000 per year resulting in a cost saving of \$40,000 to administer the 404 Program within Nebraska. The report acknowledged shortcomings of assuming the 404 Program, where it alone would not provide an adequate solution to degradation concerns for state waters. Significant data gaps were also outlined as well as the need to establish a method for identifying wetlands and creating a wetland inventory for purposes of management.

In 2001, LB 628 was introduced by Senator Beutler to amend sections 81-1505 and 81-1506 of the Nebraska Environmental Protection Act to provide for the regulation of dredge and fill materials into state waters. In 2009, LB 504 was introduced by Senator Langemeier to again amend the same sections of the Nebraska Environmental Protection Act and to provide for the regulation of dredge and fill materials into waters of the state. LB 504 had a fiscal note attached for \$356,219 to work on assumption in FY 2010 and \$1,047,122 to administer the assumed program in FY 2011. Both bills were held in committee and ultimately not enacted. To date, only three states have assumed the 404 Program, Michigan in 1984, New Jersey in 1994 and most recently Florida in 2020. Several states are actively pursuing assumption or investigating the feasibility of assumption.

Recent regulatory changes have given states a renewed interest in assuming the 404 Program. In 2015, EPA established the Assumable Waters Subcommittee to develop recommendations regarding non-assumable waters due to the uncertainty surrounding jurisdiction between the Corps and assumed states. The Assumable Waters Subcommittee released a report in May 2017 recommending limiting the Corps authority to waters regulated under Section 10 of the Rivers and Harbors Act of 1899. On July 30, 2018 the Corps released a memo, *Clean Water Act 404(g) – Non-Assumable Waters*. The memo stated retained waters as, “waters 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”, including, “wetlands adjacent thereto”. The Corps memo outlines a standard starting place for states to begin analyzing retained waters by using the Corps existing Section 10 listed waters.

The Association of State Wetland Managers (ASWM) received an EPA grant in 2019 to develop content and tools to assist states’ 404 assumption efforts. The Department’s CWA 404 Section staff are workgroup members and routinely met with other assuming and interested states to share information and help ASWM develop content and tools. This grant wrapped up in 2020 and concluded with a new ASWM webpage dedicated to assisting interested states and tribes navigate the assumption process (<https://aswm.org/wetland-programs/s-404-assumption>).

The most recent federal action to assist states assume the 404 Program was an EPA change in position regarding the Endangered Species Act (ESA) Section 7 consultation. In EPA’s August 27, 2020 memo, *Memorandum on Endangers Species Act Section 7(a)(2) Consultation for State and Tribal Clean Water Action Section 404 Program Approvals*, EPA took the position that consultation under Section 7 of the ESA is discretionary for program transfer decisions. This means when a state assumes the 404 Program, EPA will consult with the U.S. Fish and Wildlife Service (FWS) to provide a programmatic biological opinion of the state’s 404 Program. In the past when a state administers the 404 Program, permittees must avoid adverse impacts to listed species or acquire a separate incidental take permit from FWS under ESA section 10. Under current guidance, the FWS provides a biological opinion on Corps administered 404 programs, where their permittees are covered for incidental take with pre-established permit conditions and not required to obtain a separate permit.

2.0 CWA Section 404 Program Assumption Plan

Following the enactment of LB302 in 2019, the Department created a CWA 404 Section within the Permitting and Engineering Division and assembled a small team including a Section Supervisor and two Program Specialists. The first task was to develop an assumption gantt chart to track tasks needed to develop each element of the 404 Program Application and estimate project milestones and deadlines (Appendix A). The assumption plan was divided into two phases, an Investigation Phase and a Program Development Phase. The main goals of the Investigation Phase was to learn how the 404 Program is currently being administered in Nebraska, develop a workload analysis, estimate staffing needs and program administration cost estimates as well as create sustainable funding options.

2.1 Federal Rule Changes and Impacts on 404 Program Assumption

Section staff reviewed current state and federal regulations and policies as well as investigated other states with both state wetland programs and assumed 404 Programs. Several additional federal regulations were reviewed to account for new federal rules that took effect and position changes that occurred during the state's assumption Investigation Phase (Table 2).

Federal Rules Released or Federal Position Changes During the Investigation Phase					
Rule & Federal Register Docket Number	Notice of Proposed Rule in Federal Register	Notice of Final Rule in Federal Register	Effective Date	Vacated and Remanded Date	Nebraska Comment Provided
Navigable Waters Protection Rule Doc. No. EPA-HQ-OW-2018-0149	2/14/2019	4/21/2020	6/22/2020	8/30/2021	
Request for Comment on Whether EPA's Approval of a Clean Water Act Section 404 Program Is Non-Discretionary for Purposes of Endangered Species Act Section 7 Consultation Doc. No. EPA-HQ-OW-2020-0008	5/21/2020	N/A EPA issued a Memorandum	8/27/2020	N/A	Yes
Clean Water Act Section 401 Certification Rule Doc. No. EPA-HQ-OW-2019-0405	8/22/2019	7/13/2020	9/11/2020	10/21/2021	
National Environmental Protection Act Doc. No. CEQ-2019-0003	1/10/2020	7/16/2020	9/14/2020	N/A	Yes

Table 2. Federal Rules Changes during the Investigation Phase

2.2 Water of the United States Definition and Impacts

During the Investigation Phase, the definition of Waters of the United States (WOTUS) changed several times. On June 22, 2020, the Navigable Waters Protection Rule (NWPR) took effect, replacing the 2015 definition of WOTUS. The NWPR reduced federal permitting authority by reducing the amount of waters considered to be WOTUS under the new definition. The NWPR excluded ephemeral streams, ditches, isolated waters, prior converted cropland, and groundwater (Figure 2).

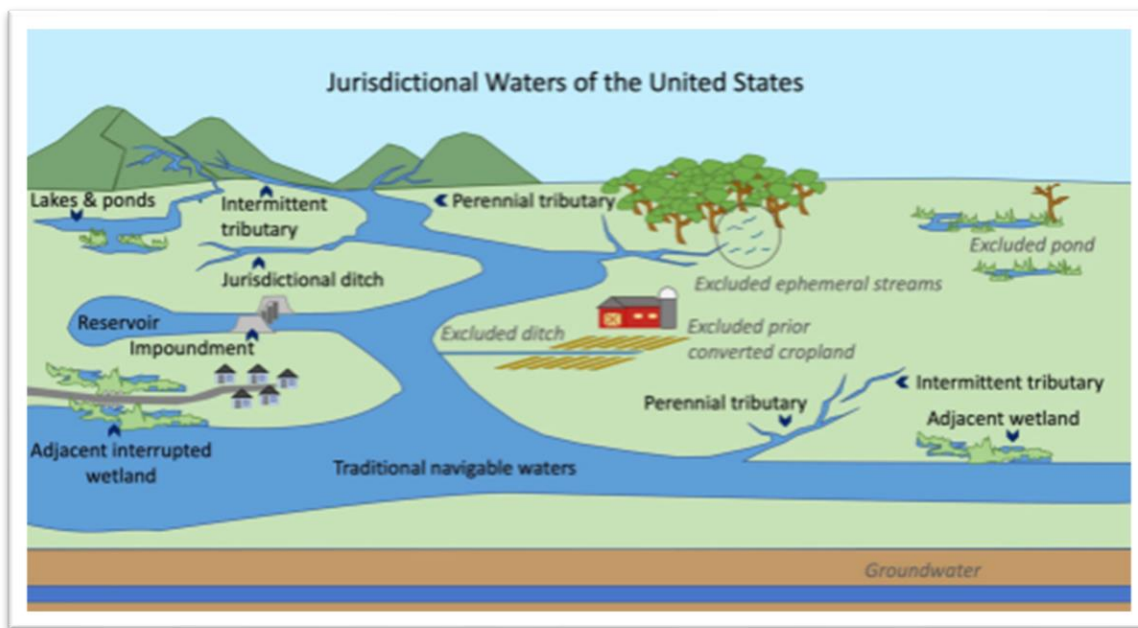


Figure 2: Jurisdictional Waters of the U.S under the 2020 NWPR

(Image Credit: Clemson University adapted from USEPA)

There are no existing state or federal maps illustrating WOTUS. Although the Investigation Report does not utilize the NWPR for assumption workload calculations, the Department did cautiously estimate the impact of this WOTUS definition on the assumable workload. A half mile buffer was placed on the National Hydrology Dataset major streams shapefile and an intersect mapping tool was used to capture permits from the database that would likely remain under WOTUS jurisdiction. This approach resulted in 54% of the past 10 years of permits falling within the assumed area. Stream gauges with data that indicated that location met the flow requirements under NWPR to be considered WOTUS were plotted against the major streams buffer shapefile and determined that 12% was not captured. In order to estimate the total percentage of permits that would have remained under WOTUS jurisdiction given the new NWPR, a ratio matrix was used with the raw results from these calculations. This exercise provided the Department with a rough estimate of about 62% +/- 1% of the past 10 years of permit actions would be required to obtain 404 permits under the new NWPR.

Although the calculations of this exercise are over simplistic, it highlights the potential for significant fluctuations in the assumable workload. When the NWPR was vacated and remanded on 8/30/2021, the definition of WOTUS reverted back to the per-2015 rule while a new rule is under development. This uncertainty with the workload could be avoided if the state were to concurrently develop a similar permitting program for waters of the state.

2.3 404 Program Assumption Coordination

The Department began meeting with key state and federal agencies and developing a stakeholders listserv for interested members from the regulated community, professionals currently working on 404 projects, and the public in Nebraska. The listserv will be used to provide assumption updates and meeting invites throughout the assumption process. Beginning in November 2019, the CWA 404 Section staff began meeting bi-monthly with EPA Region 7 and Headquarters to discuss assumption plans and progress.

An internal Assumption Advisory Committee (AAC) was formed in January 2020. The AAC consists of Department staff from other water quality permitting programs, water quality standards, emergency response, process improvement, legal, fiscal, and the public information office. The AAC also meets bi-monthly and provides critical perspectives from various divisions within the Department. Coordination meetings with the Omaha District Corps and the Nebraska Regulatory Office were initiated in March 2020 and began meeting monthly in August 2020 to develop an MOA outlining jurisdiction and establishing coordination procedures.

The Department developed four Investigation Phase deliverables for full assumption, which is currently the only legal option for assuming the CWA 404 Program, as well as for the Department's preferred partial assumption option: assumable workload estimates, staffing needs, administration costs, and sustainable funding options. Developing these deliverables first requires the establishment of an administrative line between the state's jurisdiction for assumed waters and the Corp's jurisdiction for retained waters.

3.0 Administrative Line Analysis

The administrative line is the boundary between the Corps jurisdiction for retained waters and the states jurisdiction for assumed waters. The Corps' retained area must include Section 10 waterbodies up to their ordinary highwater mark (OHM), adjacent wetlands, and WOTUS within tribal lands. The OHM is approximately 2 ft above the Construction Reference Plain (CRP) which is the elevation they use to design projects. The OHM is generally considered as the area along the edge of a waterbody where the land is in frequent enough contact with the water that vegetation doesn't grow. In Nebraska the only Section 10 water is the Missouri River however there are several tribal lands, most of which are abutting the Missouri River. The development of an administrative line is the first step in developing a state assumed 404 Program.

The administrative line provides a starting point for determining which agency has jurisdiction while allowing for case specific jurisdictional determinations where adjacent wetlands are identified, delineated and included in the permitting actions of either the state or the Corps program. Projects on Section 10 waters will still be required to obtain permits from the Corps for structures or work in these waters. On July 25th, 2012, the Omaha District Corps announced the Missouri River from it's headwaters near Three Forks, Montana downstream to the Nebraska/Kansas state line on it's western bank is the only Section 10 water in Nebraska.

The Department analyzed the Missouri River including its current channelized state, geology, hydrogeology, tributaries, and flooding history. This reach of the Missouri River has been highly altered and is currently able to provide for its navigation use due to these anthropogenic modifications. Thousands of structures have been built by the Corps under their CWA Section 408 authority in the Missouri River floodplain over the last 150 years. Flood control and channelization structures were built to constrict and redirect the river into its current path. Many of these channelization structures are often buried thousands of feet from the river throughout the floodplain (Figure 3). The locations of these structures are not all well-known as the Corps has been unable to provide location information for all of their Section 408 structures. When a 408 structure such as wing dikes build along the river's edge are discovered, all work must cease until the Corps gives the project a 408 authorization to impact that structure.

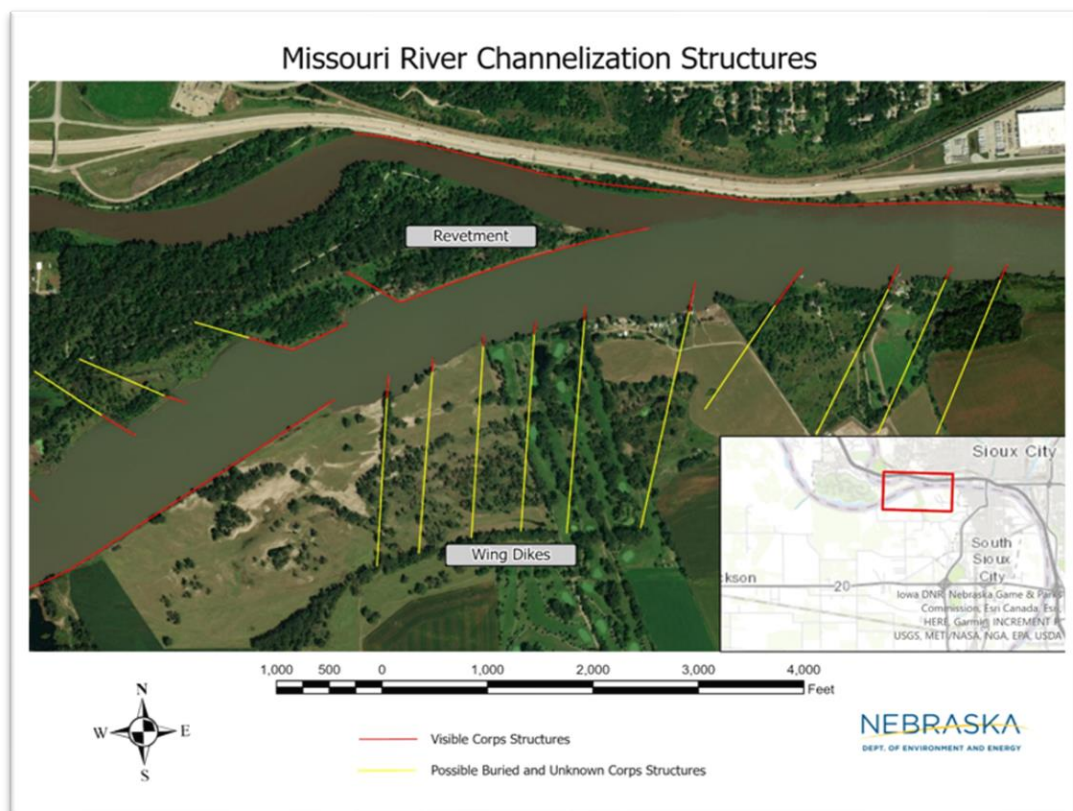


Figure 3: Missouri River Channelization Structures

United States Geologic Survey and National Oceanic Atmospheric Administration stream gauge data were analyzed at various locations along the Missouri River reach within Nebraska. The gauge data indicated the OHM was approximately 11 ft below the top of the bank of the river on the northern portion of the reach near South Sioux City. As the river flows south it drops in elevation at an average rate of 1 ft per mile however the distance between the OHM and bank of the river also decreases. The OHM is a little over 5 ft below the top of the bank of the river at

Rulo, NE, the last gauge before the river flows into Kansas. The Missouri River's flood plain widths are extremely variable, ranging from nonexistent to several miles wide. The Digital Elevation Model (DEM) illustrates the extreme variability of the Missouri River valley along the eastern boarder of the state (Figure 4).

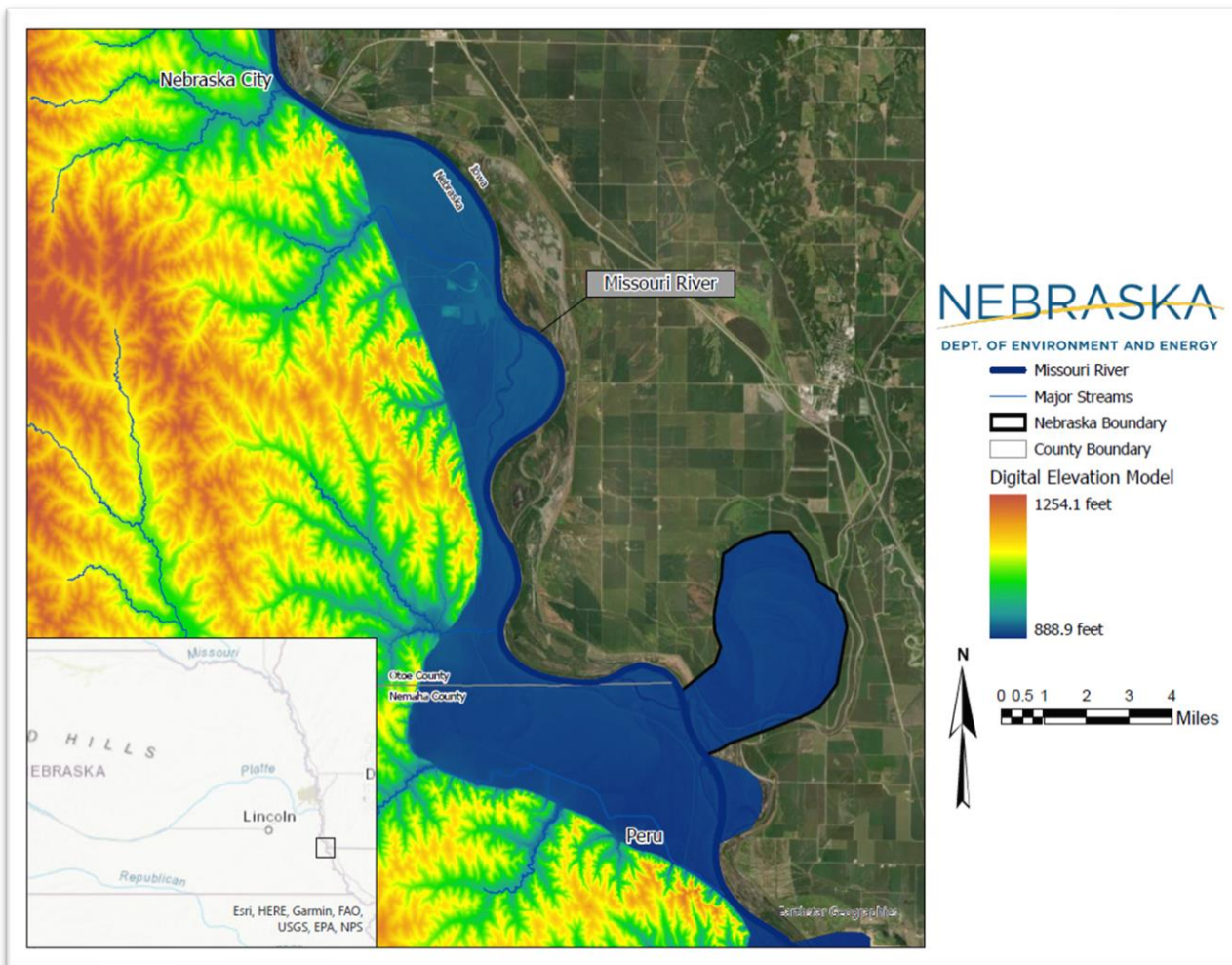


Figure 4: Missouri River Valley DEM Map

The results of this analysis highlight the need to approach the establishment of the administrative line utilizing elevation from the river's OHM rather than using a setback distance. The Corps provided the Department with their Construction Reference Plane (CRP) elevation points for the Missouri River from Gavin's Point Dam downstream to the Nebraska/Kansas state line as a starting point for establishing the administrative line. The Nebraska Department of Natural Resources (NDNR) provided their Geographic Information System (GIS) flood frequency tool which was built for the Missouri River in conjunction with the Corps. The Department was able to modify the tool to map potential administrative line scenarios based on elevations from the Missouri River's CRP appose to a standard setback distance from the river.

4.0 Full Assumption Program Proposal

The full assumption program proposal was developed given the current CWA Section 404(g) Rule and the jurisdictional extent of WOTUS under pre-2015 WOTUS Rule. The 404(g) Rule requires states to assume all WOTUS outside of Section 10 waters, adjacent wetlands and tribal lands

4.1 Full Assumption Administrative Line

Under the current CWA Section 404(g) Rule, the administrative line must be crafted where the Corps' Section 10 authority for the Missouri River ends which is at the OHM or two feet above the CRP. The Missouri River is unique in that it is incised to the point where the OHM is several feet below the bank of the river and no longer has a connection to its riparian areas outside of flooding events. There are many tributary streams that meander through the Missouri River flood plain which must be assumed by the state. Given the rigid assumption requirements of the current 404(g) Rule and the Corps Section 10 jurisdiction ending at the OHM, the administrative line will follow the Missouri River's bank within the geographic boundary of the state of Nebraska up to the OHM (Figure 5). The Corps retains the authority to determine wetlands adjacent thereto for jurisdictional determination purposes in accordance with the policy and procedures outlined in our MOA.

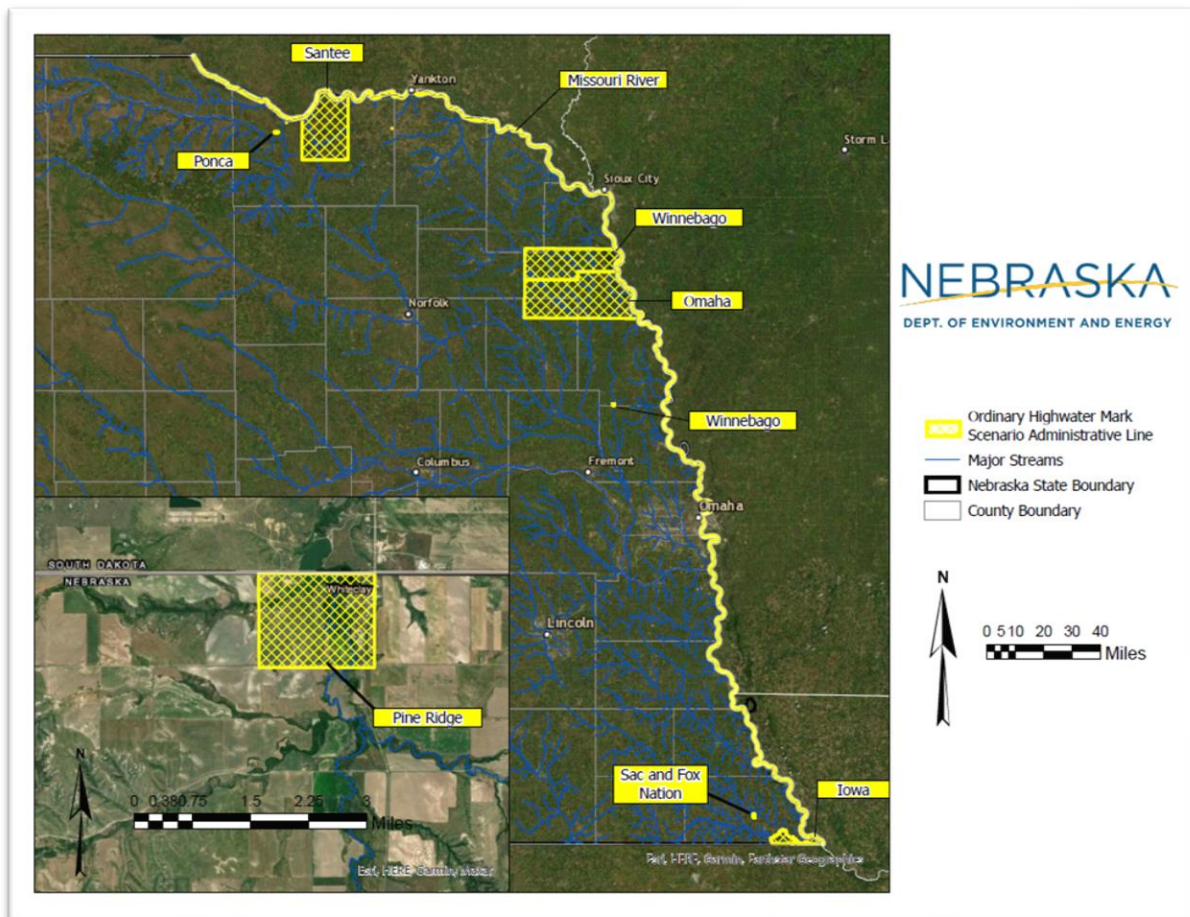


Figure 5: Full Assumption Administrative Line Scenario

4.2 Full Assumption Workload Analysis

The Department obtained the last 10 years of 404 permitting data (2010-2019) for Nebraska from the Corps' Other Regulated Materials (ORM) database to estimate the assumable workload. There were a few issues identified with the dataset that weakened the confidence of the results from our assessments. The database did not utilize unique identifiers for each entry. Permit numbers were sometimes duplicated instead of issuing new ones for activities such as maintenance of a past project. The data was not always entered in the same manner where fields were left blank and terms were used inconsistently to document similar actions.

Approximately 1% of the entries did not have associated geographical location information meaning the workload estimate will be +/- 1% due to the use of mapping tools to develop the estimate. The ORM data was plotted along with streams regulated under Title 117, State Water Quality Standards (Figure 6). Utilizing the proposed administrative line, the Department extracted plotted datapoints that fell within the state's assumed area. This determine the annual estimate for quantities and types of assumable permits. This exercise resulted in an

assumable workload estimate of 99.6% of the Corps past 10 years of workload or 8714 permitting actions.

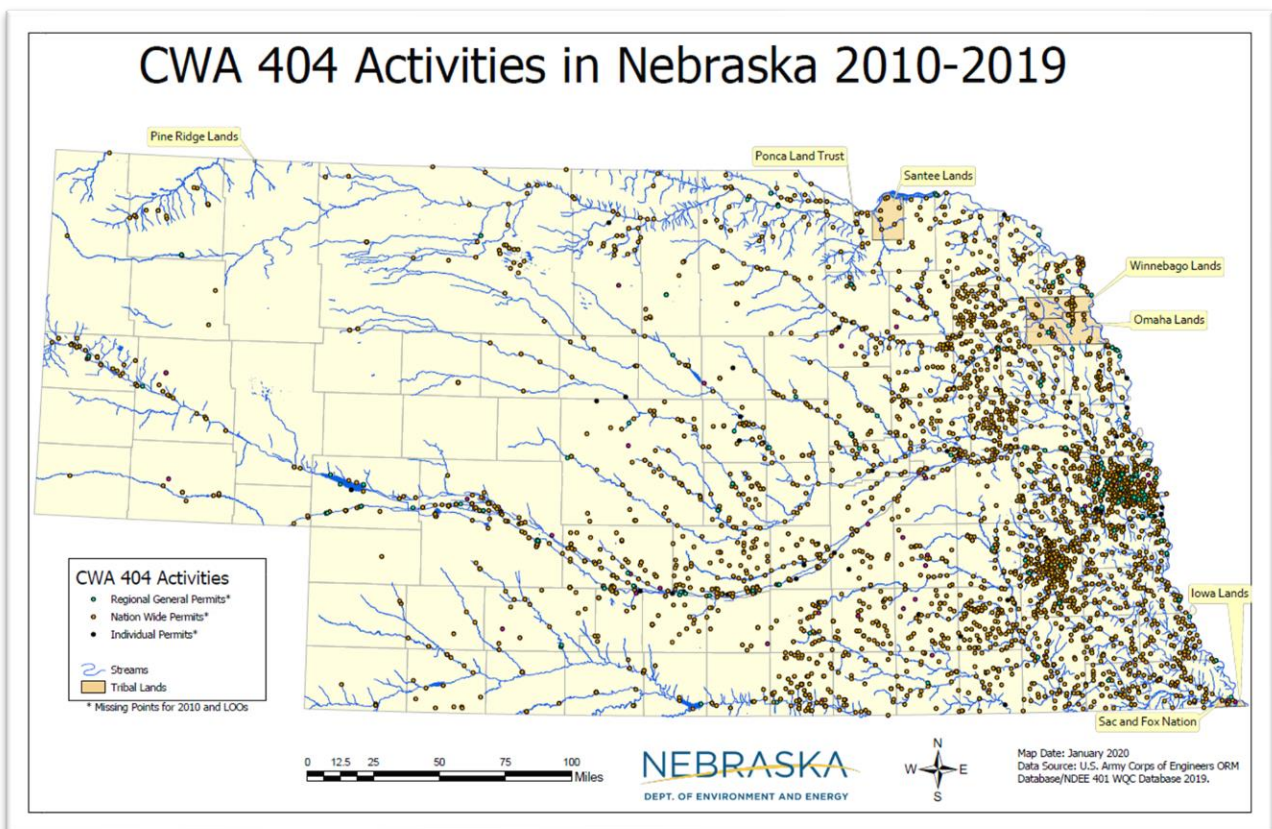


Figure 6: CWA Section 404 Permit Activities in Nebraska (2010-2019)

The ORM data provided by the Corps included processing times for all of their issued permits including individual permits (IP), regional general permits (RGP), program general permits (PGP), and nationwide permits (NWP). Due to similarities in the nature and processing times of general permits, the Department combined RGPs, PGPs, and NWPs into one general permit (GP) category.

Over the last few years, the Corps altered their process for making Jurisdictional Determinations (JDs). In the past, the Corps would review all projects that had the potential to impact WOTUS to ensure they had the jurisdiction to issue a 404 permit; however, since 2018, they changed the process to where jurisdiction was assumed and the permittee could request a JD if they felt the project was not impacting a WOTUS. The average number of JDs went from several hundred per year to a few dozen; however, the percentage of JDs that require a field visit have increased from 10-15% to 20-25%. Processing times documented in the ORM data fluctuate from year to year with no significant trend over time. Due to this variability, the Department used mean processing times over the last 5 years. The annual program hours

required to administer the assumed 404 Program were estimated utilizing the number of expected annual permits per permit type, multiplied by mean processing times (Table 3).

Annual Assumable Workload	Total	IP	GP	JD
Full Assumption	871	8	448	415
Processing Time (Hours)		292	39	8
Total Annual Hours	23128	2336	17472	3320

Table 3. Full Assumption Annual Workload Estimates

IP = Individual Permit, GP = Regional General Permit, Program General Permit, and Nationwide Permit, JD = Jurisdictional Determination

4.3 Full Assumption Staffing Levels

The annual assumable workload results from Table 3 were used to determine the number of Permit Writers needed to process an average of 871 permit actions annually. Information from the Department's other CWA permitting programs was used to quantify the need and ratio for program support staff per Permit Writer. The result determined the program would require 1 Inspector, 0.5 Engineer and 0.5 Wetland Biologist for every 3 Permit Writers.

Each full-time employee (FTE) accounts for 2080 hours annually, however not all of their time is spent processing or enforcing permits. Department employees attend coordination meetings, trainings as well as conferences and are often asked to provide presentations and assist with workshops. Many staff members have special licenses and professional certifications that require specific continuing education training. Staff also fill necessary Agency rolls such as Emergency Support Functions for the Nebraska Emergency Management Agency and sit on Department teams, professional boards, councils and associations. In addition to these extra duties, paid time off must also be accounted for in the total program operation time estimates.

The Department expects 1300 hours or approximately 62.5% of each FTE will be dedicated to program work. The 404 Program will operate with one Section Supervisor to ensure 404 Program oversight and manage staff. The 404 Program staffing needs come to a total of 30.7 FTE and have been broken down by employee type in Table 4. The staffing needs estimated do not account for expected efficiencies due to cross program training of Department staff and process improvements. Efficiencies include sending one Inspector to conduct site visits where multiple programs are involved. The 404 Program will follow similar permitting standard operating procedures as our other CWA permitting programs and modify existing permitting software systems to allow for consistency in reviews, approvals, and documentation.

Type of Employee	FTE	Total Hours	Notes
Section Supervisor	1	1300	Program Administration
Permit Writer	17.8	23128	Based on ORM data
Inspector	5.9	7709	Based on Department data
Engineer	3.0	3855	Based on Department data
Wetland Biologist	3.0	3855	Based on Department data
Total Staffing Needs	30.7	39847	

Table 4: Full Assumption Program Staffing Needs

4.4 Full Assumption Program Administration Cost

The Department uses an FTE Model which calculates the average cost of FTEs in both management and non-management positions across the Department. The FTE Model takes the direct costs of each employee which is their salary and calculates the benefits of each employee at a rate of 33%. A majority of the calculated benefits cover insurance and retirement. The indirect rate is calculated at 37% of the direct cost and covers both management services support provided by other Department divisions such as fiscal and legal. The indirect rate also covers a portion of rent, vehicles, and overhead items such as computers and utilities. On average the Department estimates the administration cost of implementing a program to be 25% more than the total of the direct and indirect cost of each FTE working within that program. Based on the staffing needs calculated in Table 4 and the FTE Model, the Department estimates the total cost to administer the assumed 404 Program to be \$2,585,157 annually (Table 5).

Department FTE Model	Direct Cost	Benefits	Indirect rate	Direct+Indirect	Total FTE Cost	Administration Cost
	Provided	33% of Direct	37% of Direct	D+I	D+B+I Costs	$((D+I) * 4) / 3$
		0.33	0.37			
Average FTE w/ Management	\$ 56,160.00	\$ 18,532.80	\$ 20,779.20	\$ 76,939.20	\$ 95,472.00	\$ 102,585.60
Average FTE w/o Management	\$ 45,760.00	\$ 15,100.80	\$ 16,931.20	\$ 62,691.20	\$ 77,792.00	\$ 83,588.27
Program Calculations	# Managers	# Staff		Direct+Indirect	Total TFE Cost	Administration Cost
Assumed 404 Program	1	29.7		\$ 1,938,867.84	\$ 2,405,894.40	\$ 2,585,157.12

Table 5: Full Assumption Program Administration Cost

Additional economies of scale savings are expected due to the Department's ability to share resources among all our permitting programs as well as from process improvements utilizing existing agency infrastructure and the development of permitting software. However, a factor not included in these estimates are the agency's cost from working with the Attorney General's Office on enforcement actions for repeat or extreme permit violations.

4.5 Full Assumption Sustainable Funding

A major barrier to state assumption of the 404 Program is the lack of a dedicated funding source. A requirement of an assumption application is sustainable funding. The Corps does not charge permit fees as they're fully funded through Department of Defense, however these

funds do not transfer with the program to the state managing an assumed 404 Program. It would take an act of Congress to have this changed.

The Department developed a Services Calculator tool to investigate different funding options. Each option has the ability to be adjusted to cover the total cost of providing 404 permitting services. Each option can be adjusted to a percentage of the total cost to account for the possibility of appropriated funds from the Nebraska Legislature. A mixed funding source provides an added layer of security and accountability. Department programs have busy and slow times of the year for various components of their programs. Permitting demand may slow in summer months while projects are being implemented and pick up in the winter as developers focus on their next projects. There are also program cycles such as end of year reporting and planning both within the Department and in conjunction with EPA and other agencies. It is important to be able to maintain a high level of customer service during busy times of the year but also be able to sustain employees during slower times.

Each funding option shows results that cover both the cost to reasonably cover the entire program and approximately 75% of the program. The 75% estimate is simply to illustrate the impact to permittees if the Nebraska Legislature were to appropriate funds covering 25% of the 404 Program. The results of Services Calculator tool are provided in greater detail below and are summarized in Table 6.

Funding Option	Base	Annual Total	Unit	Fee per unit (75% Program Cost)	Fee per unit (100% Program Cost)
Chargeable Impact	\$ -	8710	acre/linear feet	\$ 222.60	\$ 296.80
Hourly Rate	\$ -	38547	hours	\$ 50.30	\$ 67.07
Hybrid Base + Hourly Rate	\$ 800.00	38547	hours	\$ 32.22	\$ 48.99
Pay Per Service (IP)	\$ -	8	Individual Permit	\$ 24,478.96	\$ 32,638.61
Pay Per Service (GP)	\$ -	448	General Permit	\$ 3,245.87	\$ 4,327.83
Pay Per Service (JD)	\$ -	415	Jurisdictional Determinations	\$ 700.80	\$ 934.39
Hybrid Base + Project Cost	\$ 800.00	Program Cost - Base	1% project cost	\$ 1,426.03	\$ 2,168.03

Table 6: Summary of Full Assumption Funding Option Results

4.5.1 Chargeable Impact Funding Option

The first funding option is the Chargeable Impact. This option estimates the actual impact to the environment based on the permits issued over the course of the year. The Department's Air Operating Permit Program uses this model and adjusts the fees annually based on the previous years permitted discharge in tons of pollution released to the air. The 404 Program could follow this model utilizing a set rate per acre and linear feet of aquatic resources impacted. Unfortunately, the ORM data provided by the Corps did not include the spatial impacts associated with each permit. The Department assigned an average of 10 units of impact per permit action from the annual assumable workload estimate of 871 permits (Table 7).

Chargeable Impact	D+I Cost	Administration Cost	Chargeable Pollution (CP)	Units	D+I Cost	Administration Cost
	75% of Program	100% of Program	Est. Annual Impact		75% of Program	100% of Program
Assumed 404 Program	\$ 1,938,867.84	\$ 2,585,157.12	8,710	acres/linear feet	\$ 222.60	\$ 296.80

Table 7: Chargeable Impact Funding Option

This option is simple in its concept but has some issues for a 404 permit that an Air operating permit doesn't. The change in demand between the two types of permits is much different. A facility that is operating and requires annual inspections and permits is fairly stable whereas 404 permit demand changes with fluctuations in the economy as investors may hold on to their disposable income or choose to invest in projects elsewhere. It would also be difficult to implement this option in an equitable fashion given the permitted project's impact may vary. Project may be simple yet span a large area. For example, a boat ramp project could impact the same linear feet as a wastewater plant project that requires a more rigorous environmental review. Along the same lines, the project may fall under a general permit in which the processing is streamlined compared to the review of an individual permit. In addition, many projects require a JD which take much less time and effort to process than a permit review and should be charged at lesser rate.

4.5.2 Hourly Rate Funding Option

The Hourly Rate option is based on the total amount of hours dedicated towards program work which include all program staff time aside from the Section Supervisor. In this option the applicant would be billed for the time it takes to review and process an application including any project inspections. This option is equitable and commonly used in the private sector. The Hourly Rate option addresses the issue from the Chargeable Impact option with the ability to charge more time towards complicated projects that have greater impacts and require more rigorous environmental reviews. This funding option does have a few issues in that project developers will be unable to plan for an exact permitting cost even when projects are similar in nature. There are also factors that may affect the number of hours each project takes to permit, such as the permit writer's experience, skills, and familiarity with the project location as well as input from other agencies that may extend environmental reviews. If the Hourly Rate option were to be used to cover the entire cost of the 404 Program the average rate would be \$67.07/hour compared to \$50.30/hour if the Department only needed to cover 75% of the cost to run the program (Table 8).

Hourly Rate	D+I Cost	Administration Cost	Billable Hours (BH)	D+I Cost	Administration Cost
	75% of Program	100% of Program	Staffing Needs	75% of Program	100% of Program
Assumed 404 Program	\$ 1,938,867.84	\$ 2,585,157.12	38547	\$ 50.30	\$ 67.07

Table 8: Hourly Rate Funding Option

4.5.3 Pay Per Service Funding Option

The Pay Per Service option which is based on the average assumable workload and the average processing time for each type of permit activity. This funding option establishes a set rate per permit activity that eliminates the uncertainty issue noted in the first two options. This option also averages the experience and skills of Department staff so no individual permittees end up paying the costs of being assigned a newer less experienced permit writer. The Pay Per Service option also addresses the issue associated with complex projects needing more rigorous environmental reviews through the type of permit the project will fall under. Complex projects such as large industrial complex development will fall under an Individual Permit as they likely to have many impacts that require detailed environmental reviews. For this example, it is reasonable and equitable for the developer to cover the cost of the service provided by the state and not the tax payers of Nebraska. On the other hand, a small community that must cross a bridge to access town may need to complete periodic maintenance to stabilize the stream bank and protect the infrastructure. This type of routine work will fall under a nationwide permit or similar state permit as it will have very little impact compared to a new industrial complex. The service to review this type of project is reflected in the lower cost of the type of permit the project will fall under (Table 9).

Pay Per Service	D+I Cost	Administration Cost	Permit	Annual	Hours	% of Total	D+I Cost	Administration Cost
	75% of Program	100% of Program	Type	Permits	each	Workload	75% of Program	100% of Program
Individual Permit	\$ 1,938,867.84	\$ 2,585,157.12	IP	8	292	10%	\$ 24,478.96	\$ 32,638.61
General Permit	\$ 1,938,867.84	\$ 2,585,157.12	GP	448	39	75%	\$ 3,245.87	\$ 4,327.83
Jurisdictional Determination	\$ 1,938,867.84	\$ 2,585,157.12	JD	415	8	15%	\$ 700.80	\$ 934.39

Table 9: Pay Per Service Funding Option

IP = Individual Permit, GP = Regional General Permit, Program General Permit, and Nationwide Permit, JD = Jurisdictional Determination

4.5.4 Hybrid Base Rate/Hours Funding Option

This Hybrid funding option combines a flat base rate to be submitted with the permit application with an additional hourly rate on the back end. For this example a flat rate of \$800 was chosen as it closely represents the cost for the Department to provide a JD. This approach accounts for both the cost of the initial review as well as project complexity and permit processing workloads associated with individual permits verse much simpler general permits.

Hybrid: Base + Hours	D+I Cost	Admin Cost	Base Rate	Workload	Units	Hours	Units	D+I Cost	Administration Cost
	75% of Program	100% of Program	Set Fee					75% of Program	100% of Program
Assumed 404 Program	\$ 1,938,867.84	\$ 2,585,157.12	\$ 800.00	871	permit/ action	38,547	hours	\$ 32.22	\$ 48.99

Table 10: Hybrid Base Rate/Hours Funding Option

4.5.5 Hybrid Base Rate/Project Cost Funding Option

The final funding option combines a flat rate that would be submitted with the permit application with an additional percentage of the overall cost of the project. A flat rate of \$800 was used again as it closely represents the cost for the Department to provide a JD. The resulting estimated cost per project was calculated from the remaining program cost after considering the flat rate fees generated by the estimated annual workload of 871 permit actions. The Department does not have project costs associated with 404 permitted projects to calculate what 1% equates to. Therefore, the project costs were applied to all projects evenly and calculated to cover the remaining cost to administer 100% of the program and 75% of the program. After the first year of implementation, these rates can be adjusted based on actual project costs associated with state issued 404 permits.

Hybrid Base Rate +	D+I Cost	Administration Cost	Base Rate	Workload	Units	1% Project Cost	1% Project Cost
Project Cost	75% of Program	100% of Program	Set Fee			75% of Program	100% of Program
Assumed 404 Program	\$ 1,938,867.84	\$ 2,585,157.12	\$ 800.00	871	permits/actions	\$ 1,426.03	\$ 2,168.03

Table 11: Hybrid Base Rate/Project Cost Funding Option

5.0 Partial Assumption Program Proposal

Partial assumption is not currently an option however, EPA published proposed 404(g) rule making timelines in the Federal Unified Regulatory Agenda on June 11, 2021. The draft 404(g) rule is projected to be release in December 2021 with the final rule expected the following December. EPA has not provided any indications of what a partial assumption rule might look like however the state has been working closely with EPA Region 7 and Headquarters on the issues surrounding Full Assumption along the Missouri River. The partial assumption proposal was created as a more common sense approach given the significant issues identified with the full assumption program proposal's administrative line, outlined in 5.1.1.

5.1 Partial Assumption Administrative Line

The partial assumption program proposal was developed utilizing the natural topography of the Missouri River's watershed by following the bluff line. The bluff line administrative line was created 40 feet above the elevation of the Missouri River's CRP and generally remains 40 feet above the CRP as it flows from north to south (Figure 7). This proposal creates a clear line that is easy for the public to understand and identify in the field. Very few projects would fall on the bluff line, reducing the frequency and need to coordinate jurisdictional determinations with the Corps. Deviations triggers and methods will be outlined in our MOA with the Corps.

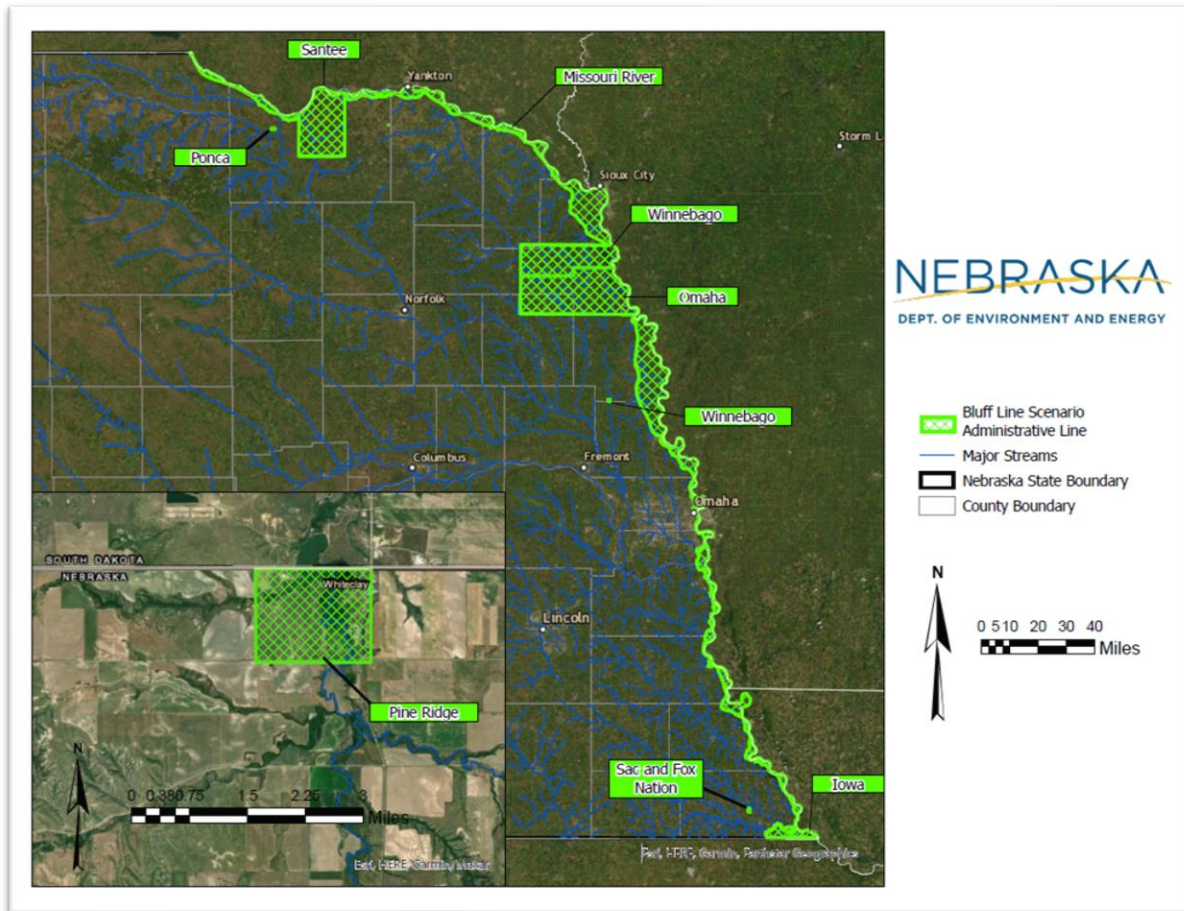


Figure 7: Bluff Line Administrative Line Scenario

5.1.1 Bluff Line Scenario Administrative Line Analysis

States that have assumed the 404 program have established administrative lines at arbitrary distances from their Section 10 waters' OHM. This concept does not lend itself well to dividing jurisdiction along this portion of the Missouri River. The Department reviewed 1,000 ft. and 5,000 ft. buffer administrative line scenarios along with the bluff line and found the bluff line although more coordination is required up front, avoided unnecessary complications caused by a standard set back distance approach (Figure 8).

The Missouri River flows along the base of the bluff in certain areas while in others the bluff is several miles from the river bank. An arbitrary line will cause some areas along the tops of bluffs to be falsely identified as retained while other low lying areas that contain wetlands adjacent to the Missouri River may appear as assumed. A standard distance approach cuts through urban areas randomly making it difficult to articulate and determine who's jurisdiction a project falls under.

The bluff line scenario solves several issues regarding the discrepancies between the boundary of the state of Nebraska and the location of the Missouri River channel. The center of the Missouri River is not the border of the state which leaves areas where NDEE would need to assume permitting authority on portions of the state that are located on the Iowa and Missouri side of the Missouri River (Figure 8). The Omaha District Corps currently has an MOA with the Rock Island District Corps to manage the Iowa side of the Missouri River landward to the bluff. Utilizing the bluff line scenario would allow the state to avoid entering into two additional MOAs with the Rock Island and Kansas City Corps Districts.

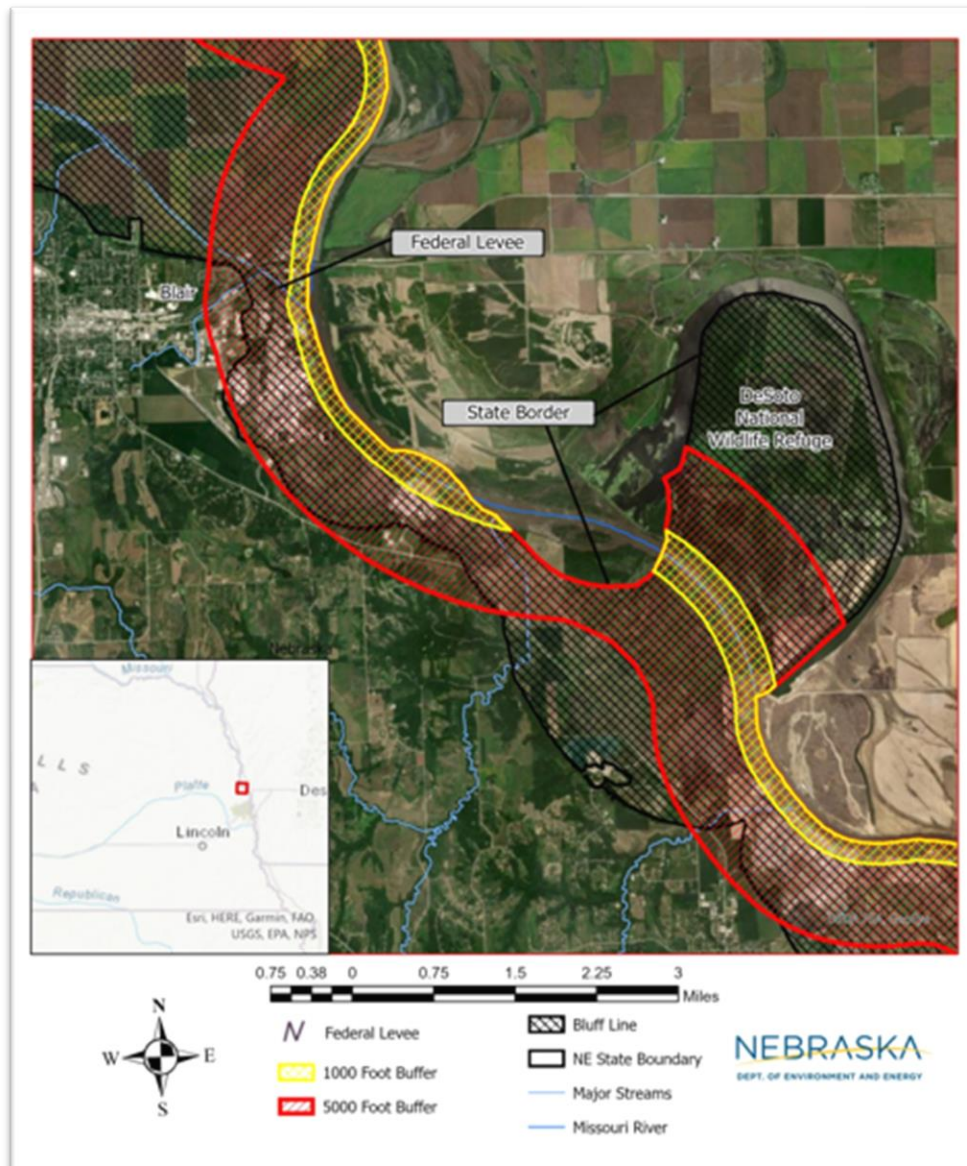


Figure 8: Partial Assumption Administrative Line Scenarios

Flood inundation maps from the 2019 flood were created from data received from the US Military. The inundated area was mapped against the normal open water areas from the river and wetlands identified in the National Wetland Inventory as well as the bluff line to ensure the administrative line remained outside the floodplain (Figure 9). The Missouri River was above flood stage for nine months from March 2019 to December according to USGS gauge data at Rulo, NE.

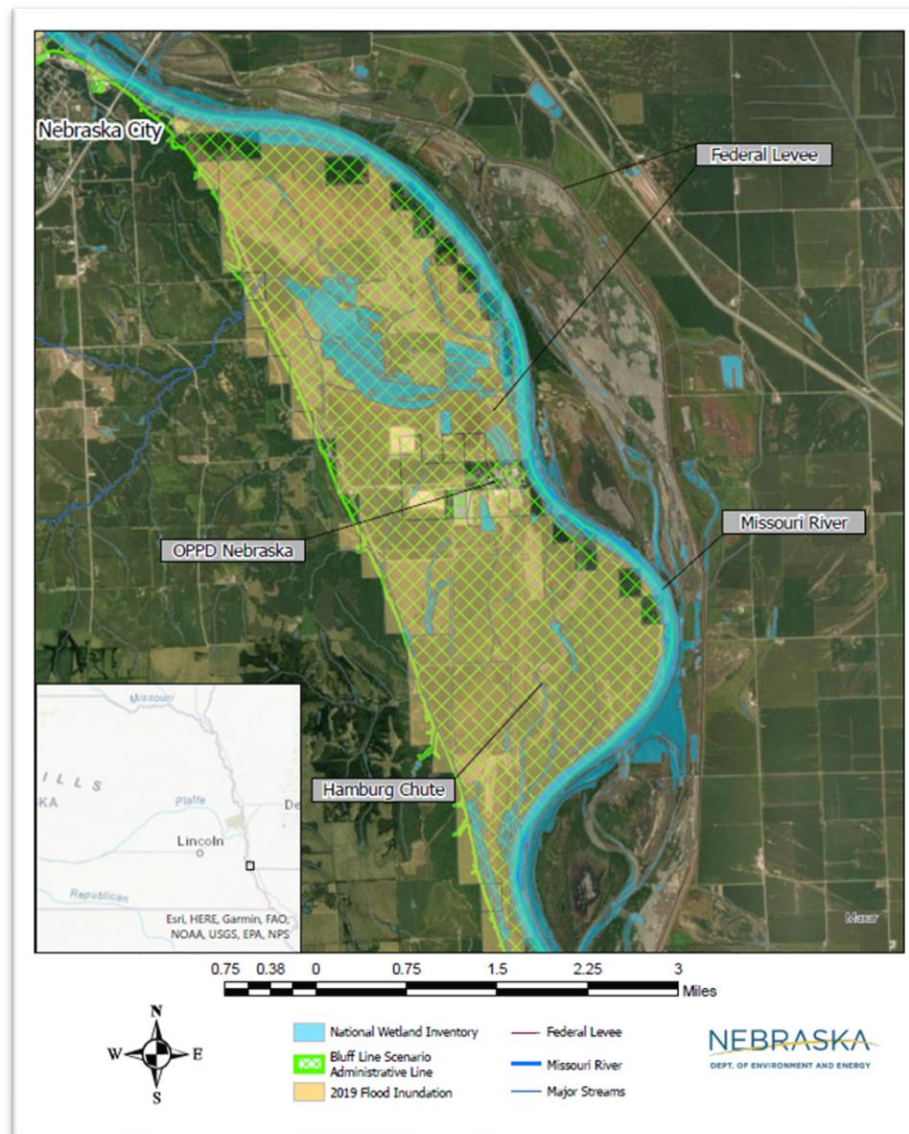


Figure 9: Inundated Areas within the Missouri River Floodplain, March 2019

When the bluff line intersects a city or installation, it would be modified to follow the city limit boundary when possible in order to keep facilities intact. If the bluff line was unable to be adjusted around a city, landmarks such as streets, railroads, and levees would be used. The problematic areas map (Figure 10) using Offutt AFB as an example, shows the bluff line

adjusted in orange by the AFB boundary on the north end to avoid splitting the runway in half. Further south, the levee is utilized as the boundary followed by the Hwy 34 Bridge, which is just upstream of the 300 meters upstream of the confluence with the Missouri River, before rejoining the bluff line.

When the bluff line encountered a tributary flood valley, a line was drawn across the valley 300 meters upstream from the tributary's confluence. The 300 meter confluence used describes Pallid Sturgeon sampling locations in the mouth of large tributaries on the Missouri River and was identified as the transition area from the tributary to the Missouri River (Welker et al., 2020). The 300 meter distance upstream of the confluence is also appropriate to allow the Corps to maintain the navigability of the Missouri River. During the 2019 floods, the Platte River cut a new channel to the south of the historic confluence essentially bypassing the old flow path and compromising the navigability of the Missouri River north of Plattsmouth, NE (Figure 10). The bluff line would be easily recognizable in the field and Corps channelization and flood control structures would remain in the Corps retained jurisdiction.

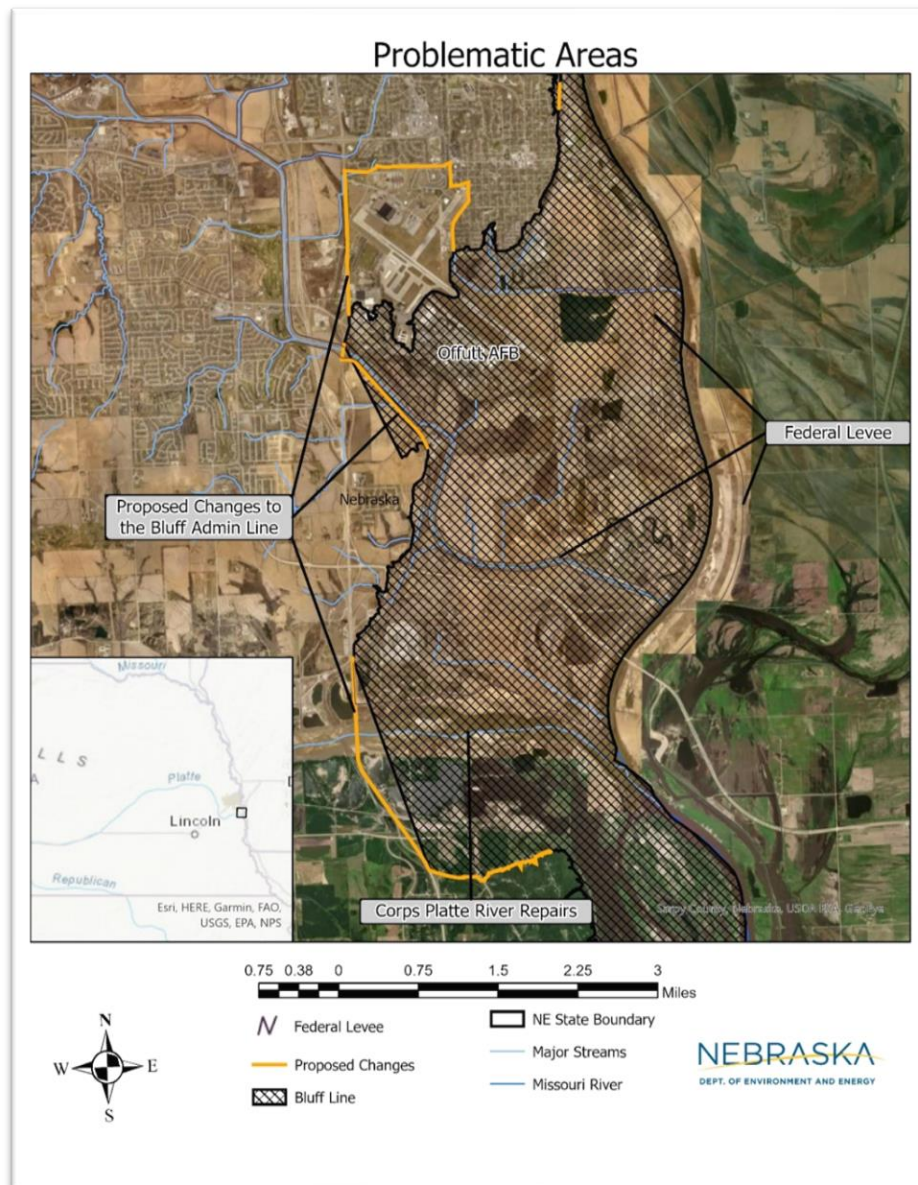


Figure 10: Problematic Areas Example Bluff Line at Offutt AFB

5.2 Partial Assumption Workload Analysis

Applying the same methods outlined in the full assumption program proposal, the Department used the last 10 years of 404 permitting data (2010-2019) for Nebraska from the Corps' Other Regulated Materials (ORM) database to estimate the assumable workload. Utilizing the proposed bluff line administrative line, the Department extracted plotted datapoints that fell within the state's assumed area. Approximately 1% of the entries did not have associated geographical location information meaning the workload estimate will be +/- 1% due to the use of mapping tools to develop the estimate. This determined the annual estimate for quantities and types of assumable permits.

The assumable workload was estimated to be 95.4% of the Corps past 10 years of workload or 8349 permitting actions. The annual program hours required to administer the assumed 404 Program were estimated utilizing the number of expected annual permits per permit type, multiplied by mean processing times (Table 12).

Annual Assumable Workload	Total	IP	GP	JD
Partial Assumption: Bluff Line	834	8	432	394
Processing Time (Hours)		292	39	8
Total Annual Permitting Hours	22336	2336	16848	3152

Table 12. Annual Assumable Workload

IP = Individual Permit, GP = Regional General Permit, Program General Permit, and Nationwide Permit, JD = Jurisdictional Determination

5.3 Partial Assumption Staffing Levels

The annual assumable workload results from Table 12 was used to determine the number of Permit Writers needed to process an average of 834 permit actions annually. The reduction in permits that would be assumed by the state under the bluff line scenario compared to full assumption are general permits and jurisdictional determinations which have much simpler environmental review and take less time to process compared to an individual permit. The 404 Program staffing needs were calculated the same way as they were under the full assumption staffing levels and came to a total of 29.6 FTE. and have been broken down by employee type in Table 13.

Type of Employee	FTE	Total Hours	Notes
Section Supervisor	1.0	1300	Program Administration
Permit Writer	17.2	22336	Based on ORM data
Inspector	5.7	7445	Based on Department data
Engineer	2.9	3723	Based on Department data
Wetland Biologist	2.9	3723	Based on Department data
Total Staffing Needs	29.6	38527	

Table 13: 404 Program Staffing Needs

5.4 Partial Assumption Program Administration Cost

The Department uses an FTE Model which calculates the average cost of FTEs in both management and non-management positions across the Department. The FTE Model takes the direct costs of each employee which is their salary and calculates the benefits of each employee at a rate of 33%. A majority of the calculated benefits cover insurance and retirement. The indirect rate is calculated at 37% of the direct cost and covers both management services support provided by other Department divisions such as fiscal and legal. The indirect rate also covers a portion of rent, vehicles, and overhead items such as computers and utilities. On

average the Department estimates the administration cost of implementing a program to be 25% more than the total of the direct and indirect cost of each FTE.

Based on the staffing needs calculated in Table 13 and the FTE Model, the Department determined the total cost to administer the assumed 404 Program to be \$2,493,210 annually (Table 14). Although the difference between the full assumption proposal and partial assumption proposal is roughly \$92,000, dividing jurisdiction between the state and Corps program at the bluff line is expected to save a significant amount of time and resources which will lead to additional hard savings and further reduce the cost to assume the 404 Program.

Department FTE Model	Direct Cost	Benefits	Indirect rate	Direct+Indirect	Total FTE Cost	Administration Cost
	Provided	33% of Direct	37% of Direct	D+I	D+B+I Costs	((D+I) * 4) / 3
		0.33	0.37			
Average FTE w/ Management	\$ 56,160.00	\$ 18,532.80	\$ 20,779.20	\$ 76,939.20	\$ 95,472.00	\$ 102,585.60
Average FTE w/o Management	\$ 45,760.00	\$ 15,100.80	\$ 16,931.20	\$ 62,691.20	\$ 77,792.00	\$ 83,588.27
Program Calculations	# Managers	# Staff		Direct+Indirect	Total TFE Cost	Administration Cost
Assumed 404 Program	1	28.6		\$ 1,869,907.52	\$ 2,320,323.20	\$ 2,493,210.03

Table 14: 404 Program Administration Cost

5.5 Partial Assumption Sustainable Funding

Sustainable funding is a requirement of a 404 Program assumption application. The Department developed a Services Calculator tool to investigate different funding options. Each option can be adjusted to a percentage of the total cost to account for the possibility of appropriated funds from the Nebraska Legislature. A mixed funding source provides an added layer of security and accountability. The results of each funding option provide the cost to reasonably cover the entire program as well as approximately 75% of the program. The 75% estimate is simply to illustrate the impact to permittees if the Nebraska Legislature were to appropriate funds covering 25% of the 404 Program (Table 15).

Funding Option	Base	Annual Total	Unit	Fee per unit (75% Program Cost)	Fee per unit (100% Program Cost)
Chargeable Impact	\$ -	8349	acre/linear feet	\$ 224.21	\$ 298.95
Hourly Rate	\$ -	37227	hours	\$ 50.23	\$ 66.97
Hybrid Base + Hourly Rate	\$ 800.00	37227	hours	\$ 32.31	\$ 49.05
Pay Per Service (IP)	\$ -	8	Individual Permit	\$ 24,445.42	\$ 32,593.90
Pay Per Service (GP)	\$ -	432	General Permit	\$ 3,264.97	\$ 4,353.29
Pay Per Service (JD)	\$ -	394	Jurisdictional Determinations	\$ 711.89	\$ 949.19
Hybrid Base + Project Cost	\$ 800.00	Program Cost - Base	1% project cost	\$ 1,442.10	\$ 2,189.46

Table 15: Summary of Partial Assumption Funding Option Results

Concerns with funding options were noted under the full assumption sustainable funding sub-sections, however comparing the results for each option raises a noteworthy deduction. Some funding structures may unintentionally lead to economies of scale savings for permittees when there are greater levels of pollution permitted. For example the results of the Chargeable Impact and Hybrid Base + Project Cost options are slightly costlier under partial assumption

than under the full assumption proposal even though the overall workload and cost to administer the program is less.

5.5.1 Chargeable Impact Funding Option

The Chargeable Impact option estimates the actual impact to the environment based on the permits issued over the course of the year. The Department's Air Operating Permit Program uses this model and adjusts the fees annually based on the previous years permitted discharge in tons of pollution released to the air. The 404 Program could follow this model utilizing a set rate per acre and linear feet of aquatic resources impacted. Unfortunately, the ORM data provided by the Corps did not include the spatial impacts associated with each permit. The Department assigned an average of 10 units of impact per permit action from the annual assumable workload estimate of 834 permits (Table 16).

Chargeable Impact	D+I Cost	Administration Cost	Chargeable Pollution (CP)	Units	D+I Cost	Administration Cost
	75% of Program	100% of Program	Est. Annual Impact		75% of Program	100% of Program
Assumed 404 Program	\$ 1,869,907.52	\$ 2,493,210.03	8,340	acres/linear feet	\$ 224.21	\$ 298.95

Table 16: Chargeable Impact Funding Option

5.5.2 Hourly Rate Funding Option

The Hourly Rate option is based on the total amount of hours dedicated towards program work which include all program staff time aside from the Section Supervisor. In this option the applicant would be billed for the time it takes to review and process an application including any project inspections. This option is equitable and commonly used in the private sector. The Hourly Rate option addresses the issue from the Chargeable Impact option with the ability to charge more time towards complicated projects that have greater impacts and require more rigorous environmental reviews. The Hourly Rate funding option results in a rate of roughly \$67 per hour to cover the entire cost to administer the program compared and about \$50 per hour if the Department needed to cover just 75% of the cost to run the program (Table 17).

Hourly Rate	D+I Cost	Administration Cost	Billable Hours (BH)	D+I Cost	Administration Cost
	75% of Program	100% of Program	Staffing Needs	75% of Program	100% of Program
Assumed 404 Program	\$ 1,869,907.52	\$ 2,493,210.03	37227	\$ 50.23	\$ 66.97

Table 17: Hourly Rate Funding Option

5.5.3 Pay Per Service Funding Option

The Pay Per Service option which is based on the average assumable workload and associated processing times for each type of permit activity. This funding option establishes a set rate per permit activity that eliminates the uncertainty issue noted in the first two options. (Table 18).

Pay Per Service	D+I Cost	Administration Cost	Permit	Annual	Hours	% of Total	D+I Cost	Administration Cost
	75% of Program	100% of Program	Type	Permits	each	Workload	75% of Program	100% of Program
Individual Permit	\$ 1,869,907.52	\$ 2,493,210.03	IP	8	292	10%	\$ 24,445.42	\$ 32,593.90
General Permit	\$ 1,869,907.52	\$ 2,493,210.03	GP	432	39	75%	\$ 3,264.97	\$ 4,353.29
Jurisdictional Determination	\$ 1,869,907.52	\$ 2,493,210.03	JD	394	8	15%	\$ 711.89	\$ 949.19

Table 18: Pay Per Service Funding Option

IP = Individual Permit, GP = Regional General Permit, Program General Permit, and Nationwide Permit, JD = Jurisdictional Determination

5.5.4 Hybrid Base Rate/Hours Funding Option

This Hybrid funding option combines a flat base rate to be submitted with the permit application with an additional hourly rate on the back end. For this example a flat rate of \$800 was chosen as it closely represents the cost for the Department to provide a JD. This approach accounts for both the cost of the initial review as well as project complexity and permit processing workloads associated with individual permits verse much simpler general permits.

Hybrid: Base + Hours	D+I Cost	Admin Cost	Base Rate	Workload	Units	Hours	Units	D+I Cost	Administration Cost
	75% of Program	100% of Program	Set Fee					75% of Program	100% of Program
Assumed 404 Program	\$ 1,869,907.52	\$ 2,493,210.03	\$ 800.00	834	permit/ action	37,227	hours	\$ 32.31	\$ 49.05

Table 19: Hybrid Base Rate/Hours Funding Option

5.5.5 Hybrid Base Rate/Project Cost Funding Option

The final funding option combines a flat rate that would be submitted with the permit application with an additional percentage of the overall cost of the project. A flat rate of \$800 was used again as it closely represents the cost for the Department to provide a JD. The resulting estimated cost per project was calculated from the remaining program cost after considering the flat rate fees generated by the estimated annual workload of 834 permit actions. The Department does not have project costs associated with 404 permitted projects to calculate what 1% equates to. Therefore, the project costs were applied to all projects evenly and calculated to cover the remaining cost to administer 100% of the program and 75% of the program. After the first year of implementation, these rates can be adjusted based on actual project costs associated with state issued 404 permits.

Hybrid Base Rate + Project Cost	D+I Cost	Administration Cost	Base Rate	Workload	Units	1% Project Cost	1% Project Cost
	75% of Program	100% of Program	Set Fee			75% of Program	100% of Program
Assumed 404 Program	\$ 1,869,907.52	\$ 2,493,210.03	\$ 800.00	834	permits/actions	\$ 1,442.10	\$ 2,189.46

Table 20: Hybrid Base Rate/Project Cost Funding Option

6.0 Next Steps

Stakeholder participation is crucial for the Department to assume the 404 Program. The Department is seeking input on the major findings of the Investigation Phase which will be

carefully considered in moving forward with the 404 Program Development Phase. Please contact Laura Johnson, CWA 404 Section Supervisor at laura.r.johnson@nebraska.gov with questions and comments.

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Appendix A: 404 Assumption Gantt Chart

CWA Section 404 Assumption	Task Descriptions	Task Completion Date
Elements of a Program Application	Tasks for each Element	Due Date
	Program Investigation Phase	Completed
B.c. (State Agency Organization)	Build Team for new CWA 404 Section (Move/hire positions)	Fri 11/29/19
B.h. (ID State vs Corps waters)	Develop Administrative Line and Mapping tools	Fri 8/28/20
B.e. (Estimate Workload)	Estimate annual workload	Fri 9/11/20
B.d. (Funding and Staffing needs)	Develop annual program budget	Fri 10/2/20
	Program Development Phase	Planned
B.a. (Scope and Structure)	Outline scope and structure of state program	Fri 1/28/22
B.f. (Permit application forms, templates and reporting)	Develop permit application form/template	Mon 3/14/22
Stakeholder Input (B.c/d/e/h)	Hold Stakeholder Meeting	Tues 4/5/22
Stakeholder Input (B.c/d/e/h)	Incorporate Stakeholder Input	Fri 4/15/22
B.c/d/e/h (Completed in Investigation Phase)	Provide final draft elements to EPA for unofficial review	Tue 4/19/22
	Incorporate EPA and NDEE AAC Comments	Tue 5/31/22
B.b. (Review Procedures)	Develop permitting review procedures	Fri 4/21/22
B.b. (Review Procedures)	Develop administrative review procedures	Fri 6/3/22
E (MOA with Corps)	MOA with Secretary of the Army	Mon 6/20/22
B.b. (Review Procedures)	Outline judicial review procedures	Fri 7/8/22
recommended for NEPA	MOA with NE SHPO	Thu 8/18/22
B.f. (Permit application forms, templates and reporting)	Develop permit reporting form/report	Mon 8/29/22
recommended for NEPA	MOA with NGPC and USFWS	Thu 9/29/22
C.a. (Regulatory Cross-walk - Laws/Regs)	ID Regulatory gaps/ Draft new Regs and State Statues	Mon 10/17/22
B.g. (Compliance Evaluation and enforcement)	Outline Coordination with EPA and Corps	Thu 10/20/22
D (MOA with EPA)	MOA with EPA Regional Administrator	Thu 10/20/22
Stakeholder Input (B.a/b/f/g, D, E)	Hold Stakeholder Meeting	Tues 11/1/22
Stakeholder Input (B.a/b/f/g, D, E)	Incorporate Stakeholder Input	Fri 11/11/22
B.a/b/f/g, D, E	Provide final draft elements to EPA for unofficial review	Thu 11/17/22
	Incorporate EPA and NDEE AAC Comments	Fri 1/6/23
B.i. (BMPs for exemptions (404)(f)(1)€)	Outline exemptions and ID BMPs	Mon 1/30/23
B.g. (Compliance Evaluation and enforcement)	Develop compliance evaluation procedures	Mon 2/13/23
B.g. (Compliance Evaluation and enforcement)	Develop enforcement procedures	Mon 3/13/23
C.d. (Attorney General's Statement - Multi-agency)	Multi-agency responsibility & authorities	Mon 6/12/23
C.a. (Attorney General's Statement - Laws/Regs)	Laws and Regs have adequate authority	Mon 6/12/23
C.b. (Attorney General's Statement - Tribal Lands)	Tribal lands not assumable	Mon 6/12/23
C.c. (Attorney General's Statement - Legal Analysis)	Legal analysis of no private property take w/o compensation	Mon 6/12/23
Stakeholder Input (New Program)	Develop Public Rulemaking Workshops	Mon 8/28/23
Stakeholder Input (B.g/l, C.a/b/c/d)	Hold Stakeholder Meeting	Tue 9/5/23
Stakeholder Input (B.g/l, C.a/b/c/d)	Incorporate Stakeholder Input	Mon 9/18/23
B.g/l, C.a/b/c/d	Provide final draft elements to EPA for unofficial review	Thu 9/28/23
	Incorporate EPA and NDEE AAC Comments	Mon 11/13/23
F (Copies of all state statutes & regs)	Finalize all new state statutes and regulations	Fri 1/19/24
NE EQC Review and Adoption	Nebraska EQC Reviews and Adopts new statues and regs	Wed 2/7/24
A (Letter from Governor)	Draft letter for Governor's review/approval	Mon 3/4/24
Stakeholder Input (New Program)	Public Notice	Wed 5/8/24
Stakeholder Input (New Program)	Hold Public Rulemaking Workshops x 3	Mon 5/31/24
404 Program Package (Elements A-F)	Submit Assumption Application to EPA for Review & Approval	Wed 5/8/24
EPA Review and Approval of State's Application	EPA Reviews & Approves Assumption Package (120 Days)	Fri 9/6/24