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WETLAND REGULATORY SIMPLIFICATION STUDY

As Pursuant to

Wetlands Conservation Act of 1991

MINNESOTA DEPARTMENT OF NATURAL RESOURCES

DIVISION OF WATERS

&

BOARD OF WATER AND SOIL RESOURCES

JANUARY 22, 1992

ERRATA SHEET

WETLAND REGULATORY SIMPLIFICATION STUDY

Page 24:

"The DNR clearing-house would then provide the applicant with a checklist of the agencies notified and their response to the project."

Is corrected to read:

"The ~~DNR~~ clearing-house would then provide the applicant with a checklist of the agencies notified and their response to the project."

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## EXECUTIVE SUMMARY

The Department of Natural Resources and the Board of Water and Soil Resources, in consultation with the appropriate State and Federal agencies, conducted a study to examine and simplify wetland regulatory processes. The purposes of this study were to: 1) examine current wetland regulatory programs, 2) explore options of combined local, State and Federal processes relating to wetland regulation, and 3) recommend alternatives to aid in the public's understanding of regulatory programs and simplify the wetland permit process. The U.S. Army Corps of Engineers, the U.S. Environmental Protection Agency, the U.S. Soil Conservation Service and the U.S. Fish and Wildlife Service are the primary Federal agencies involved with wetland regulation. The Department of Natural Resources, the Board of Water and Soil Resources and the Minnesota Pollution Control Agency are the primary State agencies involved in wetland regulation. Watershed Districts, Watershed Management Organizations, counties, townships, and cities regulate wetlands at the local level. Soil and Water Conservation Districts assist in the regulation of wetlands at the local level.

This study revealed many differences between local, State and Federal permit application processes, fee rates, areas of jurisdiction, enforcement procedures and appeal/hearing procedures. Current local, State and Federal program differences are not adaptable to a combined application process without law and rule changes.

Regulatory simplification is a very complicated process. Combining or eliminating regulatory processes would require law and rule changes. Pre-approval of projects has been taken as far as possible without authorizing projects having potential for causing significant environmental damage. U.S. Army Corps of Engineers general permits could be expanded to reduce overlap between State and Federal wetland regulatory programs. The assumption of Section 404 would complicate regulation of wetlands and is impossible for the State to achieve given the current situation. The legislature should request exemption from Federal regulation of wetlands. An interagency project notification form would not require extensive rule or law changes. Expanded Memoranda of Agreement would enhance interagency cooperation. A packet containing a common interagency notification form and a common informational brochure is the best way to achieve wetland regulatory simplification.

## WETLAND REGULATORY SIMPLIFICATION

### I. INTRODUCTION

#### PURPOSE OF CURRENT REVIEW

In May of 1991, the Minnesota Legislature passed the Wetlands Conservation Act of 1991 (Laws of Minnesota 1991, Chapter 354). This Act contains many broad ranging changes to the current state of wetland protection and regulation. Included in the Act is a mandate that the Board of Water and Soil Resources (BWSR) and the Commissioner of the Department of Natural Resources (DNR), in consultation with the appropriate Federal agencies, develop a plan to simplify and coordinate State and Federal regulatory processes related to wetland use by January 1, 1992. Individuals who are currently proposing to work in "protected" wetlands can be faced with at least three sets (Local, State and Federal) of regulations, permit processes, and philosophies (Appendix A; adapted from Wetland Program Comparison Fact Sheet, DNR-DOW, no date reference). The intent of simplification is to make wetland regulatory processes more understandable for the public through enhanced interagency cooperation.

#### REGULATORY AGENCIES

The U.S. Army Corps of Engineers (USCOE), the U.S. Environmental Protection Agency (EPA) and the U.S. Fish and Wildlife Service (FWS) are the primary Federal agencies involved with wetland regulation. The USCOE administers the 1899 Rivers and Harbors Act (Section 10) and the 1972 Clean Water Act (Section 404) permit programs for projects which affect our nations waters. The EPA

oversees the administration of the Clean Water Act (Section 404) and provides comment and oversight to the USCOE on Section 10 and Section 404 permit applications. The FWS also provides review and comment to the USCOE on projects which will affect our nations water resources. In addition, agricultural landowners who wish to farm wetlands must follow U.S. Soil Conservation Service (SCS) guidelines if they are to avoid losing U.S. Department of Agriculture (USDA) farm subsidies.

The primary State agencies involved in the protection and regulation of Minnesota's wetland resources are the DNR, BWSR and the Minnesota Pollution Control Agency (MPCA). The DNR administers the Protected Waters Permit Program for activities which will alter the course, current or cross-section of Minnesota's public waters and wetlands. The BWSR oversees local unit of government (LUG) regulation of wetland areas outside of the DNR's jurisdiction under the 1991 Wetland Conservation Act. The MPCA issues certification for the Federal Clean Water Act (Section 401) for activities which will result in the discharge of dredge or fill materials into waters of the State. The MPCA also issues State certification (Minnesota Rules Chapter 7050) for all activities which will result in the discharge of dredge or fill materials into waters of the state.

At the local level, Soil and Water Conservation Districts (SWCD), under Minnesota Statutes Chapter 103C, assist landowners in the

implementation of plans to conserve and protect soil and water resources. Watershed Districts (WSD) and Watershed Management Organizations (WMO) have statutory authority under M.S. Chapter 103D to regulate land use and projects affecting flood plain and shoreland areas within district boundaries. Many counties (under M.S. Chapter 394) and municipalities (under M.S. Chapter 462) have implemented shoreland, floodplain, wild and scenic river and wetland ordinances, in addition to their own building and zoning codes, to control development and protect the environment.

The existence of several types of jurisdictional wetlands, regulatory programs and agencies has made it very difficult for the public to understand how and why Minnesota's wetlands are regulated. The purpose of this document is to: 1) examine current wetland regulatory programs, 2) explore the options of combined processes coordinating the interaction of Federal, State and Local units of government as concerns the protection and regulation of Minnesota's wetland resources, and 3) recommend alternatives which will aid the public's understanding of regulatory programs and simplify the wetland permit process.

## **II. CURRENT PROGRAMS**

### **AREAS OF JURISDICTION**

The USCOE regulates various activities in virtually all of Minnesota's waters. USCOE Section 10 permits are required for the placement of structures or any other work in "navigable waters" of

the United States. USCOE Section 404 permits are required for the discharge of dredged or fill materials into "Waters of the United States". "Navigable waters" of the United States are those waters which are presently used, have been used in the past, or are susceptible to use to transport interstate or foreign commerce (Regulatory Program: Applicant Information, USCOE, May, 1985). "Waters of the United States" includes not only navigable waters, but also waters, wetlands and tributaries adjacent to navigable waters and other waters where the degradation or destruction of which could affect interstate or foreign commerce (53, Fed. Reg. 20765, 1988). In the past, these definitions have been given very liberal use and application. However, the defining characteristics of Federally regulated wetlands are being tightened under proposed changes to the "1989 Federal Manual for Delineating Jurisdictional Wetlands" (58 Fed. Reg., 40446 - 40480, 1991) Until the proposed revisions have been field tested, it is unclear what effects the proposed changes will have on Federal (USCOE) and State (BWSR) regulation of Minnesota's wetlands.

The DNR, under M.S. 103G.005, Subdivisions 15 and 18, regulates "public waters" and "public waters wetlands". Public waters and Public Waters Wetlands were inventoried by the DNR in the early 1980's and are shown on official Protected Waters Inventory Maps. These maps are available from the Department of Natural Resources - Division of Waters, 500 Lafayette Road, St. Paul, MN 55155-4032. DNR Protected Waters Permits are required under M.S. Chapter 103G

for activities at or below the ordinary high water level (OHW) which alter the course, current or cross-section of public waters and public waters wetlands. The OHW means the boundary of waterbasins, watercourses, public waters and public waters wetlands as defined in M.S. 103G.005, Subdivision 14.

With the passage of the 1991 Wetlands Conservation Act, BWSR and SWCD's will oversee local unit of government (LUG) regulation of wetland areas not under the jurisdiction of the DNR (with certain exemptions). As defined in the Act, "wetlands" under the jurisdiction of BWSR/LUG are:

...lands transitional between terrestrial and aquatic systems where the water table is usually at or near the surface or the land is covered by shallow water. For purposes of this definition, wetlands must have the following three attributes:

- 1) have a predominance of hydric soils;
- 2) are inundated or saturated by surface or ground water at a frequency and duration sufficient to support a prevalence of hydrophytic vegetation typically adapted for life in saturated soil conditions; and
- 3) under normal circumstances support a prevalence of such vegetation...(Laws of Minnesota 1991, Chapter 354).

There is no minimum basin size limit and the jurisdictional boundaries of regulated wetland areas corresponds to the boundary that would be used by the USCOE (using the 1989 Federal Manual for Wetland Delineation). Applicants must replace altered/degraded wetlands under a locally approved mitigation plan.

The MPCA is responsible for the abatement and control of water pollution (Section 401 Certification Program: Synopsis, MPCA-

Water Quality Division, August, 1990). Section 401 of the Federal Clean Water Act requires that any applicant for a Federal permit (from the USCOE) for any activity which may result in a discharge of dredged or fill materials to navigable waters obtain certification for that activity (Section 401 Certification Program: Synopsis, MPCA-Water Quality Division, August, 1990). The MPCA has been designated under Minnesota Statutes Chapters 103B and 103F as the agency responsible for Section 401 certification of USCOE issued permits (Section 401 Certification Program: Synopsis, MPCA-Water Quality Division, August, 1990). The MPCA's rules (Chapter 7050) are applicable to all waters of the State as well as to 401 certifications. "Certification" means that the activity proposed by a permit applicant is in compliance with State water quality rules and statutes. The USCOE cannot issue permits in cases where the MPCA has denied certification.

Prior to the passage of the Wetlands Conservation Act of 1991, the primary role of SWCD's was to furnish aid to landowners and agencies for the development and revision of comprehensive plans to implement State policy specified in Minnesota Statutes Section 103A.206 (M.S.A. 103C.331, 1991) and to advise local and State agencies on the implementation of these plans. SWCD's developed and assisted in the implementation of plans for urban, forestry and agricultural "Best Management Practices", erosion and sedimentation control projects, changes in land use, construction, maintenance and operation of structures, mechanical practices and related

technical standards and practices (M.S.A. 103C.331, 1991). With the passage of the Act, SWCD's now have a role in the oversight/regulation of activities which affect certain wetlands.

Watershed Districts, under M.S. Chapter 103D, protect and conserve the natural resources of the State through land use planning, flood control, and regulation of improvements by riparian property owners. This authority extends over surface and ground water resources within the watershed district boundaries and, in some instances, to neighboring land and wetland resources outside of the watershed district boundaries. In the metropolitan area, Watershed Management Organizations have been established, under Minnesota Statutes Chapter 103B, to perform some or all of the functions of a WSD similar to the authority under Minnesota Statutes Chapter 103D (M.S.A. 103B.211, 1991). Watershed Districts and WMO's have the authority to deny or issue permits for activities which will impact wetland resources under their jurisdiction. WMO's may be designated to regulate wetlands covered under the Wetlands Conservation Act in the Twin Cities metropolitan area.

Under the Shoreland, Floodplain and Wild and Scenic Rivers Management programs, counties and cities regulate a variety of activities above the OHW of public waters and wetlands. In addition, some counties and cities have adopted ordinances to protect wetland areas which are outside of the DNR's jurisdiction. Many townships have also started adopting shoreland, floodplain and

environmental protection ordinances. The degree of wetland protection and associated permit processes can vary widely between local units of government and discussion of these differences goes beyond the scope of this document. The role of counties and cities in wetland regulation will be discussed only as it pertains to the Wetland Conservation Act of 1991.

Depending upon the size and type of wetland affected by a proposed action, a permit applicant could be faced with working with a number of possible combinations of regulatory agencies (Appendix B; Who to Contact About Land And Water Development/Alteration Questions, DNR-DOW, January 1992). The current regulatory situation can be extremely confusing, especially when local, State and Federal policies and procedures are conflicting. While the EPA, SCS and FWS play an important part in the Federal regulation of wetland areas, to include them in the simplification process goes beyond the scope of this document.

#### CURRENT STATE/FEDERAL PROCESSES

To ease the burden on the regulated public, the USCOE has issued a series of "nationwide general permits" which give blanket authorization to activities which will have minimal environmental impact. Depending upon the type of project, nationwide general permits can convey Section 404 authority, Section 10 authority, or both to a project, provided the necessary certifications have been obtained from the DNR and the MPCA.

In response to concerns of Minnesota's regulatory agencies and to avoid regulatory duplication with the DNR, the USCOE has also issued a "regional general permit" (Draft Reg. Conditions and General Permit Revisions, Weburg, September, 1989). The regional general permit is a blanket authorization that covers projects which are routine and will have little, if any, significant environmental impact (e.g. DNR boat ramps/public accesses). General Permit-001-MN avoids Federal duplication of 19 specific activities regulated by the DNR (Federal Regulation of Wetlands, Wopat, no date reference). Upon issuance of all State and local authorizations (e.g. DNR protected waters permit and/or MPCA 401 certification), the activity covered by a blanket permit is given immediate approval. In some instances, the USCOE must send a copy of the general permit to the owner before the project can be started.

"Individual permits" are required for activities not authorized under nationwide general permits or regional general permits because of conditions for Minnesota that have been prescribed by the DNR and the MPCA. An individual permit (Appendix C; Federal Section 404: Assumption Feasibility Study, DNR-DOW, August, 1989) generally requires a pre-application meeting, a public interest review of the project impacts and the preparation of an environmental assessment. Project review includes consideration of alternatives to avoid, minimize and mitigate any adverse effects of a project. Approval to begin a project can take anywhere from a

few days under a blanket authorization, to 90 days or more in the case of an individual permit. The USCOE must deny project approval to those projects which do not receive individual Section 401 or Minnesota Rules Chapter 7050 certification from the MPCA or any other required State or local authorizations.

DNR "Protected Waters Permits" are required under M.S. Chapter 103G to alter the course, current or cross-section of "public waters" or "public waters wetlands". In general, DNR rules cover a much wider range of project types than do Federal standards. However, similar to the nationwide and general permits, the DNR has given pre-approval to a variety of projects with minimal environmental impact, provided they meet certain specifications. Individuals can start pre-approved projects without providing notice to the DNR.

The DNR, under M.S. Chapter 103G.301, coordinates the review of Protected Waters Permit applications with other units of government having jurisdiction in such matters. Under an existing Memorandum of Agreement (MOA), the DNR notifies the USCOE of all Protected Waters Permit applications and of all instances in which a DNR permit has been determined to be unnecessary. Under a similar MOA, the DNR notifies the MPCA of all protected waters permit applications which meet certain conditions. Copies of protected waters applications are also sent to the SWCD, WSD/WMO, county, city and DNR sections of Fisheries and Wildlife for review and comment. The DNR Protected Waters Permit process (Appendix D;

Federal Section 404: Assumption Feasibility Study, DNR-DOW, August, 1989) takes approximately 60 days to complete.

In many cases, pre-application meetings are held to work out difficulties before a DNR Protected Waters Permit application is submitted for review. The DNR Area Hydrologist, DNR Area Fisheries and Wildlife Managers and, in some cases, representatives from other units of government meet with the applicant to discuss the intended project, reduce adverse environmental impacts and work out any problems before the application is submitted. Cooperative efforts such as this help to ease the applicant through the permit process and avoid unforeseen problems after the permit process has started.

The aforementioned system works for most applicants. However, in some cases, applicants find out about a required permit "after-the-fact" or at a point too late in the process to pull-back because of financial commitments. Very often, the applicant has unintentionally neglected to obtain all of the necessary permits because they were unaware of a particular agency's jurisdiction over their project. Results of a study conducted by the Wisconsin DNR revealed that the awareness of the need to obtain permits varied between agencies. Of the individuals polled, all knew that they needed to obtain a Wisconsin DNR permit, half knew they needed a local permit and only a few knew that they needed a USCOE permit (An Assessment of Wisconsin's Wetland Protection Programs, WI-DNR,

January 1991). The study went on to suggest that an instruction book is needed to explain the permit process, how to work with all the agencies, what permits are needed, the steps in the process and where to go for help (An Assessment of Wisconsin's Wetland Protection Programs, WI-DNR, January 1991). When the process fails, it is not because of over-regulation, but because of a lack of public information and understanding of wetland regulatory programs.

Because the roles of BWSR, SWCD and local governments in wetland regulation are so new, no combined processes or MOA's have been developed with them (Appendix E). At this time, it is unclear how and to what extent local governments, DNR, BWSR, MPCA and the USCOE will interact on the regulation of wetland areas. While watershed districts, watershed management organizations, counties, towns and cities have an important role in the regulation of wetlands, a discussion of their current regulatory processes and their interaction with State and Federal agencies is beyond the scope of this document. Because of the wide range of program variations observed, the role of local governments will be examined only as it pertains to the Wetlands Conservation Act of 1991.

### **III. PROGRAM DIFFERENCES**

#### **LOCAL/STATE/FEDERAL PROGRAM DIFFERENCES**

An application involving the USCOE, DNR, BWSR, MPCA, WSD, WMO and local unit(s) of government would be extremely complex. Different

fee rates, time of fee payment, review periods, areas of jurisdiction and appeal, public hearing and enforcement procedures do not lend themselves to an integrated process. An analogous situation would be a combined local, State and Federal income tax system. In addition, WSD/WMO's, counties and municipalities often operate under their own (local) agenda. The degree of interaction with a State agency, such as the DNR, varies from district to district and from local unit of government to local unit of government. Lastly, Federal agencies do not interact with local units of government in the regulation of wetlands. Federal wetland programs are geared solely to interact with State-wide agencies.

#### SECTION 404

The 1991 wetlands protection act (Laws of Minnesota 1991, Chapter 354) contains a mandate which requires the Commissioner of the DNR, in consultation with the attorney general, to adopt rules that provide adequate authority for administering the Section 404 program by February 1, 1993. In addition, the Act requires that, by March 1, 1993, the governor shall make a submission to the administrator of the U.S. Environmental Protection Agency (EPA) to obtain authority to administer the Section 404 program. This option was examined in a legislatively mandated and EPA funded, DNR-Division of Waters study published on August 31, 1989.

The 1989 study gave an overview of the costs and complexities of assuming a 404 program, Federal versus State program differences and what the legislature would have had to accomplish prior to

program assumption. The purpose of this part of the study is to examine and update the 1989 Section 404 study as regards permit and regulatory simplification. While the EPA's basic conditions for State Section 404 assumption are relatively unchanged, there have been changes and proposed changes in legislation, at both the State and Federal level, that are worth further examination.

#### RECAPITULATION OF 1989 STUDY

The main points of the 1989 study, are as follows:

The Minnesota Department of Natural Resources currently has regulatory authority over Public Waters and most types 3, 4, and 5 wetlands as discussed earlier in this report. The Department's position concerning assumption of the 404 program in its current form, is not to encourage this action...The cost to the State without Federal funding, the reportability by the State to the U.S. Environmental Protection Agency and the program controversy with the public prevented the proposed legislation from being officially introduced during the session...

A more desirable program for the Department would be for the Minnesota Legislature to pass legislation which would protect most of the remaining non-protected State wetlands as attempted during the 1989 legislative session (one acre or more of wetlands Types 2, 6, 7 and 8). The Federal government would then have the option of incorporating these wetlands into their General Permits similar to the way the U.S. Army Corps of Engineers has with the State's current Public Water and Wetland Permit Program...

Under 404 program assumption, the State would be obligated to create a set of less restrictive rules regulating the discharge of dredged or fill materials for wetlands not presently protected by the State (State of Minnesota, Federal Section 404 Assumption Feasibility Study, August 31, 1989)...

The Federal Government would retain permitting authority over navigable waters, wetlands adjacent to navigable waters and waters under the control of sovereign Indian nations...

The State may limit the impact of assuming the Section 404 program by creating a new statutory section which might be termed "Other Waters of the United States". This option minimizes the effect of changing the definition of public waters for some 75 State statutes, while providing only that

additional permitting authority mandated by the Environmental Protection Agency (EPA). The State would not be required to expand its regulatory responsibility over a host of programs such as the waterbank program, game and fish laws, wild rice and cranberry harvesting, and purple loosestrife and other noxious plant control.

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

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

\*Statutory authority for the imposition of penalties not to exceed \$25,000 per day for each instance of a civil violation and up to \$100,000 per day for each instance of a criminal violation. It is recommended that the State also have the statutory authority to impose administrative penalties in the amounts of \$10,000 per violation to a maximum of \$125,000...

\*Notwithstanding any other laws to the contrary, the Commissioner must be able to regulate ditch maintenance under Chapter 106A and 112, which affect waters of the United States to the extent necessary for the Section 404 Program.

\*It is not required, but to make compensation more equitable, the legislature should consider expanding the wetland no drainage compensation (Waterbank Program) provisions of M.S. 105.391, Subd. 3 to include wetlands as defined by the EPA.

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

Annual costs for State administration of the Section 404 program range from approximately \$864,743 to \$1,304,743... The figure of \$1,304,743 is a cost estimate for the Department

of Natural Resources if the Section 404 program were assumed without any exclusions. Neither figure includes a required two to three year appropriation of \$67,400 per year for the preparation of EPA mandated assumption documents or any external program costs... In consideration of statewide accessibility to field offices and enforcement personnel, permit applications may increase, possibly, requiring a cost reevaluation in order to continue with the program.

It is the Department's opinion that assumption costs for any other unit of State government would be at least comparable to that of the DNR (contingent upon an agency's existing resources)...(DNR-DOW, August, 1989)

As was mentioned earlier, the EPA's general conditions for State assumption of the Section 404 program have remained relatively unchanged since the completion of the 1989 study. The State would have to submit to the EPA administrator a full and complete description of the program it proposes to establish and administer. Items which would have to be included in the State's submission are as follows:

- 1) An informational program designed to guide prospective applicants through the permit program.
- 2) A Federally approved permit application form.
- 3) A letter from the governor requesting program approval.
- 4) A complete program description. This must include descriptions of staff, permitting and administrative procedures, funding, estimates of numbers of permits, enforcement capabilities, regulated waters and best management practices.
- 5) A statement from the State attorney general which says that the laws necessary for the State to adequately administer and enforce a complete Section 404 program are in place.
- 6) A Memorandum of Agreement (MOA) with the regional administrator of the EPA which includes terms and conditions of State assumption.
- 7) A MOA with the Secretary of the Army which includes the terms and conditions of State assumption of the program from the USCOE (DNR-DOW, August, 1989).

The major item of change since the 1989 study is the passage of the Wetlands Conservation Act of 1991. At the time of the 1989 study, the DNR was the only State agency with permit authority over

"protected" waters and wetlands. With the passage of the Act, BWSR now oversees the SWCD/local unit of government regulation of all types 1 through 8 wetlands not regulated by the DNR (with certain exemptions). Assumption of the 404 program would mean that State wetland regulation would be split between BWSR/SWCD/LUG and the DNR, as full program assumption is the only option available to the State. Assumption of Section 404 would replace one regulatory agency, the USCOE, with potentially hundreds of entities (DNR, BWSR, SWCD, counties, townships and cities). In addition, the State would need to find a way to finance a program that would require at least \$1,300,000 annually. Increased hearing costs, numbers of violations and permit actions would require an addition of field/regional staff. Finally, large differences in permit processes, fee structures, violation and enforcement procedures, penalties, areas of jurisdiction, exempted activities and management philosophies would have to be resolved before Section 404 assumption could occur.

However, assumption is impossible at this time as the EPA will not approve local administration of the Federal Section 404 program. Federal wetland programs are geared solely to interact with State-wide agencies. The delegation of wetland regulatory authority to local units of government prevents the State from assuming the Section 404 program.

#### STATE/FEDERAL PROGRAM DIFFERENCES

There are many differences between State and Federal application

processes. For waters which fall under the jurisdiction of both the DNR and the USCOE, the idea of a combined DNR/USCOE application form was examined several years ago in a series of meetings involving the DNR, USCOE and other State and Federal agencies. After much debate, it was concluded that a combined application process was unworkable and the idea was discarded. Differences in fee rate structures, time of fee payment, after-the-fact application fees and review periods would have to be resolved before such a system could be workable. An analogous situation would be the creation of a combined State and Federal Income Tax Form (Letter to Ben Wopat, Nargang, June, 1990).

For example, the DNR Protected Waters Permit application fees range from a minimum of \$75 to a maximum of \$500. Fees are calculated based on the maximum of the following:

- 1) Project Cost x 1%.
- 2) Length of Shoreline affected x 75 cents per foot.
- 3) Volume of material filled or excavated x 75 cents per cubic yard.

Townships applying for a road, bridge or culvert project are charged a maximum fee of \$100. There is no distinction between fees for non-commercial versus commercial projects. Fees are payable before project review takes place and are nonrefundable. There are no application fees for State or Federal agencies. For work without a required permit, a double after-the-fact permit application fee is charged plus a minimum of \$100 for field inspection fees.

In contrast, the USCOE currently charges a \$10 application fee for private, non-commercial projects and a \$100 application fee for private, commercial projects. Fees are not assessed until after a permit decision is reached. To further complicate matters, the USCOE is currently reexamining their fee structure.

Under the proposed USCOE fee structure, the minimum application and general permit fees would increase to \$100. Fees for standard (individual) permits would increase to \$500 and \$2000 respectively for non-commercial and commercial projects. There would also be additional fees for wetland jurisdictional delineations, public hearings and preparing environmental impact statements. Fees would also be up-front and nonrefundable under the proposed system. Also, no fees would be charged of State agencies if the State did not charge the USCOE a regulatory fee. Finally, after-the-fact permit applications would be charged a 30% penalty in addition to the normal application fee (55 Fed. Reg., 41354-41357, 1990). At this time, it is unclear what type of fee schedule the USCOE will implement.

There are also many differences between the DNR and USCOE application processes. Before a combined application form could be used there are several concerns/questions that would need to be addressed:

- 1) What fee structure(s) would apply? Would applicants have to submit two separate payments for State versus Federal fees? (an analogous situation would be a combined State and Federal income tax payment).

- 2) If a common application fee was arrived at, how would the money be split between the agencies? Some projects requiring a DNR permit do not require a USCOE permit and vice versa.
- 3) Would there be a distinction between commercial and non-commercial project fees for DNR permits? If so, rule and law changes would be needed.
- 4) Would fees be paid up-front or after the issuance/denial of a permit? If so, rule and law changes would be needed.
- 5) Would the State and Federal agencies have separate time frames for permit review or would a common review period time-line be adopted? Rule and law changes would be required to change the Protected Waters Permit review process.
- 6) Who would determine when fee schedules are to be changed to reflect current economic conditions? How would this process be coordinated?

Before a combined application form would be feasible, changes in State and/or Federal rules and laws regarding application fees and review processes would be required. Changes in Minnesota Rules would require hearings involving both State personnel and the public. Based on past experience, total costs for rule hearings ranges from \$50,000 to \$100,000 (depending upon the complexity of the hearing). Finally, following changes in Federal regulations, the State would be required to change it's regulations. Since the State has no control over Federal legislation, this would mean that State legislative action would be mandated following Federal actions. Until the USCOE arrives at a set fee schedule and other differences can be worked out, the possibility for a combined application form would seem to be nonexistent.

However, it should be mentioned that the State of Wisconsin and the USCOE have successfully adopted a limited version of a combined application form. A prospective applicant sends two copies of the

application and the Wisconsin DNR fee to the appropriate Wisconsin DNR office. Upon receipt of the application, the DNR forwards a copy of the application to the District USCOE office. The agencies then respond separately to the applicant with their respective jurisdictional interests. As mentioned later in this report, the Minnesota DNR and the USCOE also cooperate in this fashion using the DNR permit application as the starting point (refer to DNR-USCOE MOA).

A combined application form for projects falling under the jurisdiction of USCOE and BWSR/LUG would be more feasible than a combined DNR/USCOE application as there are fewer program differences. With the exception of the agricultural exemptions outlined in the Wetlands Conservation Act, BWSR/LUG and the USCOE generally regulate the same sizes and types of wetlands.

BWSR/LUG, in their new wetland regulatory role, are not permit issuing agencies. There would be no need to develop interagency fee rates and schedules. The combined form would serve the dual role of being an application for a USCOE permit and a notification form to BWSR and the local unit of government. Upon receipt of the form, agencies would reply in a timely manner to the applicant with their respective jurisdictional interests.

However, a combined LUG/BWSR/USCOE application form would only simplify regulation of wetlands which fall under the jurisdiction

of these respective entities. The potential for confusion over wetlands regulated by the DNR and USCOE would still remain. At best, such a form represents only a partial solution to permit simplification.

#### IV. OPTIONS

##### COMBINED NOTIFICATION

A combined "notification form" is one possibility for simplifying the permit process (Appendix F; Weburg, Adapted from draft Notification Form, no date reference). A prospective applicant would complete a single project description form with sufficient information to allow the respective agencies to determine jurisdictional interest in the project. The "notification form" would be sent to one agency designated as the "clearing-house" for all project notices (Appendix G). The clearing-house would then distribute the form to a preestablished list of regulatory agencies for review. It would then be up to the respective agencies to contact the applicant and provide appropriate forms, regulatory information and project guidance. To avoid any miscommunication, agencies receiving the notification form would also notify the clearing-house of their jurisdictional determination. The clearing-house would then provide the applicant with an update of agency responses to the project.

Such a form would be advantageous to prospective applicants in that:

- 1) Only one form would be required (initially) to notify local, State and Federal agencies of the applicant's proposed intentions.
- 2) No changes would be required in local, State and Federal application fees and permit review periods.
- 3) There is less chance of an applicant finding out about a necessary permit "at the last minute".
- 4) Warning statements which tell the applicant to contact the SCS (if on agricultural land), watershed districts, watershed management organizations, local unit of government and county officials could be included on the form.

This approach would simplify the initial step in the permit application process (Appendix G). Once past the initial notification process, the applicant would still deal with separate local, State and Federal application forms, fee structures, review periods and processes. There is also the possibility that once past the notification process, local, State and Federal agencies would be operating independent of each other. This could lead to differences in the scope of the project authorized, issuance or denial of a permit, and enforcement difficulties. However, existing MOA's could be expanded to ensure interagency cooperation (Appendix H). Finally, there is the more formidable task of educating and informing the public to the existence of such a form and the permit process in general.

The DNR and SWCD are in an ideal position to act as a "clearing-house" agency. Persons interested in working in protected wetlands could fill out one "notification form" (Appendix F; Weburg, Adapted from draft Notification Form, no date reference). The form, which would contain information sufficient to determine project location and agency jurisdiction, would be filled out and sent to the

appropriate field office. The clearing-house would then forward the notification form to the appropriate local, State and Federal agencies. The agencies, including the clearing-house, would then notify the applicant of their jurisdictional interest, and the need for any additional application forms and fees in a timely manner. Agencies would also provide the clearing-house with a copy of their jurisdictional determination. The DNR clearing-house would then provide the applicant with a checklist of the agencies notified and their response to the project.

The aforementioned system would be effective for applicants who have limited knowledge of wetland regulatory processes. For applicants who are familiar with the current permitting system, there would be two possible courses of action: 1) follow the combined notification process, or 2) proceed with the "separate" application system currently in place (Appendix G). There would be no need for "experienced" applicants to use the combined notification process if they are already familiar with the current regulatory system. These applicants would contact agencies individually to obtain necessary permits/authorizations for their projects.

Violations of permit conditions arising from either the "combined" notification system or the "separate" permit application system would need to be coordinated under expanded Memoranda of Agreement (Appendix I). Reporting and enforcement of "after-the-fact"

violations could also be coordinated under an expanded MOA.

#### COMBINED INFORMATIONAL MATERIALS

An interagency task force could be assembled to develop brochures, manuals, etc., which include all of the agencies that regulate Minnesota's wetland resources. Combined publications could be distributed to city halls, libraries and State and Federal government offices to facilitate passage of information to the general public. The recently published DNR/USCOE permit information brochure is an excellent example of interagency cooperation (Attachment A). This brochure gives a brief overview of each agencies regulatory jurisdiction and permit requirements as well as other general information. The brochure also contains a warning to prospective applicants telling them to contact their local SWCD if they are proposing to work in a wetland after January 1, 1992. Interagency brochures, used in conjunction with a combined notification form, could go a long way toward regulatory simplification and public understanding of Minnesota's water laws.

#### V. CONCLUSIONS AND RECOMMENDATIONS

Regulatory simplification is a very complicated process. A degree of regulatory complexity is inevitable given existing differences in jurisdiction, rules and permit processes of the agencies involved in wetland regulation. The intent of this study was to examine the agencies involved in wetland regulation and their areas of jurisdiction in an effort to locate ways in which the regulation

of Minnesota's wetlands can be simplified for the public.

It is felt that the activities which require protected waters permits warrant the close attention they receive because of the potential for significant, adverse effects on major lakes, marshes and streams. Conversely, pre-approval of projects has been taken as far as is possible without authorizing projects which have potential for causing significant environmental damage. However, similar to GP-001-MN, USCOE regional general permits could be expanded to reduce regulatory overlap with the BWSR/LUG wetland regulations.

It is also the Department's position that the addition of new programs, such as Section 404, is counterproductive to simplification. The regulated public as well as regulatory agencies need a period of time to adjust to new legislation (ie. Wetlands Conservation Act of 1991). The assumption of Section 404 would not simplify the regulation of protected wetlands for the general public in any measurable way (ie. one regulatory agency, USCOE, would be replaced by potentially hundreds of regulatory entities: DNR, MPCA, BWSR, WMO, counties and cities). Until it is possible for the State to assume parts of a Section 404 program with no strings attached, the Department continues our position of not assuming Section 404.

A better course of action would be for the State, acting through

the legislature, to request changes in wetland regulation at the Federal level. For example, states such as Minnesota, which have a comprehensive wetland regulatory program in place, would become exempt from the Section 404 program. This would be advantageous to the State in that: 1) the State would have autonomy over the regulation of its wetland resources, and 2) an entire regulatory layer would be removed (simplification). A far less desirable option is for the State legislature to preempt the wetland permitting authority of all State and local agencies except for the DNR and BWSR/SWCD. Under this system, the WSD's, WMO's, county and city units of government would become advisory agencies to the permitting agencies. Such action would result in a prospective applicant having to obtain a permit or authorization from only three possible agencies (DNR, BWSR/SWCD, and USCOE). This action would not only simplify the wetland regulatory process, but also preserve the input of local units of government over affairs within their jurisdiction.

Combined interagency permit notification or application procedures and combined information brochures were presented as ways to help to ease public confusion regarding wetland regulation. Various forms and combinations of application and/or notification forms were examined and their relative merits discussed. The best option for regulatory simplification is a process involving a combined "notification form" and a "combined informational brochure". Information packets, containing a combined notification form and an

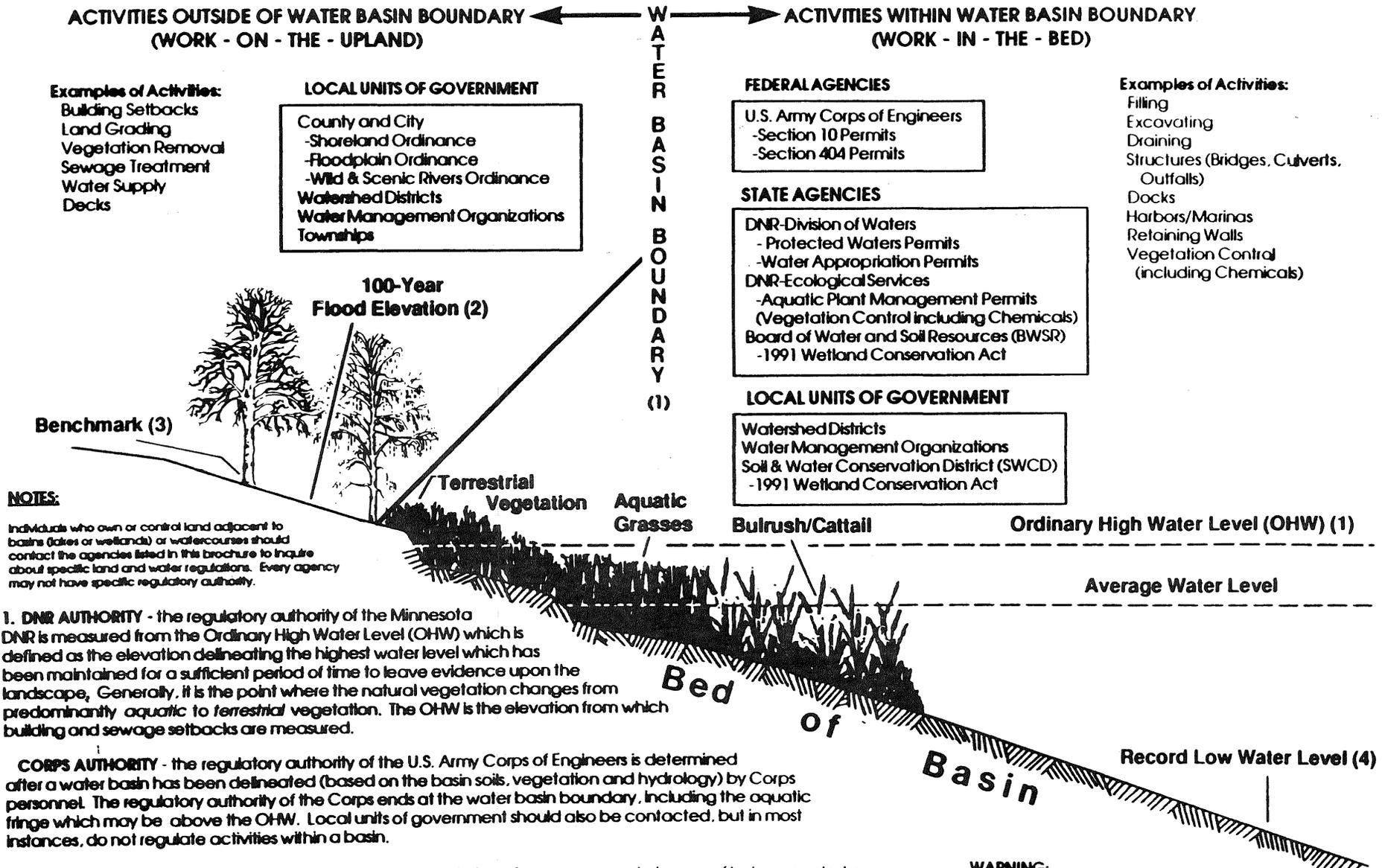
interagency permit process brochure would be made available to the public at local, county, State and Federal offices. Individuals proposing to work in a water body would complete and mail the combined notification form to a "clearing-house" agency which would then forward it to an established list of regulatory agencies. The agencies would then respond to the applicant in a timely manner with their respective jurisdictional interests. Combined information brochures would help to guide the applicant through the permit process with as little difficulty as is possible. Combined notification and information processes, in conjunction with expanded Memoranda of Agreement would go a long way towards regulatory simplification.

DCJ, 1991

APPENDIX A

<b>WETLAND DEFINITION</b>	Wetlands are defined by Minnesota Statute (M.S.) 103G.005, Subdivision 10; by a minimum basin size and type.	Wetlands are defined by Federal Regulations 33 CFR 328.3(b) as those areas that are inundated or saturated by surface or ground water at a frequency and duration sufficient to support, and under normal circumstances do support a prevalence of hydrophytic vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs and similar areas.	Wetlands are defined by M.S. 103G.005, Subd. 10, and do not include public waters and public waters wetlands as defined in subd. 10.	A variety of definitions may be used in local zoning ordinance.
<b>DEGRADED WETLAND TYPES (Per USFWS Circular #39)</b>	Types 3, 4, and 5.	Types 1 through 8.	Types 1 through 8.	Various wetland typing may be used.
<b>MINIMUM WETLAND SIZE</b>	2.5 acres in incorporated areas; 10 acres in unincorporated areas.	No size minimum.	No size minimum.	Various basin sizes may be used.
<b>MITIGATION</b>	Under M.S. 103G.245, Subd. 7, if a major change in the resource is justified, protected waters permits must include provisions to compensate for the detrimental aspects of change. Commonly used when governmental units make permit applications for roadway fills.	In order to issue a Section 404 Permit to fill a wetland, an applicant is required to perform compensatory mitigation in the form of rearing, draining, wetlands or the purchase and conversion of upland areas into wetlands. No net loss of wetlands.	Under M.S. 103G.222, after July 1, 1993, wetlands must not be drained or filled, wholly or partially, unless replaced by rearing or creating wetlands of at least equal public value under an approved replacement plan.	Various types of mitigation may be used depending on local ordinance.
<b>PAUSES</b>	The 600 - 600 does not have any taxing authority in Minnesota.	The USFWS does not have any taxing authority in Minnesota.	6000 does not have any taxing authority in Minnesota.	Local units of government have taxing authority.
<b>COMPENSATION</b>	The 600 - 600 has no compensation program relative to wetland management.	The USFWS has no brown compensation program relative to wetland management.	6000 provides compensation to eligible landowners who preserve types 1, 2 & 3 wetlands through the Wetland Preserve Program. Provides cost-share funding to landowners who propose to establish or restore wetlands.	Landowners may be exempted from taxes on protected wetlands. Local governments have acquired wetlands for mitigation purposes as regulated with resource management agencies.
<b>FARMABILITY</b>	Under M.S. 103G.231, Subd. 1, a landowner may use the bed of wetlands for pasture or cropland during periods of drought if 1) dikes, ditches, tile lines or buildings are not constructed, and 2) the agricultural use does not result in the drainage of the wetland. In addition, a landowner may fill a wetland to accommodate wheeled beams or irrigation devices if the fill does not impede normal drainage.	USFWS regulations allow landowners to farm wetlands when conditions permit as long as they don't change the course, current or cross-section of a wetland basin.	The 1991 Wetlands Conservation Act lists many agricultural exemptions.	Local ordinances may allow landowners to farm wetlands in periods of drought.
<b>VIOLATION PENALTIES</b>	Violations of M.S. 103G.245 are punishable as a misdemeanor with fines up to \$700 and/or 90 days in jail.	Criminal: fines up to \$100,000 per day and 6 years in jail. Civil: fines up to \$25,000 per day. Administrative: A) Class I - \$10,000 per violation; B) Class II - \$16,000 per day.	Violations of M.S. 103G are punishable as a misdemeanor with fines up to \$700 and/or 90 days in jail. Violations may be enforced by criminal prosecution, injunction, action to compel performance, reprobation, or other appropriate action.	Penalties may vary depending on local ordinance.
<b>APPEAL PROCESS</b>	1) Administrative Law Judge (ALJ) hearing and recommendations. 2) per final order. 3) court of appeals. 4) higher courts.	1) file reviewed by higher authority (EPA), 2) suit in federal court system, 3) appeal to higher court.	1) Appeal of wetland replacement plan decision by mailing notice of appeal to board within 30 days of receipt of decision. 2) Appeal heard by committee for dispute resolution. 3) ALJ hearing. 4) final order. 5) Court of appeals. 6) higher court.	In the case of a county, appeals are made to the Board of Adjustment for cities, appeals are made to either a Board of Adjustment or to the city council. Further appeals are civil actions in district court.

# Who to Contact About Land and Water Development/Alteration Questions



**NOTES:**

Individuals who own or control land adjacent to basins (lakes or wetlands) or watercourses should contact the agencies listed in this brochure to inquire about specific land and water regulations. Every agency may not have specific regulatory authority.

**1. DNR AUTHORITY** - the regulatory authority of the Minnesota DNR is measured from the Ordinary High Water Level (OHW) which is defined as the elevation delineating the highest water level which has been maintained for a sufficient period of time to leave evidence upon the landscape. Generally, it is the point where the natural vegetation changes from predominantly aquatic to terrestrial vegetation. The OHW is the elevation from which building and sewage setbacks are measured.

**CORPS AUTHORITY** - the regulatory authority of the U.S. Army Corps of Engineers is determined after a water basin has been delineated (based on the basin soils, vegetation and hydrology) by Corps personnel. The regulatory authority of the Corps ends at the water basin boundary, including the aquatic fringe which may be above the OHW. Local units of government should also be contacted, but in most instances, do not regulate activities within a basin.

**2.** The 100-year or regional flood is the record event in which there is a one-percent chance of being equaled or exceeded in any given year. The 100-year flood elevation is higher than the OHW and is used to determine the boundaries of the floodplain, which is usually regulated by a local floodplain ordinance.

**3.** A benchmark is an established (or assumed) reference point or elevation most commonly expressed in feet above mean sea level. Benchmarks are commonly used by surveyors and building officials to locate the OHW and 100-year flood elevations.

**4.** The record low water level illustrates that actual basin water levels fluctuate, but the regulatory basin boundary or OHW does not.

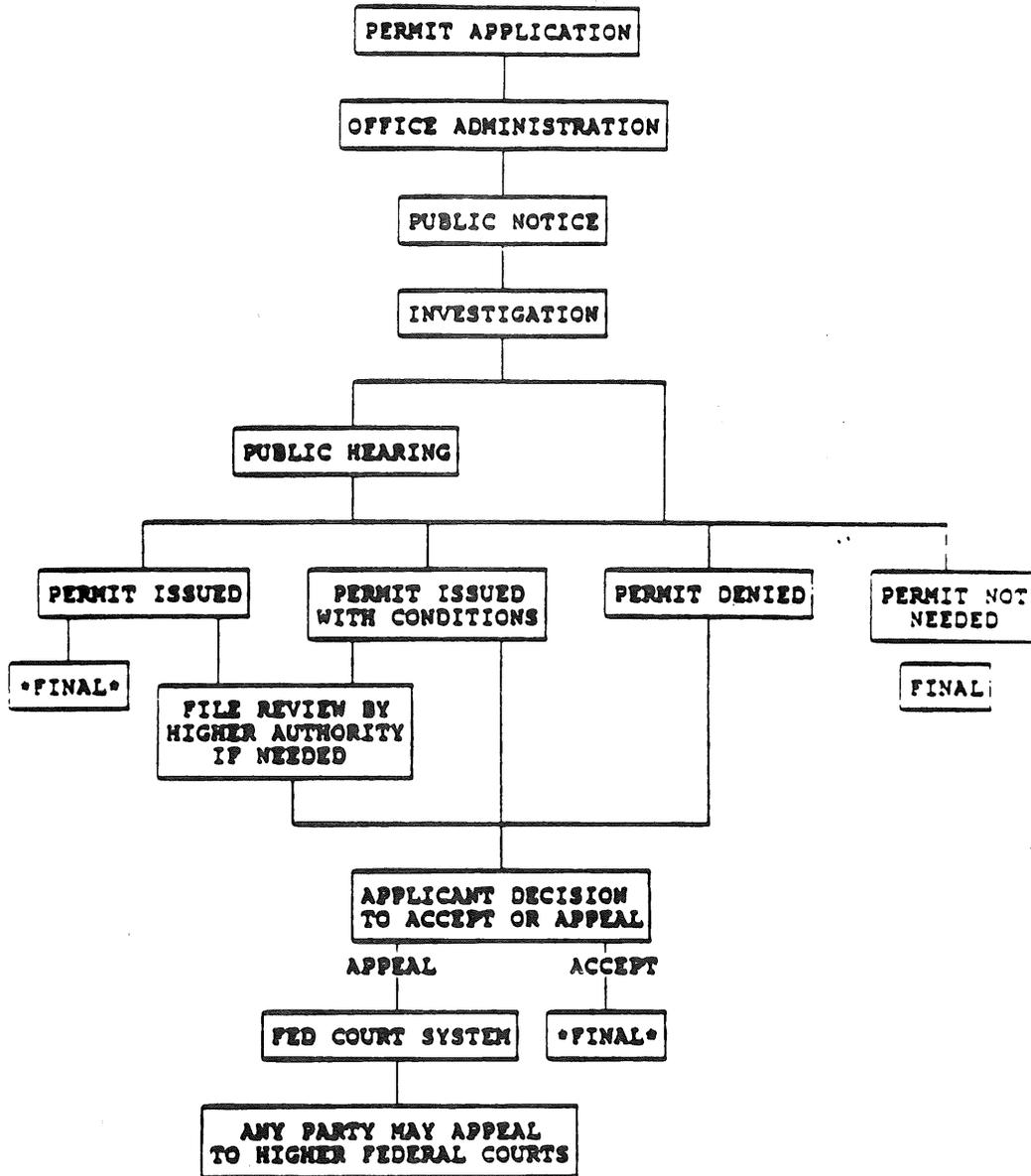
**WARNING:**

Any drainage activity including maintenance on wetlands may affect a landowners receipt of USDA benefits under the 1985 Food Security Act (FSA) as amended. Before commencing any activity affecting drainage on your land, contact your local USDA Soil Conservation Service and refer to their fact sheet entitled "FSA Wetland Determinations and Agriculture Service" (May, 1990)

January 1992

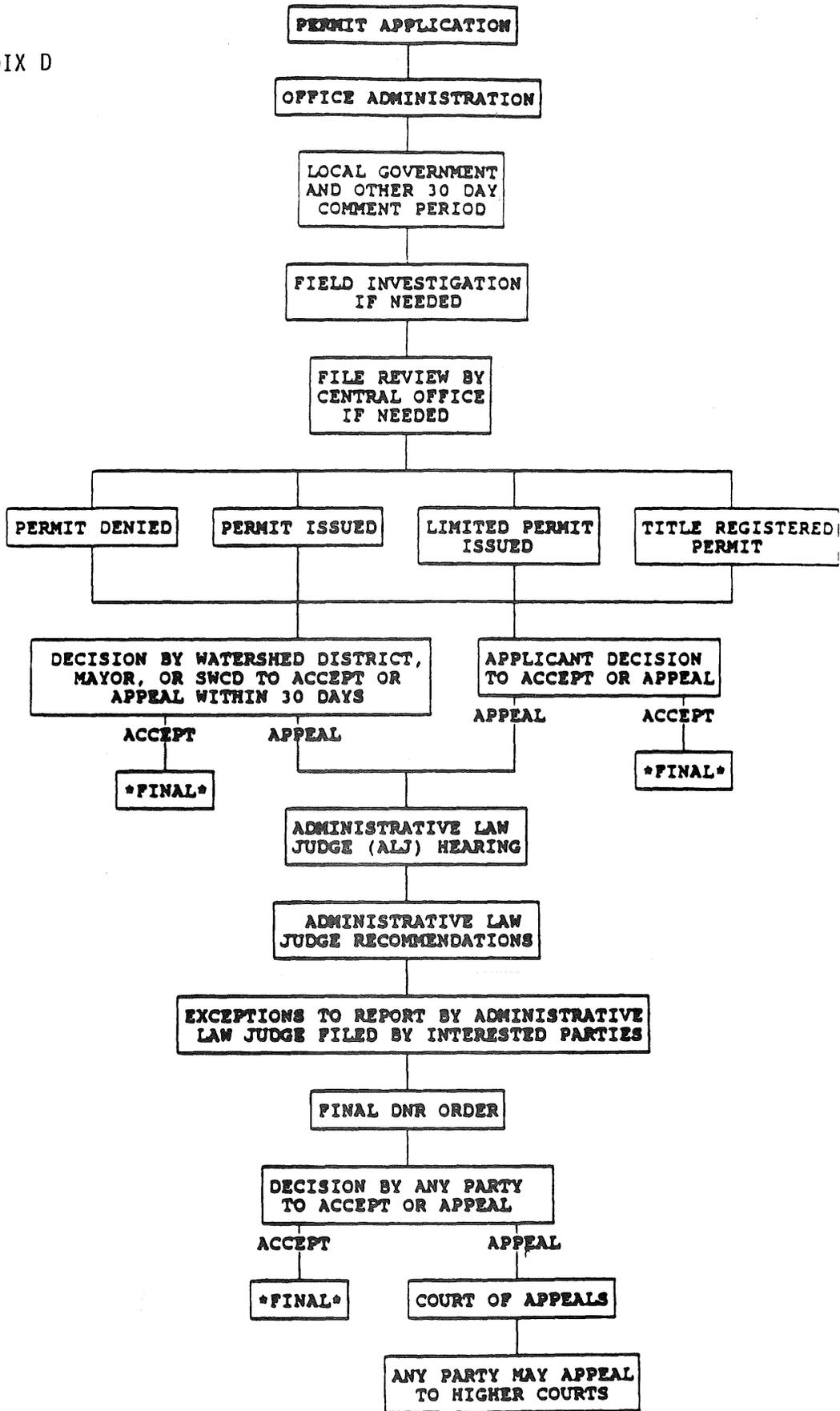
APPENDIX C

FLOW CHART FOR U.S. ARMY CORPS OF ENGINEERS SECTION 404 INDIVIDUAL REVIEW PERMITS. LETTERS OF PERMISSION, NATIONWIDE, REGIONAL AND GENERAL PERMITS ARE HANDLED SIMILARLY WITH THE EXCEPTIONS - PUBLIC NOTICE IS NOT GIVEN.



\*FINAL\* : THIS MEANS FINAL, ONLY, IF THE DECISION IS NOT APPEALED BY ANOTHER PARTY.

APPENDIX D



\*FINAL\* : THIS MEANS FINAL, ONLY, IF THE DECISION IS NOT APPEALED BY ANOTHER PARTY.

APPENDIX E

EXISTING PATHS OF INTERACTION

FEDERAL

U.S.F.W.S.

E.P.A.

S.C.S.

U.S.C.O.E.

STATE

M.P.C.A.

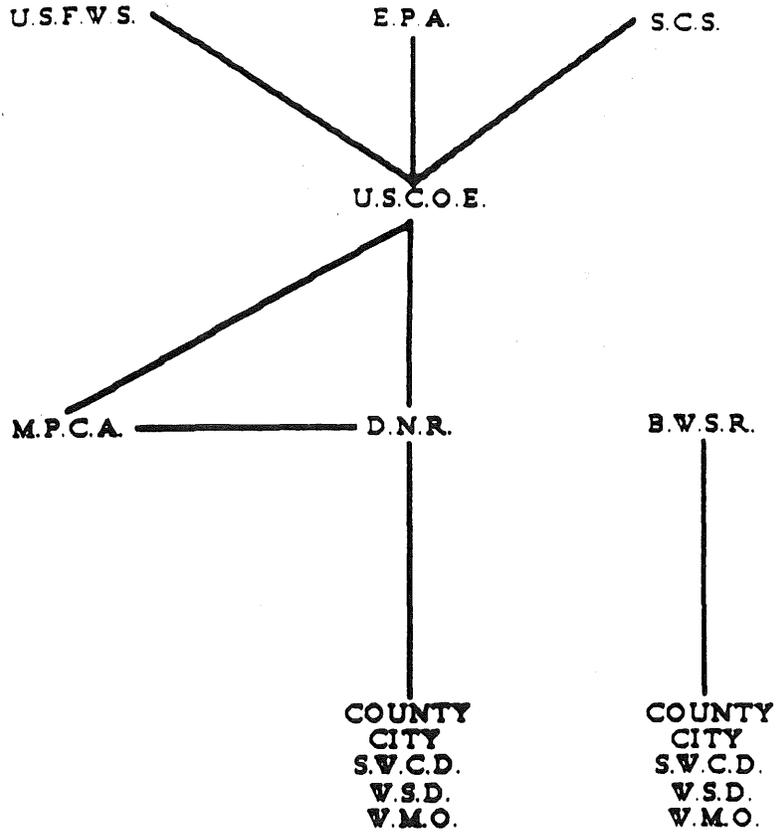
D.N.R.

B.W.S.R.

LOCAL

COUNTY  
CITY  
S.V.C.D.  
V.S.D.  
V.M.O.

COUNTY  
CITY  
S.V.C.D.  
V.S.D.  
V.M.O.



**LOCAL--STATE--FEDERAL PROJECT NOTIFICATION FORM**

You may use this form to notify the Minnesota Department of Natural Resources, the Army Corps of Engineers, and your county and municipal offices of a project or work you propose which may fall within their jurisdiction. These agencies should advise you of their jurisdiction, if any, within 45 days of receipt of this notification. This form is provided as a convenience and its use is optional. You may, if you wish, apply for permits or authorizations using standard agency forms. Fill out this form completely and mail a copy, with plans, maps, etc. to each of the agencies listed on the reverse of the form. Keep a copy of all materials submitted for your records. You must obtain all required authorizations before beginning work. Violations of local, State, or Federal laws may be punishable by administrative, civil and/or criminal penalties.

I. Applicant's Name (First, Last, M.I.) \_\_\_\_\_ / Authorized Agent, if any \_\_\_\_\_ / Area Code, Telephone \_\_\_\_\_ / ( ) \_\_\_\_\_

Address (Street, RFD, Box Number, City, State, Zip Code) \_\_\_\_\_

**II. LOCATION OF PROPOSED PROJECT (ATTACH DRAWING SHOWING HOW TO GET TO SITE)**

Government lot(s) \_\_\_\_\_ Quarter Section(s) \_\_\_\_\_ Section(s) No. \_\_\_\_\_ Township(s) No. \_\_\_\_\_ Range(s) No. \_\_\_\_\_ Lot, Block, Subdivision \_\_\_\_\_

Fire No., Box No., or Project Address \_\_\_\_\_ County \_\_\_\_\_ Work will affect \_\_\_ lake \_\_\_ wetland \_\_\_ waterway \_\_\_ ag production  
Waterbody Name, No. (if known) \_\_\_\_\_

**III. ESTIMATED PROJECT COST: \$ \_\_\_\_\_ LENGTH OF SHORE AFFECTED (in feet): \_\_\_\_\_**

IV. Volume of fill or excavation (cubic yds.): \_\_\_\_\_ Area filled or excavated is \_\_\_\_\_ acres, or \_\_\_\_\_ square feet.  
(NOTE: You may substitute dimensions)

V. TYPE OF WORK AND AREA (Check all that apply):  
 REMOVE  DRAIN  DAM  FILL  EXCAVATE  REPAIR  CONSTRUCT  
 SHORELINE  WETLAND  WATERWAY  DOCK  CULVERT  BRIDGE  LAKE  
 ACCESS PATH  RIPRAP  SAND BLANKET OTHER (describe): \_\_\_\_\_

**WETLAND TYPE(S) AND ACREAGE(S) PROPOSED TO BE FILLED/DRAINED:**

Attach drawings and plans. Include a description of any proposed compensatory mitigation. Important: Identify any disposal and borrow areas. Describe the work below; how it would be done, what equipment would be used:

**VI. PROJECT PURPOSE ( why is this project needed--what benefits will it provide?):****VII. ALTERNATIVES (describe any other sites or methods that could be used to achieve the purpose of your project while avoiding or minimizing wetland/water impacts: Attach additional sheets, if needed).**

VIII. DATES-- Activity proposed to begin on: \_\_\_\_\_ Be completed: \_\_\_\_\_  
Has any of the work been done? NO \_\_\_\_\_ YES \_\_\_\_\_ (identify any completed work on drawing).

**IX. ADJOINING PROPERTY OWNERS (Attach list if more than two).**

Name	Address	City	State	Zip
1. _____	_____	_____	_____	_____
2. _____	_____	_____	_____	_____

X. PERMITS have been received (enter an R) or already applied for (enter an A) from: \_\_\_\_\_ DNR \_\_\_\_\_ ARMY CORPS  
 \_\_\_\_\_ COUNTY \_\_\_\_\_ TOWN/CITY \_\_\_\_\_ WATERSHED DISTRICT \_\_\_\_\_ MN. POLLUTION CONTROL AGENCY.  
 Has an archaeological survey of the project site been done? \_\_\_\_\_ If so, by whom: \_\_\_\_\_

XI. I hereby notify the recipients of this form of the project proposed herein and request that I be advised of any permits or other determinations concerning this project that I must obtain. I understand that proceeding with work before all required authorizations are obtained may subject me to Federal, State, and/or local administrative, civil and/or criminal penalties.

DATE: \_\_\_\_\_

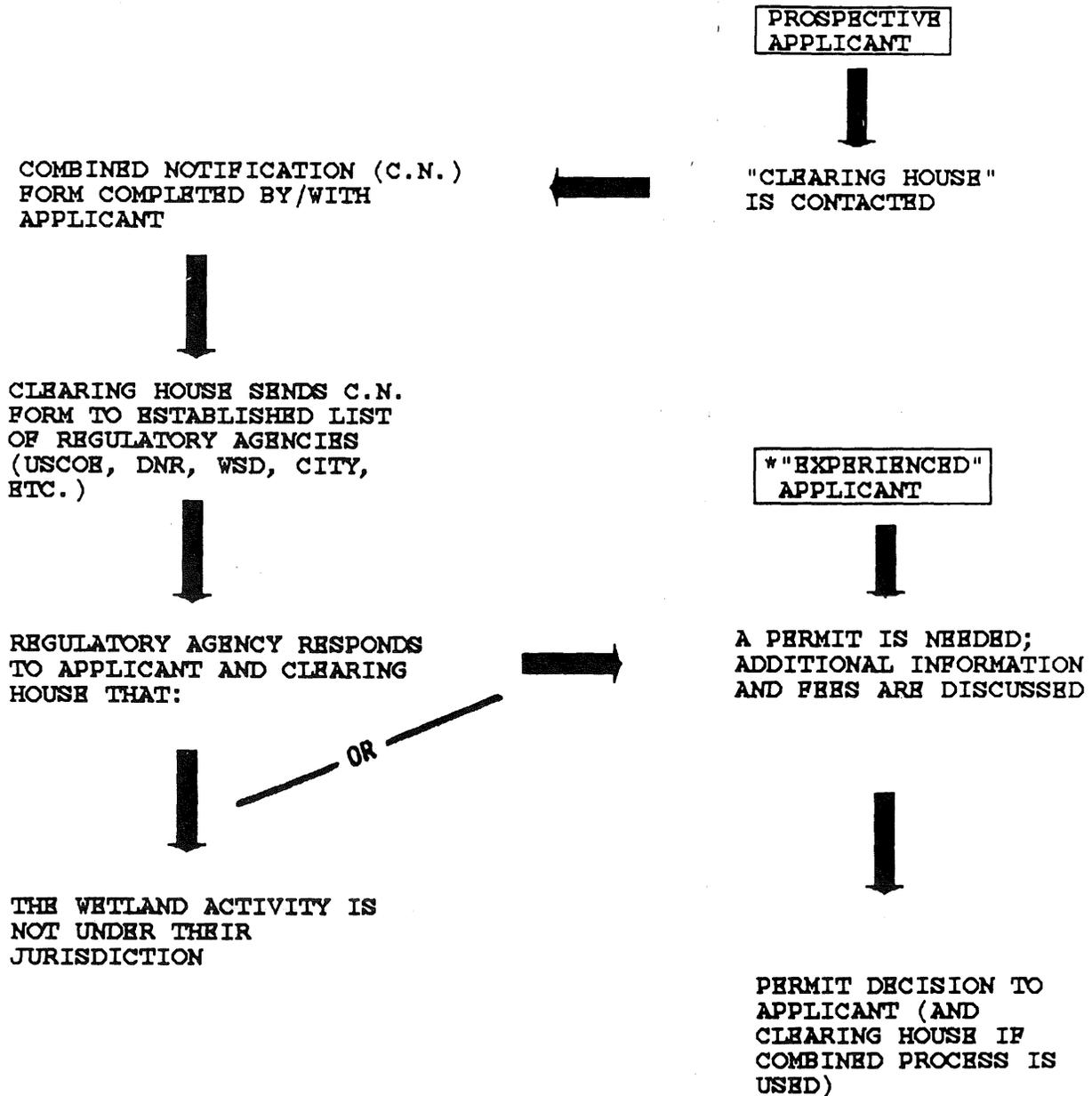
Signature of Person Proposing Project or Agent \_\_\_\_\_

<<< PLEASE CAREFULLY READ AND COMPLETE BACK OF FORM >>>



APPENDIX G

COMBINED NOTIFICATION PROCESS FLOWCHART



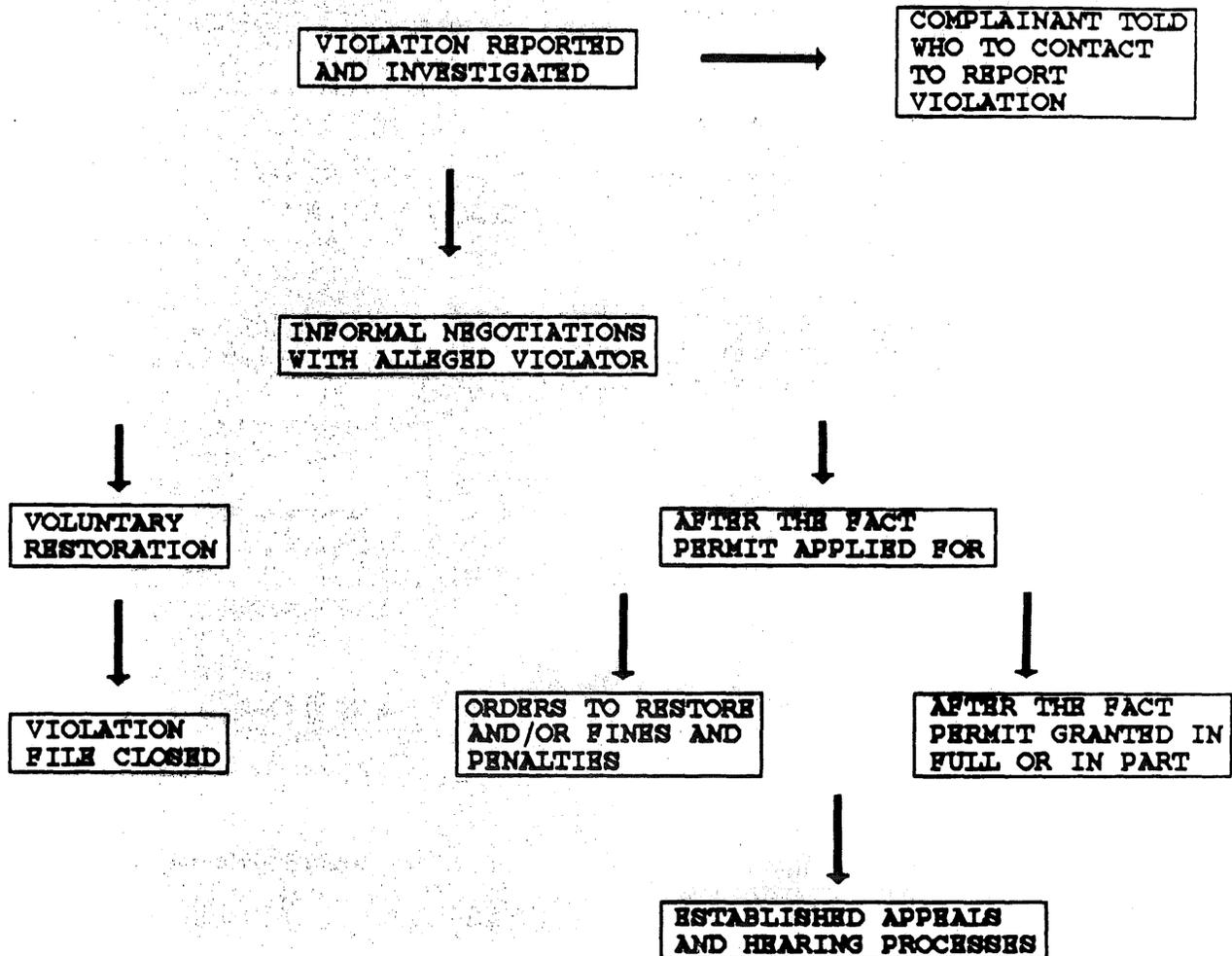
\*NOTE: "Experienced" applicants would have the option of bypassing the combined notification process and submitting applications directly to regulatory agencies.

NOTE: This is a general process flowchart. The actual process may differ.



APPENDIX I

**FLOW CHART FOR VIOLATIONS**



**NOTE**

Violations would be coordinated under expanded Memoranda of Agreement. No distinction would be made between violations occurring under the joint "notification" process or the current "separate" application process.

**NOTE:** This is a general process flow chart. The actual process may differ.

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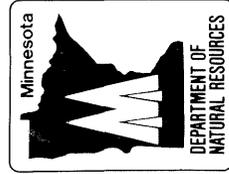
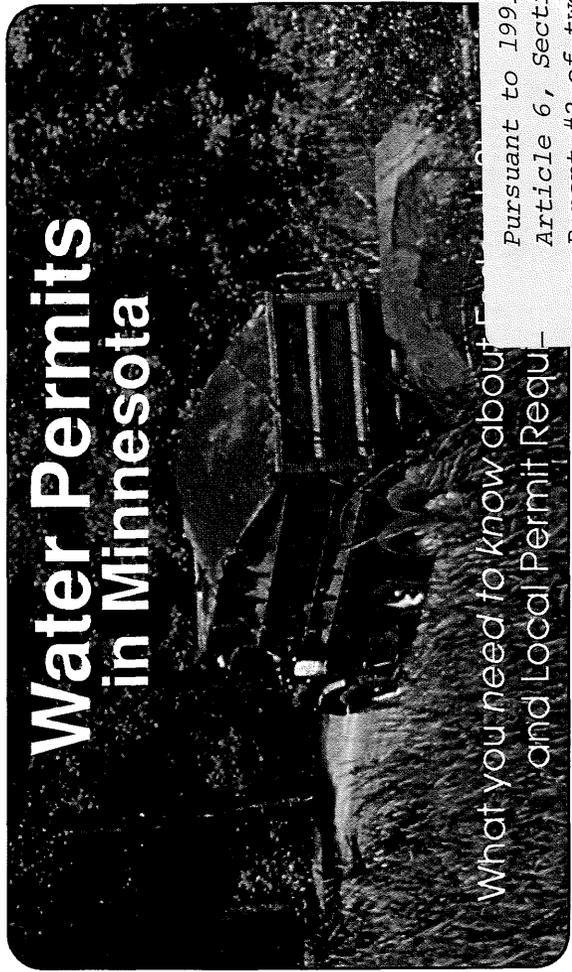
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Wopat, Ben A. St. Paul District of the Corps of Engineers.  
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**Joint U.S. Army Corps of Engineers/  
Dept. of Natural Resources  
Water Permit Brochure**



What you need to know about Federal, State, and Local Permit Requirements

Pursuant to 1991 Laws, Chapter 354  
Article 6, Section 20  
Report #2 of two reports



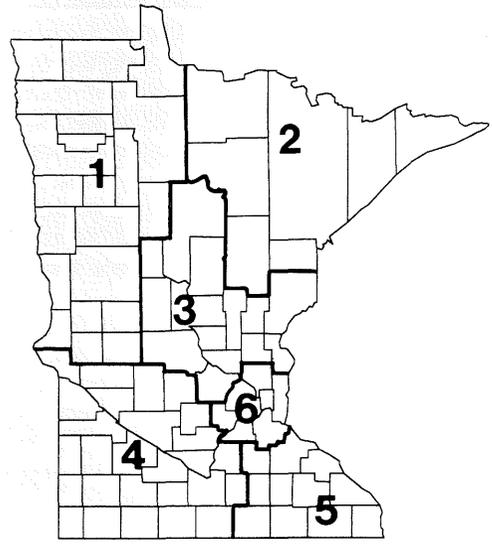
**US Army Corps of Engineers**  
St. Paul District

**Important!**  
In 1991, the Minnesota Legislature approved the Wetland Conservation Act. The act includes new wetlands regulations effective January 1, 1992. This brochure does NOT cover these new regulations; however, after January 1992, you may contact your local soil and water conservation district for more information on the new regulations.

**Who To Contact**

**DNR-DIVISION OF WATERS**

For more information about water-related issues, you can contact your DNR-Division of Waters Area Hydrologist through the appropriate regional office.

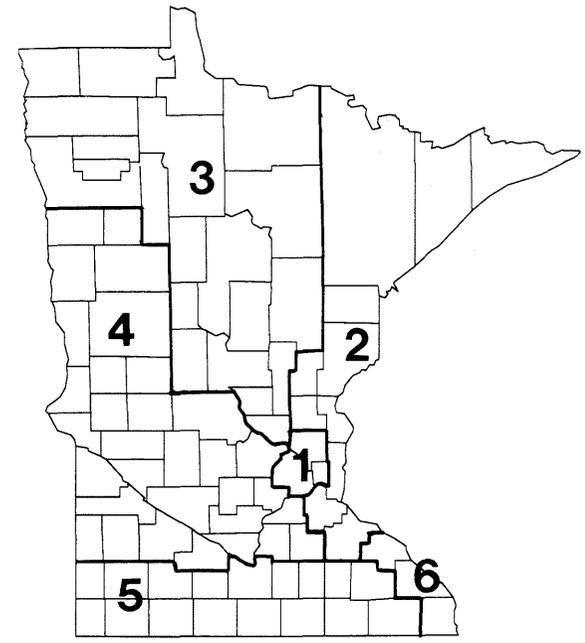


- REGION 1**  
2115 Birchmont Beach Road N.E.  
Bemidji, MN 56601 - (218) 755-3973
- REGION 2**  
1201 East Highway 2  
Grand Rapids, MN 55744 - (218) 327-4416
- REGION 3**  
1601 Minnesota Drive  
Brainerd, MN 56401 - (218) 828 -2605
- REGION 4**  
Highway 15 South  
Box 756  
New Ulm, MN 56073 - (507) 359-6053
- REGION 5**  
P.O. Box 6247  
Rochester, MN 55903 - (507) 285-7430
- REGION 6**  
1200 Warner Road  
St. Paul, MN 55106 - (612) 772-7910
- CENTRAL OFFICE**  
DNR Building, Third Floor  
500 Lafayette Road  
St. Paul, MN 55155-4032 - (612) 296-4800



**U.S. ARMY CORPS OF ENGINEERS**

**St. Paul District**



- CORPS OF ENGINEERS, ST. PAUL DISTRICT REGULATORY CONTACTS**
- AREA 1 - Ramsey and extreme southern Hennepin (612) 220-0362  
Anoka, northern Hennepin (612) 220-0360
  - AREA 2 (612) 220-0355
  - AREA 3 (612) 220-0358 or 220-0370
  - AREA 4 (612) 220-0363 or 220-0372
  - AREA 5 (612) 220-0362
  - AREA 6 (608) 784-8236 (La Crosse, Wis.)
  - BEMIDJI FIELD OFFICE (218) 759-1728
  - DULUTH FIELD OFFICE (218) 722-6424
  - GENERAL INFORMATION (612) 220-0375



**US Army Corps of Engineers**  
St. Paul District

**Department of the Army  
Corps of Engineers  
St. Paul District  
180 Kellogg Blvd. East  
Room 1421  
St. Paul, MN 55101-1479**

In addition, permits may be required by watershed districts and water management organizations (contact the State Board of Water and Soil Resources at (612) 296-3767 for location information), and local units of government such as counties, townships, and cities (see your phone directory under government listings).

# Wetland Types and Definitions

## Introduction

Little more than a decade ago, wetlands were commonly referred to as swamps, bogs, or marshes and were considered of little to no value, if not simply a nuisance. By the 1970's, the ecological and functional value of wetlands was recognized as expanding agricultural and development pressures contributed to their rapid disappearance. Since the 1970's new laws have been enacted, old laws enforced, and new policies developed to regulate the alteration of wetlands. Along with the existing and new laws came a myriad of federal, state, and local governmental agencies to deal with. The Army Corps of Engineers and the Minnesota Department of Natural Resources are the two major agencies that regulate wetlands in Minnesota. Local units of government are now becoming more involved with wetland management regulations, too. This brochure will attempt to clarify the different levels of governmental regulation.

## Wetland Functions

Wetlands can provide a number of values that directly benefit the general public. Collectively they provide:

- Floodwater storage and retention
- Nutrient assimilation
- Sediment entrapment
- Groundwater recharge
- Low flow augmentation
- Aesthetics and recreation
- Shoreland anchoring and erosion control
- Wildlife habitat
- Fisheries habitat
- Habitat for rare plant and animal species

## Wetland Classification

The State of Minnesota has based its program of wetland protection on the classification system presented in Wetlands of the United States, U.S. Department of the Interior Fish and Wildlife Circular No. 39, 1971 Edition. At the time of the initial protected waters inventory legislation in 1976, the U.S. Soil Conservation Service, and Fish and Wildlife Service used the same terminology. When the state legislation was amended in 1979, the terminology remained.

Since that time, the U.S. Fish and Wildlife Service published Classification of Wetlands and Deepwater Habitats of the United States which provides the basis for the current national wetlands inventory. However, because of its familiarity with the Circular 39 system, the state legislature has decided to continue with this system. Both systems are currently used in Minnesota. The following pictures are based on the Circular No. 39 classification system. Type 1 contains three examples of this type of wetland:

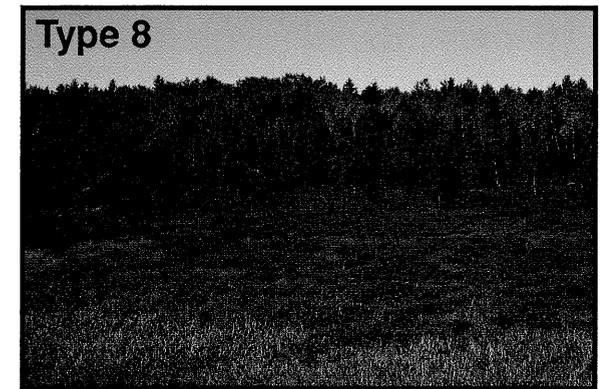
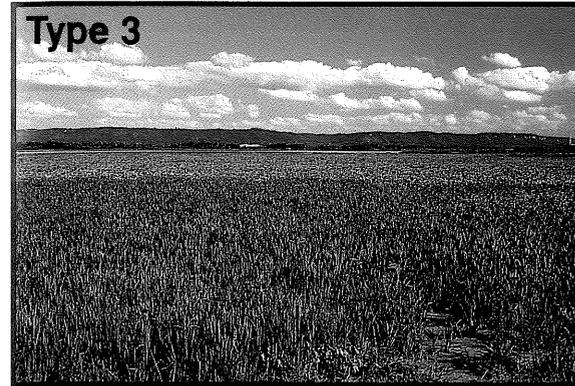
**Type 1 Seasonally Flooded Basin**



**Type 1 Floodplain Forest (May)**



**Type 1 Floodplain Forest (August)**



A SPECIFIC DEFINITION OF WETLAND TYPES 1 THROUGH 8 MAY BE FOUND IN U.S. FISH AND WILDLIFE CIRCULAR 39, 'WETLANDS OF THE UNITED STATES' OR IN MINNESOTA DEPARTMENT OF NATURAL RESOURCES - DIVISION OF WATERS PUBLICATION 'WETLAND TYPES AND DEFINITIONS'.

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# Minnesota Department of Natural Resources Division of Waters

## Introduction

Minnesota's waters have been grouped into two categories for purposes of regulations which encourage the wise use of many types of water basins and watercourses. The waters involved have been identified as "protected waters" or "wetlands" depending on size, physical characteristics and ownership of surrounding lands. Any person, agency or organization proposing to change the course, current, or cross-section of Minnesota's protected waters or wetlands, must obtain a permit from the Department of Natural Resources (DNR). The DNR's authority to require such permits is established in Minnesota Statutes Chapter 103G.

Maps identifying protected waters and wetlands are available for inspection at DNR Regional and Central Offices, County Soil and Water Conservation District Offices, County Auditor Offices and County Zoning Offices. Maps are available from the DNR Information Center, 500 Lafayette Road, St. Paul, MN 55155-4040, (612) 296-6157.

## Why does the State regulate "protected waters" and "wetlands"?

The identification of protected waters and wetlands was adopted to make it easier to determine all waters where a state (DNR) permit is required for any change in their course, current, or cross-section. The underlying philosophy is that the state not only has an interest in protecting the amount of water contained in these lakes, marshes and streams, but also has an interest in protecting the container (i.e., lake, marsh or stream) which confines these waters.

## What are "protected waters"?

"Protected Waters" include all of the following:

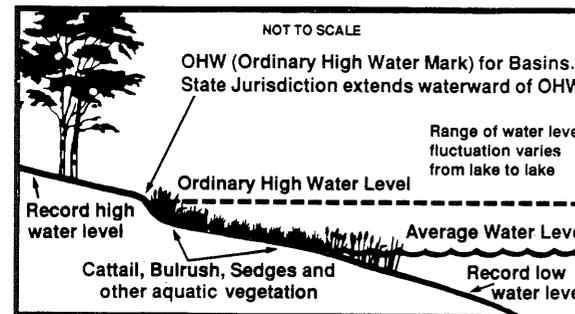
1. All water basins assigned a shoreland management classification, except wetlands less than 80 acres classified as natural environment lakes. Check with your county zoning official to determine whether this applies to your lake.
2. All waters which have been determined to be public waters or navigable waters by a court of law.
3. All meandered lakes, except those which have been legally drained. Meandered lakes were identified by the General Land Office Surveys in the late 1800's.
4. All water basins previously designated by the Commissioner of Natural Resources for specific management purposes such as trout lakes or game lakes.
5. All water basins previously designated as scientific and natural areas.
6. All water basins located within and totally surrounded by publicly owned lands.
7. All water basins where the State of Minnesota or the federal government holds title to any of the beds or shores, unless the owner declares that the water is not necessary for the purposes of public ownership.
8. All water basins where there is a publicly owned and controlled access which is intended to provide for public access to the water basin.
9. All natural and altered natural watercourses with a total drainage area greater than two square miles and all designed trout streams (by the Commissioner of Natural Resources) regardless of the size of their drainage area.

## What are "wetlands"?

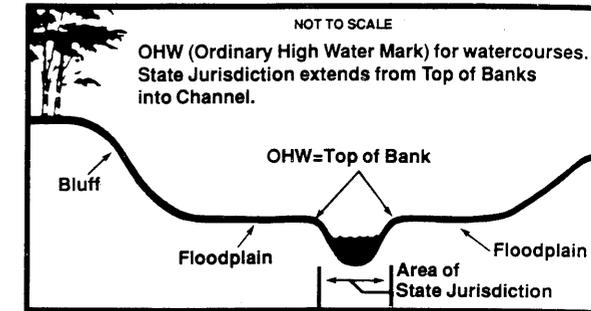
"Wetlands", which are regulated and protected under Minnesota law, include and are limited to, all types 3, 4 and 5 wetlands that have not been designated as "protected waters", which are 10 or more acres in size in unincorporated areas, or 2-1/2 or more acres in size in incorporated areas. The wetlands types are defined in Circular 39, Wetlands of the United States, 1971 Edition, U.S. Department of Interior.

## What is the boundary of "protected waters" and "wetlands"?

The boundary of protected waters and wetlands, for regulatory purposes, is defined by the "ordinary high water mark" (OHW). The OHW is the elevation delineating the highest water level which has been maintained for a sufficient period of time to leave evidence upon the landscape. Generally, it is the point where the natural vegetation changes from predominantly aquatic to predominantly terrestrial.



For watercourses, the OHW is the elevation of the top of the bank of the channel. For reservoirs and flowages, the OHW is the operating elevation of the normal summer pool. Any work done below the OHW is within the beds of protected waters or wetlands and is therefore subject to the permit authority of the Department of Natural Resources.



## NO DNR PERMIT REQUIRED

Certain projects do not require DNR-Waters permits. Please refer to DNR brochure "Work That Can Be Done Without A Protected Waters Permit".

## When is a DNR permit needed?

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

BEFORE INITIATING ANY PROJECT AFFECTING PROTECTED WATERS OR WETLANDS, contact your local Conservation Officer or the Regional Hydrologist by writing or phoning the appropriate Regional Office.

NOTE: Any work exceeding the established limits and/or any other work in protected waters or wetlands without a permit is a violation constituting a misdemeanor and is punishable by imposition of fines up to \$700 and/or 90 days in jail.

If you see what you think is a violation of State Water Law, you can call the DNR Violations Coordinator at (612) 296-4800.

# United States Army Corps of Engineers

## Federal Permits for Work in Wetland and Water Areas

### You must have authorization

from the Army Corps of Engineers to put fill or dredged material into any water or wetland area (Section 404 of the Clean Water Act)

### **OR**

to do any work in, over, under, or which may affect the navigable capacity of a Navigable Water of the United States. (Section 10 of the Rivers and Harbors Act).

Note that the Corps regulates many more wetland and water areas than does the Minnesota Department of Natural Resources (MDNR). The Corps regulates every wetland type discussed in this brochure; and has jurisdiction over virtually every wetland and waterbody in Minnesota. You probably need a permit from the Corps even if you already have, or do not need, a MDNR permit.

The Corps regulates many wet prairie and meadow, forested, shrub, and floodplain wetlands that may seldom, if ever, contain standing water. These areas may not appear to be wetlands to the untrained eye. However, you should contact the Corps to obtain a jurisdictional determination at least 90 days in advance whenever you plan to place any material in a low area or other location which may be a wetland, or to do any work, in, over, under, or which may affect a Navigable Water of the U.S.

### Section 404 Permits ...

... to fill wetland or water areas are not easy to obtain. In order to be issued a Section 404 permit for an activity that need not be located in water or wetland areas to fulfill its basic purpose, an applicant must clearly demonstrate that:

1. An upland site that would avoid filling water or wetland areas is not reasonably available, even if not presently owned by the applicant, and
2. No feasible on-site alternatives exist that would avoid or minimize the placement of fill into

waterbodies, including wetlands. Such alternatives include confining development to uplands, eliminating parts of the development, reducing building and/or parking lot sizes, etc.

After an applicant has successfully passed steps 1 and 2, the last step in the process is compensatory mitigation (creating water or wetland areas having values sufficient to offset the values lost because of the fill). Such mitigation must be included to the maximum extent feasible. This often involves the purchase and restoration of previously drained wetlands, or the purchase and conversion of upland areas into wetlands. **National policy is that there shall be no net loss of wetlands.**

Even if all of the above are satisfied, a permit must be denied if the proposal would have a significant adverse effect upon aquatic resources, or the Corps determines that the proposal is contrary to the public interest, or if a state or local permit is denied for the work.

### Section 10 Permits ...

... are required for work affecting "navigable waters" of the U.S. These are the major rivers and lakes, which in Minnesota are:

Big Fork River, Big Stone Lake, Bois De Sioux River, Kawishiwi River, Kettle River, Lake of the Woods, Lake Traverse, Lake Superior, Little Fork River, Lower Red Lake, Mille Lacs Lake, Minnesota River, Mississippi River and Headwaters Reservoirs, Pigeon River, Pike River, Rainy River, Red River of the North, Red Lake River, Rum River, Snake River, St. Louis River, Upper Red Lake, Vermillion Lake and River and the International Boundary Waters.

Section 10 permits are generally issued where the proposal would have no substantial adverse effects on navigation or the environment. However, if the work or structure includes a discharge of dredged or fill materials, a Section 404 permit will also be required.

**The information which follows generally applies to both Section 10 and 404 permits.**

### When will you get your permit?

You might not. A substantial number of Corps individual permits for projects that would alter wetlands are denied, usually after a review process that may exceed 90 to 120 days. The time it takes for the Corps to make a final decision depends on the kind of Corps permit that is required, how complex or controversial the project is, and how complete the information is concerning the proposed project. Lengthy delays often result while applicants prepare an alternative analysis of available upland sites, alternative designs that reduce the adverse impacts to wetlands, or develop compensatory mitigation plans.

**Corps individual permits (IP)** involve issuance of a public notice to solicit comments about the adverse and beneficial impacts of the project. An environmental assessment is also prepared for each project. Field investigations of projects sites are usually necessary, and sometimes include an archaeological survey. The Corps must coordinate individual permit projects with many Federal, state, and local agencies. Sometimes a public hearing is required, which adds about 60 days to the permit review.

**Corps nationwide permits (NWP)** can authorize some minor projects that involve small wetland fills or work in certain locations. It takes only a few days to confirm the applicability of some nationwide permits.

**A Corps general permit (GP)** can authorize certain projects that require both MDNR and Corps permits. The Corps and the MDNR developed this GP to reduce regulatory duplication for the public. It will not apply if your project has been denied a state or local permit, fails certain conditions, or is controversial. GPs may take 20 to 30 days.

**A Corps Letter-of-Permissions (LOP)** may be used to authorize certain minor work, such as a dock or storm water outfall. This kind of Section-10-only permit is limited to work or structures in navigable waters of the U.S.; it cannot be used to authorize filling water or wetland areas. LOPs may require issuance of a public notice, and usually take 10 to 45 days.

### You should keep in mind ...

... that your Corps permit may be denied. Investments that may depend upon issuance of a Corps permit to be successful should not be undertaken before a permit is granted. Remember, contact the Corps whenever it appears that work you propose may need a Corps permit, and apply for Corps permits as soon as possible.

### Corps Permit Fees...

... depend on the nature and scope of the project. The Corps will advise you of any fee so you can decide if you wish your application to be evaluated.

### Violations...

... are punishable by fines of up to \$50,000 per day of violation, or imprisonment of up to 3 years, or both. Also, the area subject to the violation generally must be restored to its original condition. If you believe you know of a violation, immediately contact the Corps Compliance Section at (612) 220-0378.

### Contact the Corps

The best way to contact the Corps is to send a letter describing your project, along with a map showing the project location, and a sketch or drawing showing the proposed work. Photos of the site help. Be sure to include your address and telephone number, so the Corps can call or write you. Or, if you wish, you may call the Corps at the numbers indicated in this brochure.

### **Warning - by USDA - SCS**

Any drainage activity including maintenance on wetlands may affect a landowner's receipt of USDA benefits under the 1985 Food Security Act (FSA) as amended. Before commencing any activity affecting drainage on your land, contact your local USDA-Soil Conservation Service and refer to their fact sheet entitled "FSA Wetland Determinations and Agriculture (May, 1990)".