

STATE OF MINNESOTA
FEDERAL SECTION 404
ASSUMPTION FEASIBILITY STUDY
As Pursuant To
United States Environmental Protection Agency Agreement
U.S. EPA Grant Number X-814966-01-0
Federal Catalog Number 66-505



MINNESOTA DEPARTMENT OF NATURAL RESOURCES
DIVISION OF WATERS

AUGUST 31, 1989

STATE OF MINNESOTA
FEDERAL SECTION 404
ASSUMPTION FEASIBILITY STUDY

As Pursuant To

United States Environmental Protection Agency Agreement

U.S. EPA Grant Number X-814966-01-0

Federal Catalog Number 66-505

MINNESOTA DEPARTMENT OF NATURAL RESOURCES

DIVISION OF WATERS

AUGUST 31, 1989

ACKNOWLEDGEMENT

Through a cooperative agreement between the State of Minnesota, Department of Natural Resources (DNR) and the United States Environmental Protection Agency (EPA), a study was conducted to determine the feasibility of the State of Minnesota assuming the Federal Section 404 permit program. This expanded version of the 1987 Minnesota Legislative mandated report was prepared under an EPA grant with 48 percent of the cost funded by the DNR, Division of Waters. The work that provides the basis for this publication was supported in part by EPA funding under this agreement. The substance and findings of that work are dedicated to interested governmental agencies and to the public. The author and publisher are solely responsible for the accuracy of the statements and interpretations contained in this publication. Such interpretations do not necessarily reflect the views of the Federal Government. This report could not have been possible without the special assistance of the United States Army Corps of Engineers.

TABLE OF CONTENTS

	<u>Page</u>
INTRODUCTION	i
DEPARTMENT OF NATURAL RESOURCES' POSITION ON 404 ASSUMPTION	ii
SUMMARY.	1
ADVANTAGES/DISADVANTAGES	4
TYPES OF ACTIVITIES AND RESOURCES INVOLVED	7
MINNESOTA STATE REGULATED WATERS	8
WORK THAT CAN BE DONE WITHOUT A PROTECTED WATERS PERMIT.	9
FEDERAL SECTION 404 AUTHORITY.	13
PERMIT EVALUATION PROCESS.	17
PERMIT HISTORIES	29
VIOLATION PROCEDURES	31
PUBLIC HEARING PROCEDURES.	33
VIOLATION HISTORIES.	35
FEDERAL CONDITIONS FOR STATE ASSUMPTION.	37
COSTS FOR STATE ADMINISTRATION	49
ASSUMPTION PREPARATION	51
STATE WATER BANK PROGRAM	52
WETLAND TAX EXEMPTION.	52
DIVISION OF FISH AND WILDLIFE.	53
RULE HEARINGS.	54
PUBLIC HEARINGS.	54
INFORMATION MANAGEMENT	55
PERMIT PROCESSING.	55
VIOLATIONS	57
COMPUTER ENTRY	61
PUBLIC NOTICES	61
INTER-AGENCY MAILINGS.	62
ANNUAL REPORT.	63
CERTIFICATION.	63
ALTERNATIVE FUNDING STRATEGIES	64
APPROPRIATE ROLES FOR STATE AGENCIES AND LOCAL UNITS OF GOVERNMENT	67
NECESSARY CHANGES IN CURRENT STATE LAW	69
GENERAL AUTHORITY.	70
WATERBANK.	70
DRAINAGE	71
PENALTIES.	71
STATUTORY ALTERNATIVES	72
DISCUSSION	72

APPENDIX 74

APPENDIX A - PUBLIC WATERS STATUTORY SEARCH. 75

APPENDIX B - CORPS OF ENGINEERS JURISDICTION 87

APPENDIX C - FEDERAL/STATE PERMIT COMPARISON 88

APPENDIX D - FLOW CHARTS FOR MN/FED PERMIT APPLICATION/VIOLATIONS. . 89

APPENDIX E - MAPS OF MN/FED JURISDICTIONAL DIFFERENCES 95

APPENDIX F - RECENT CHANGES IN FEDERAL ENFORCEMENT PROVISIONS. . . . 96

REFERENCES 97

INTRODUCTION

The 1987 Minnesota Legislature authorized the Department of Natural Resources to complete a study concerning the feasibility of the State of Minnesota assuming authority for the Federal Section 404 permit program as it relates to the Federal Clean Water Act, 1972 Amendments. The Department of Natural Resources contacted the United States Environmental Protection Agency (U.S. EPA) to develop a mutual agreement concerning the study and to receive a Federal grant to assist with the associated costs. The mutual agreement and Federal grant became effective on September 1, 1988, with an estimated study completion date of August 31, 1989.

This study provides the reader with a realistic overview of the program costs and Federal/State existing program differences as well as what the State of Minnesota would have to accomplish prior to assumption should the Minnesota Legislature or Federal Government require the State to assume the program. It should be noted that if the State of Minnesota is required to assume the program, an additional two or three years would be required for the purpose of developing agreements and memorandums of understanding with the U.S. EPA as well as completing the necessary legislative changes prior to receiving U.S. EPA program assumption approval.

This study is not intended to propose alternative legislative futures. Rather it outlines what is necessary to incorporate the current Federal Section 404 permit program into current State permit programs and laws.

DEPARTMENT OF NATURAL RESOURCES' POSITION ON 404 ASSUMPTION

The Minnesota Department of Natural Resources currently has regulatory authority over Public Waters and most Types 3, 4 and 5 wetlands as discussed in the "Types of Activities and Resources Involved" section of this report. The Department's position concerning assumption of the 404 program in its current form, is not to encourage this action. The 1989 Minnesota Legislature scheduled a bipartisan meeting with the Department and the U.S. Corps of Engineers concerning 404 assumption. 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. This proposal was introduced during the 1989 legislative session and received very positive support in several major hearings. The House File was narrowly defeated near the end of the session and a similar proposal is being prepared for the 1990 legislative session.

Under 404 program assumption, the State would be obligated to create a set of less restrictive rules regulating only the discharge of dredged or fill material for wetlands not presently protected by the State. This action would appear to the public as "dual permitting standards". Under proposed legislative authority, most of the existing State wetlands not presently protected by the State would not be allowed to be drained or filled, wholly or partially, unless replaced by creating wetland areas of equivalent quality, character and diversity under a mitigation or mining reclamation plan satisfactory to the Commissioner of the Department.

In order for the Federal Government to obtain Minnesota Department of Natural Resources' support for Section 404 assumption, the conditions required by the State are as follows:

1. The Federal Government must provide at least 50% of the State's annual program costs.
2. The Federal Government must allow the State to make the final decision on Section 404 permit and violation matters without Federal veto power.
3. The Federal Government must provide the State with an inventory map pre-identifying Section 404 waters to be transferred for State authority. This action would remove any doubt concerning State jurisdiction over applicable Section 404 waters.

4. The Section 404 program involves the discharge of dredged or fill materials only. The State would recommend the Federal Government to change this program to be more comprehensive to include other activities such as excavation, drainage and the placement of structures. This action would bring the 404 program into more compatible terms with the 404 waters presently regulated by the State. For example, Section 404 could be changed to be as comprehensive as Section 10 is for navigable waters. It would also allow for more uniform and equitable treatment to the citizens of the State.

SUMMARY

SUMMARY

A change in regulatory responsibility is an obvious impact of State Section 404 Program assumption. At present, the State regulates lakes, watercourses, and most wetland types 3, 4, and 5. This authority translates into some 3.5 million acres of waters and about 6,564 watercourses. Section 404 assumption requires that the State enlarge this regulatory responsibility over an additional 5.2 million acres of waters or 8.7 million total acres and about 31,000 additional watercourses. The Federal Government would retain permitting authority over navigable waters, wetlands adjacent to navigable waters and waters under the control of sovereign Indian nations. For an example of the jurisdictional differences, see the maps in Appendix E.

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 statutory authority to impose administrative penalties in the amounts of \$10,000 per violation to a maximum of \$125,000 (also see Appendix F).
- *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 smaller figure is a cost estimate developed for a new statutory section with just the authority required to administer the Section 404 program. 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. The figures given in this report are based on existing data in State and Federal records. In consideration of statewide accessibility to field offices and enforcement personnel, permit applications may increase, possibly, requiring a cost revaluation 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 or potential resources). If local units of government were to assume the program, the per unit cost would be less. Yet, the cumulative costs and complexity of coordination for a program consisting of 87 counties would be at least comparable to that of the DNR (any estimate of actual program costs to the State are dependent upon the level and availability of State funding).

A significant benefit of State Section 404 assumption revolves around overlapping permitting authority. State administration of the Section 404 program may help alleviate unavoidable delays resulting from the current situation of both a Federal and State agency evaluating many of the same permits, yet operating on two distinct time schedules. In some cases, applicants discover that permits are required from one of the agencies at a point too late to prevent an irreversible commitment of resources and equipment.

The State and the Department of Natural Resources in particular, are in a position to improve upon this situation. The Department of Natural Resources currently administers a number of programs focusing on the regulation and protection of the State's waters. The staff expertise required to evaluate Section 404 permits already exists within the DNR Division of Waters, as well as equipment, easily accessible regional offices, and monitoring and enforcement programs required for program implementation.

ADVANTAGES/DISADVANTAGES

ADVANTAGES/DISADVANTAGES

The following are potential advantages and disadvantages to the public and waters of the State with State assumption of the Federal 404 program. This is assuming that the Federal 404 Program will be assimilated into the Minnesota Statutes Chapter 105 Program.

Advantages

1. One of the major benefits would be the removal of the Federal/State overlapping permitting authority. This could be a savings of time and money for applicants.
2. Wetlands not inventoried under 105.391 Subd. 1 but which are defined as waters of the United States under Section 404 of the Federal Clean Water Act would be protected with recommended Legislative expansion of the Waterbank Program.
3. The State would be obligated to provide the public with property tax exempt consideration for all remaining wetlands under the Wetland Tax Exemption.
4. The State would be obligated to have statutory authority for imposition of penalties, including civil, criminal and possibly administrative. The fines can be substantial as indicated by two recent fines for \$60,000, levied by the EPA with the COE assistance, and for \$125,000 levied by the EPA. Any fines collected by the State would go into the State's general fund.
5. The six DNR regional and nine area offices are more available and accessible than the three COE offices to applicants, questions, reports of violations, etc. This could raise the number of reported violations, level of enforcement, etc.
6. The State would regulate more wetlands. The State currently regulates most wetland Types 3, 4 and 5. Following assumption, wetland Types 1, 2, 6, 7 and 8 as well as the smaller Types 3, 4 and 5 would also be regulated. However, the regulation of these additional wetlands would not be as comprehensive as the current State regulatory program. (Also see the jurisdictional map comparison in Appendix E).
7. A public benefit would be the right to a public hearing before an Administrative Law Judge (ALJ) which could save time and cost.
8. Public hearing decisions by a State ALJ carry more weight than the non-binding COE hearings and are generally better accepted by the public.
9. MPCA 401 certification is not required under State assumption of the 404 program. This would eliminate another agency and accelerate the review process potentially saving applicants time and money. It is not the intention of the State to not use MPCA for 401 type of certification. This advantage is solely to point out another potential benefit of removal of another agency for permit review. At this time the State has no alternative but to use MPCA for 401 type of certification.

Disadvantages

1. The costs would be at least \$1,000,000 per year and would have to be raised through State taxes and possibly some alternative funding. Currently, no Federal funds are available.
2. The EPA would have final say in State decisions involving waters of the United States. State decisions can be overruled by the EPA.
3. Consideration of water quality issues could be minimized if the MPCA did not review all 404 permit applications for 401 Certification.
4. Public opinion of the agency assuming the Federal 404 program may deteriorate due to perceived increased regulation authority over confusion between State and Federal regulatory procedures.
5. The State would not have an option to pursue or not pursue legal action. EPA regulations mandate prosecution for all violations.
6. Maps identifying 404 regulated waters do not exist. This will lead to controversy in regards to marginal types of wetlands, wetlands adjacent to navigable waters, etc.
7. Following changes in Federal Section 404 regulations, the State would be required to enact or change its regulations. Since the State has no control over Federal legislation, this would mean that State legislative action would be mandated by Federal actions.
8. The State would be required to submit an annual report to the EPA and to the public. This is a substantial project involving time and money.
9. Constant correspondence to the EPA concerning Section 404 permit/violation matters. This would required additional staff time and funding for coordination and reporting.
10. The State 105.42 program is more comprehensive and regulates all activities. Under 404 Assumption there would be two classes of wetlands regulated by the State suggesting unequitable regulation of the wetlands.
11. Section 404 permit processing time could be considerably longer than our current 105.42 permit processing, if the EPA elected to comment.
12. The Federal regulations and guidelines are difficult to interpret and are confusing. The State would be forced to administer and enforce these less than optimum regulations without any control in their amendment and application.

TYPES OF ACTIVITIES AND RESOURCES INVOLVED

TYPES OF ACTIVITIES AND RESOURCES INVOLVED

The State of Minnesota currently regulates approximately 3,551,700 acres of public waters and wetlands (excluding Lake Superior and State protected watercourses) or 21,871 water basins (including Lake Superior) and 6,564 watercourses. According to a 1981 University of Minnesota study, there are approximately 8,700,000 total acres of surface waters (excluding Lake Superior and watercourses) in the State. A Legislative Commission on Minnesota Resources (LCMR) project completed by the DNR, Office of Planning used data from the U.S. EPA and determined that there are approximately 37,793 watercourses with approximately 93,000 total miles within the State (University of Minnesota, 1981). If the State of Minnesota assumes the Section 404 program, all waters of the United States, which translates into all waters of the State of Minnesota, will be regulated through a State permit program. Any additional waters of the U.S. will be regulated only for the purpose of fill placement or discharge of dredged or fill materials.

The current resources and activities involved are examined in greater detail for both the State and Federal Governments as follows:

MINNESOTA STATE REGULATED WATERS

Introduction

Since 1937 the State of Minnesota has attempted to conserve our waters and protect the rights of the public to use and enjoy them. Minnesota's waters have been identified as "public 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 public 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 Section 105.42.

Public Waters

"Public 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.
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 declared that the water is not necessary for the purposes of public ownership.
8. All water basins where there is 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 designated trout streams regardless of their drainage area.

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 public waters, which are 10 or more acres in size in unincorporated areas, or 2½ or more acres in size in incorporated areas. The wetland types are defined in Circular 39, Wetlands of the United States, 1971 Edition, U.S. Department of the Interior.

When is a DNR Permit Needed?

Any work done below the ordinary high water mark (OHW) of public waters and wetlands, which changes the course, current or cross-section, requires a permit from the Department of Natural Resources (except those projects specified below). Typical examples of projects requiring a permit include: draining, filling, dredging, channelizing, construction of dams, harbors or permanent offshore structures, and placement of bridges and culverts (MN-DNR, Minnesota's Protected Waters and Wetlands Permit Program. St. Paul, Minnesota. August, 1987).

Indian Reservation Permit Requirements

No M.S. 105.42 permit is required for enrolled members of Federally recognized Indian tribes, bands or communities doing work in protected waters or wetlands lying within the boundaries of established Indian reservations. Under state assumption of the Federal 404 program, the Federal government would retain permit authority over the Indian waters or wetlands not regulated by the State.

WORK THAT CAN BE DONE WITHOUT A PROTECTED WATERS PERMIT

Some projects do not require permits from the Department of Natural Resources if certain conditions are met. However, local units of government and other agencies, such as the U.S. Corps of Engineers, may still require permits for these projects. Projects which change the course, current, or cross-section within the beds of public waters and wetlands not listed here require permits from the Department of Natural Resources.

The projects will not require permits provided all listed conditions are met:

PROJECT RESTRICTIONS

Beach Sand Blankets

- Clean, inorganic sand or gravel free of pollutants and nutrients.
- No more than 6 inches thick, 50 feet wide along the shore or one-half the lot width (whichever is less), and 10 feet waterward of the ordinary high water mark.
- Local watershed district and zoning officials given at least 7 days prior notice.
- Site is not a posted fish spawning area.
- Installation of sand or gravel may only be repeated once at same location, not exceeding same amount and dimensions of the original sand blanket.

Rock Riprap (for shore protection)

- Natural rock only, at least 12 inches diameter or larger.
- No more than 5 feet waterward of the ordinary high water mark.
- Conforms to natural alignment of shore and does not obstruct flow of water.
- Minimum finished slope no steeper than 3:1 (horizontal to vertical).
- Site is not a posted fish spawning area, designated trout stream, nor along the shores of Lake Superior.

Streams with a Watershed less than 5 Square Miles (3,200 acres)

- No permit is required to construct a bridge or culvert, or to fill or excavate the bed of a protected watercourse having a total drainage area, at its mouth, of 5 square miles or less, provided:
 - County zoning officials and local Soil and Water Conservation Districts are given at least 7 days prior notice and determine the project will not result in downstream erosion or sedimentation.
 - The project will not divert the water to a different watershed.
 - The project will not impound water by damming the watercourse.
 - The watercourse is not an officially designated trout stream.

Debris Removal

- No permit is required to remove debris such as trees, logs, stumps and trash as long as the original alignment, slope or cross-section of the lake, marsh, or stream bed is not altered.

Repair of Public Drainage Systems

- No permit is required to repair a lawfully established public drainage system (Judicial Ditch, County Ditch, etc.) provided:
 - The repair complies with the definition set forth in Minnesota Statutes, Section 106A.701, Subdivision 1 (Public Ditch Law).
 - The repair does not affect significant fish and wildlife habitat or protected vegetation (such as State or Federal wildlife management areas, designated scientific and natural areas, etc).

Seasonal Docks and Floating Structures

- Removed from water on a seasonal basis (before winter freeze-up).
- All components removable from lake or stream bed by nonmechanized means.
- Will not be a hazard to navigation or endanger public health and safety.
- Site is not a posted fish spawning area.
- Will not include fuel handling or sewage facilities.
- Is not used or intended to be used for human habitation, as a boathouse or as a marina.
- Allows for free flow of water beneath it.

Permanent Docks (on lakes only)

- Dock is a single linear structures not more than 6 feet wide.
- Does not exceed 50 feet in length, or extend into water that is more than 4 feet deep, whichever is less.
- No more than one dock per waterfront lot.
- Will not obstruct navigation or create a water safety hazard.
- Site is not a posted fish spawning area.
- Will not include fuel handling or sewage facilities.
- Is not used or intended to be used for human habitation, as a boathouse, or as a marina.
- Allows for free flow of water beneath it.
- Lake must be 500 acres or larger if dock is built on wood pilings.
- Lake must be 2,500 acres or larger, and site must preclude the use of a dock on wood pilings if dock is built on rock filled cribs.

Boat Ramps

Privately owned ramps:

- Site can support ramp without pilings, dredging, or other special site preparations.
- Constructed only of gravel, natural rock, concrete, steel matting, or other durable inorganic material.
- No more than 6 inches thick, 12 feet wide along shore, and 10 feet waterward of the ordinary high water mark or into water depth of 4 feet, whichever is less.
- No more than 5 cubic yards of excavation and 5 cubic yards of fill allowed for a stable base.
- Site is not a posted fish spawning area.

Publicly owned ramps:

- Same as above, except ramp can be up to 24 feet wide and 20 feet waterward of the shoreline or into water depth of 4 feet, whichever is less, with up to 30 cubic yards of fill and 60 cubic yards of excavation.

Removal of Existing Structures

- The original lake, marsh or stream bed is restored.
- All parts of the structure, including footings or pilings, are removed.
- The structure is not a water level control device and is not on an officially designed trout stream.

Water Level Control Structures (on streams only)

- Contributing watershed above the structure is 300 acres or less.
- Structure is not considered a "dam" under State Dam Safety rules.
- Structure is not on an officially designated trout stream.

Low Water Ford Crossings (on streams only)

- No special site preparation necessary.
- Normal summer flow does not exceed 2 feet in depth.
- Normal low flow is not restricted or reduced.
- Crossing conforms to the shape of the natural stream channel.
- Original stream bank no higher than 4 feet.
- Constructed only of gravel, natural rock, concrete, steel matting or other durable, inorganic material not more than 1 foot thick.
- Graded finished slope no steeper than 5:1 (horizontal to vertical)
- Graded banks must be seeded or mulched.
- Site is not an officially designated trout stream, wild, scenic or recreational river or officially designated canoe and boating route.

Temporary Bridges (on streams only)

- Stream bank can support bridge without pilings, foundations, culverts, excavation, or other special site preparations.
- Nothing is placed in the bed of the stream.
- Capable of removal for maintenance and flood damage prevention.
- Bridge is firmly anchored at one end and can swing away during flooding.
- Minimum of 3 feet clearance between lowest portion of bridge and normal summer stream flow.
- Consistent with floodplain, shoreland, and wild, scenic or recreational river ordinances.

Maintenance of Storm Sewers, Agricultural Drain Tile and Ditch Outlets

- Outlet must have been maintained and functioning within the last 5 years.
- Maintenance work does not alter the original course, current or cross-section of the lake, marsh or stream bed.

Installation of Agricultural Drain Tile Outlets

- Outlet involves no construction of an open ditch and is not intended to drain a protected water or wetland.
- Bank is restored to the natural slope.
- Installation does not require channelization, dredge or filling.
- Except for the tile, no permanent structure is placed in the lake, marsh or stream bed.

FEDERAL SECTION 404 AUTHORITY

The Chief of Engineers is authorized under Section 404 of the Federal Clean Water Act to issue permits for the discharge of dredged and fill materials into waters of the United States (40 CFR Part 232.2q). As such, the Corps of Engineers have responded by developing a system of distinct permit categories to facilitate processing. These categories and their respective attributes are discussed below:

Nationwide Permits

Nationwide is one category of permit established to streamline the permit evaluation process. Applicants are under no obligations to submit formal project plans, provided such proposals comply with all State and local regulations and fall within the Corps' nationwide authority. Any projects meeting these requirements may commence immediately without written authorization. A majority of applicants, however, typically request some type of written determination or recognition.

What follows is a brief summary of activities authorized under the Corps' nationwide permitting authority:

- Repair or rehabilitation of any previously serviceable structure or fill
- Placement of fish and wildlife harvesting or water measurement devices
- Surveying activities
- Placement of out-fall and in-fall structures
- Structures constructed for exploration of oil, gas, and minerals, on the outer continental shelf and leased for such purposes under the U.S. Department of the Interior
- Structures constructed to establish mooring facilities in anchorage and fleeting areas
- Placement of single mooring buoys
- Temporary buoys used for recreational purposes
- Discharge of material used for backfill or the bedding of utility lines
- Minor bank stabilization projects
- Minor road crossing fills
- Return of waters resulting from upland disposal of dredged or spoil material
- Fills associated with small hydropower projects, provided such projects and fills are authorized under the Federal Energy Regulatory Commission
- Structures, work, and discharges for the containment and cleanup of oil and hazardous waste spills
- Structures, work, and discharges associated with surface coal mining activities, provided such authority is granted by the U.S. Department of the Interior, Office of Surface Mining, or states with programs approved under Title V of the 1977 Surface Mining Control and Reclamation Act
- Activities authorized under State administration of the Section 404 program
- Discharge of concrete into tightly sealed forms, where such concrete becomes a structural member
- Discharge of dredged or fill materials into specific categories of headwaters and other non-tidal waters, including wetlands which are not tributaries to interstate or navigable waters

Source: U.S. Department of Defense, St. Paul District of the Army Corps of Engineers "Nationwide Permits in the State of Minnesota".

General Permits

The St. Paul District of the Corps of Engineers also administers what are termed General permits. General permits are specific agreements for abbreviated review procedures between the Corps and respective states. There are two agreements with Minnesota currently maintained under Section 404 and one under Section 10. GP-0012-MNDNR is an agreement authorizing the Minnesota DNR, as sole applicant, to construct specific types of boat launching facilities. GP-001-MN is an agreement or "catch all" category covering some nineteen different activities. Under Section 10 jurisdiction, GP-0006-MN authorizes construction of permanent and temporary docks in navigable waters.

The nineteen activities governed under GP-001-MN are briefly identified as follows:

- Bank stabilization
- Docks, piers, and wharfs
- Boat ramps
- Submerged utility crossings
- Sand blankets
- Fish and wildlife improvement structures
- Fish habitat improvement structures and fills
- Fish barriers
- Cofferdams and caissons
- Dredging
- Channel connections
- Wing dams and deflectors
- Groins
- Breakwaters/jetties
- Fords
- Bridge and culvert improvement or replacement
- Access paths
- Fill for shoreline reclamation and repair
- Water control structures

Source: U.S. Department of Defense, St. Paul District of the Army Corps of Engineers, "General Permit GP-001-MN".

Individual Review Permits

Individual Review permits represent those applications or projects which do not satisfy conditions for either Nationwide or General permits and which are determined to present potentially significant impacts. Applications or projects that satisfy the Individual Review criteria are subject to a full public interest review. This requires that a complete description of the proposed project be mailed to any and all interested parties. Each interested agency or party then has a specified number of days in which to make recommendations or suggest alternative actions. These comments are then used by the Corps of Engineers in making final permit determinations.

1. The definition of waters of the United States, as used in the administration of the Section 404 program, is as follows (40 CFR Part 232.2q):

a. All waters which are used or were used previously, or susceptible to use, in interstate or foreign commerce;

b. Interstate waters including interstate wetlands;

c. All other intrastate waters such as:

intrastate lakes, rivers, streams, (including intermittent streams), mudflats, playa lakes, sloughs, including any such waters or natural ponds, the use, degradation, or destruction of which would or could affect interstate or foreign commerce;

I. Which are or could be used by interstate or foreign travelers for the purposes of recreation or;

II. From which fish or shellfish are or could be taken for sale in interstate or foreign commerce (Hauger, 1988);

III. Which are or could be used for industrial purposes by industries in interstate commerce;

IV. Which are or would be used as habitat by birds protected by migratory bird treaties;

V. Which are or would be used as habitat by other migratory birds which cross State lines;

VI. Which are or would be used as habitat for endangered species;

VII. Which are used to irrigate crops sold in interstate commerce;

d. All impoundments of waters otherwise defined as waters of the United States;

e. Tributaries of waters identified in paragraphs a-d above;

f. Wetlands adjacent to waters (other than waters that are themselves wetlands) identified in paragraphs a-d above.

*The 404 authority transferable to a State is for all waters of the U.S. (State), except for navigable waters and their adjacent wetlands (i.e. Mississippi River, Lake Superior, etc.).

2. Waters generally not considered waters of the United States and treated on a case by case basis by the Environmental Protection Agency (EPA) are as follows:

a. Waste treatment systems, including the treatment ponds or lagoons;

b. Drainage and irrigation ditches excavated on dry land;

c. Artificially irrigated areas which would revert to upland if the irrigation ceased;

- d. Artificial ponds or lakes created by excavating or diking dry land to collect and retain water and which are used exclusively for such purposes as stock watering, irrigation, settling basins, or rice growing;
 - e. Artificial reflecting or swimming pools or other small ornamental bodies of water created by excavating and/or diking dry land to retain water for primarily aesthetic purposes;
 - f. Water-filled depressions created in dry land incidental to construction activity and pits excavated in dry land for the purpose of obtaining fill, sand, or gravel, unless and until the construction or excavation operation is abandoned and the resulting body of water meets the definition of waters of the United States.
3. Discharges that may result from the following activities are not prohibited by or otherwise subject to regulation under Section 404 of the Clean Water Act (CWA) (see Section 323.4 for further discussion).
- a. Normal farming, silviculture, (forestry), and ranching activities encompassing plowing, seeding, cultivating, minor drainage and harvesting for food, fiber and forest products (all of which must be an ongoing program or activity);
 - b. Maintenance, including the reconstruction of currently serviceable structures, such as dams, dikes, levees, groins, riprap, breakwaters, causeways, bridge abutments or approaches, and transportation structures;
 - c. Construction or maintenance of farm live-stock ponds or irrigation ditches (not including the construction, but including the maintenance of drainage ditches);
 - d. Construction of temporary sedimentation basins for construction sites which do not involve the placement of fill material into waters of the U.S.;
 - e. Using Best Management Practices (BMP), the construction or maintenance of farm roads, forest roads, or temporary roads used for moving for mining equipment (53 Fed. Reg. p. 20765 (1988)).

PERMIT EVALUATION PROCESS

U.S. CORPS OF ENGINEERS SECTION 404

The U.S. Army Corps of Engineers' process of evaluating Section 404 permits is fundamentally different from that of the State. The Corps' philosophy and process revolve around balancing interests of the individual or group proposing a project, against the public interest. This regulatory approach recognizes public interest but treats Section 404 (b)(1) guidelines as paramount in determining whether to issue or deny a permit. The State's regulatory approach, on the other hand, considers environmental protection of State's waters as the primary determinant.

The COE disagree with the above paragraph and offer the following comment:

"It should be indicated that, for a permit to be issued, the project must comply with the 404 (b)(1) guidelines and must not be contrary to the public interest. These are separate, if generally related evaluations, and normally proceed concurrently."

A summary of the U.S. Army Corps of Engineers' permit evaluation and balancing process follow: The rules apply primarily to Individual Review permits, where district engineers exercise considerable discretionary authority.

1. The District Engineer immediately assigns an identification number to an incoming permit application, reviews the application for completeness, and then acknowledges receipt of and the identification number assigned to application. The District Engineer may request that an applicant submit missing or incomplete information normally within 15 days of receipt of the application.
2. The District Engineer will determine whether the application is complete and issue a public notice or notify the applicant of any requirement for further information. The District Engineer shall issue a revised public notice if, in his or her opinion, substantial new evidence is presented (51 Fed. Reg. p. 41237 (1986)).
3. The District Engineer shall consider all comments received in response to a public notice in any subsequent permit actions. Receipt of comments will be acknowledged, and incorporated into the applications' administrative record. Any comments received as form letters or petitions shall be acknowledged as a group. Comments submitted by and specifically discussing issues within the expertise of another federal agency shall be given great weight by the District Engineer. At the earliest practical convenience, all substantial comments will be furnished to the applicant. The applicant may subsequently contact any or all of the objecting parties and attempt to resolve any differences. It is not a requirement. The Corps of Engineers are responsible, alone, for making final permit determinations.

The District Engineer often arranges meetings between applicants and objectors. Staff may provide information on the permit application process, to mediate differences, or to gather information which may aid in the decision making

process. Requests for delay by the permit applicant shall be at the discretion of the District Engineer.

4. The District Engineer shall follow Appendix B of 33 CFR, Part 230, to comply with environmental procedures and documentation as required by the National Environmental Policy Act (NEPA). A decision on a permit application shall require either an environmental assessment or environmental impact statement (EIS), unless it is categorically exempted.
5. The District Engineer shall also evaluate the application to determine the need for a public hearing as specified in 33 CFR, Part 327.
6. After completion of the above activities, the District Engineer shall determine whether a permit should be issued based upon the existing record and regulations. He or she shall prepare a Statement of Findings (SOF), or, where an EIS is required, a Record of Decision (ROD), for all permit decisions. The SOF or ROD shall include the district engineers' findings regarding the probable impact of such decisions upon the public interest, as well as conformity with the guidelines published in 40 CFR, Parts 220-230.

If a permit is warranted, the District Engineer shall have the discretion to determine the duration of the permit or any necessary special conditions. The District Engineer may take action or forward all the pertinent materials, including any environmental assessment or environmental impact statements to the designated decision making official, note; this step is rarely taken. Division or district engineers shall notify the applicant that the application was forwarded to a higher authority for a decision. At the option of the division or District Engineer, this information may be made available to the media. This disclosure is encouraged, in particular, where permit cases have become controversial.

If the final decision is to deny a permit, the applicant shall be advised in writing of the reasons. If the final decision is to approve a permit, a standard Individual Review permit form shall be issued for the applicant's signature. Approved permits are not valid until signed by both the applicant and issuing party. Final action on letters of permission requires the signature of the issuing official. Final action on a permit application consists of a letter informing the applicant of denial or a signature on the authorizing document itself.

7. The District Engineer shall publish a monthly list of permits issued or denied during the previous month. The list shall identify each action by public notice number, the name of each applicant, a brief statement of each project's proposed activity, and a notification of any environmental assessment or environmental impact documents prepared. This notice shall also indicate that any SOF and ROD would be available for inspection upon written request. This list will be distributed to all persons who have an interest in the public notices listed (51 Fed. Reg. p. 41237 (1986)).

The decision to issue a Section 404 permit includes an evaluation of anticipated impacts, as well as cumulative impacts of the activity and its intended use upon the public interest. Permit decisions are generally made by assessing benefits reasonably expected of a project against reasonably foreseeable detriments.

Final permit authorizations or denials, or conditions attached to an authorization, are a result of this balancing process.

The decision to issue a permit should reflect the National concern for both the utilization and protection of natural resources. An evaluation must include any and all factors relevant to the proposal (including cumulative effects) under consideration. Appropriate factors include conservation needs, economics, aesthetics, general environmental concerns, wetland preservation or protection, historic properties, fish and wildlife values, flood hazards, flood plain values, land use, navigation, shore erosion and accretion, recreation, water supply and conservation, water quality, energy needs, safety, food and fiber production, mineral needs, considerations of property ownership, and, in general, the needs and welfare of the people. A permit will be denied if the discharge does not satisfy the Environmental Protection Agency's Section 404 (b)(1) guidelines and the District Engineer determines that it would be contrary to the public interest.

The following general guidelines shall also receive consideration in the evaluation of every permit:

1. The relative extent of the public and private need for a proposed structure or work;
2. Where there are unresolved resource uses, the practicability of using reasonable alternatives locations and methods to accomplish the objective of the proposed structure or work; and
3. The extent and permanence of beneficial and detrimental effects the structure or work is likely to have upon the public and private uses to which an area is suited;

The weight and importance of each factor is largely determined by its relevance and value within a particular proposal. Therefore, the weight afforded each factor varies with each proposal. Specific factors could be heavily weighted within one proposal or irrelevant or inconsequential within another. The comments of any State, federal, or local agencies, as well as experts on matters within their expertise, shall also receive full consideration (51 Fed. Reg. p. 41237 (1986)).

Factors Considered in the Public Interest Determination

The following sections reference definitions and specific criteria used in evaluating the U.S. Army Corps of Engineers' Section 404 Individual Review permits.

Wetland Impacts

Since most wetlands are considered productive and valuable resources, their destruction and unnecessary alteration should be discouraged and considered contrary to the public interest. Any projects undertaken or partially funded by a Federal, State, or local agency, are subject to additional requirements as stated in Executive Order 11990, dated 24 May 1977.

Wetlands which serve the public interest are defined as such:

1. Wetlands are serve significant natural biological functions, including food chain production, general habitat and nesting, spawning, rearing and resting sites for aquatic and land species;
2. Wetlands set aside for study of the aquatic environment or as sanctuaries or refuges;
3. Wetlands, the destruction or alterations of which, would have detrimental effect upon natural drainage characteristics, sedimentation patterns, salinity distribution, flushing characteristics, current patterns, or other environmental characteristics;
4. Wetland which are significant in shielding other areas from wave action, erosion or storm damage. Such wetlands are often associated with barrier beaches, islands, reefs and sand bars;
5. Wetlands which serve as valuable storage areas for storm or flood waters;
6. Wetlands which are ground water discharge areas that sustain minimum base flows important to aquatic organisms or natural recharge areas;
7. Wetlands that serve significant water purification roles; and
8. Wetlands which are unique in nature or scarce within a given region or area.

Even though a particular wetland alteration might be minor, the cumulative impact of piecemeal changes may result in a major change in wetland resources. Wetlands are consequently evaluated as components of complete and interrelated systems. The District Engineer shall have discretion to undertake review of specific wetland areas in conjunction the Regional Administrator of the Environmental Protection Agency, the Regional Director of the U.S. Fish and Wildlife Service, the Regional Director of the National Marine Fisheries Service, a local representative of a soil and water conservation district, and the head of an appropriate State agency, to assess cumulative effects of such activities to a given area.

The District Engineer may after conducting a public interest review as specified in Section 320.4, issue a permit if the benefits of the proposed project outweigh damage to the wetland resource and the permit issued conforms to Section 404 (b)(1) guidelines. In making the decision, the District Engineer shall also apply the Section 404 (b)(1) guidelines.

Fish and Wildlife

In compliance with the Fish and Wildlife Coordination Act (Section 320.3 (e)), and the Endangered Species Act (Section 7) district engineers shall consult with the Regional Director of the U.S. Fish and Wildlife Service, the Regional Director of the National Marine Fisheries Services, and the director of the State agency responsible for the management of the effected State's fish and wildlife resources. This coordinating effort shall strive for the conservation and preservation of wildlife resources potentially affected directly or

indirectly by the proposed activity. The Department of the Army shall give full consideration to comments from agencies on the issuance, denial, or conditioning of general or individual review permits.

Historic, Cultural, Scenic, and Recreational Values

Permit applications for Department of the Army permits require full public consideration of any effects such a proposal or activity would have upon recognized historic, cultural, scenic, conservation, recreational, or similar values. Due consideration shall be given values associated with wild and scenic rivers, historic properties and National Landmarks, National Rivers, National Wilderness Areas, National Seashores, National Recreation Areas, National Lakeshores, National Parks, National Monuments, estuary and marine sanctuaries, archaeological resources, Indian Tribes including native Indian religious and/or cultural sites, and any other areas established for similar purposes under State or federal law. Since recognition of these values are often vested in State, regional, or local land use classifications, or with respect to similar federal actions, actions on permits should, insofar as possible, be consistent with and avoid significant adverse effects upon the values for which these classifications were established (51 Fed. Reg. p. 41237 (1986)).

Consideration of Property Ownership

1. An inherent aspect of private property is the right to reasonable private use. This right, however, is subject to the rights and interests of the public in navigable and other waters of the United States, including navigation servitude and environmental protection.
2. It is recognized that landowners have a general right to protect their property from erosion. Applications for protective structures, therefore, usually receive favorable permit consideration. However, if the protective structure adversely affects public health, safety, or impact floodplain, or wetland values, the District Engineer shall recommend alternative methods of protecting the property.
3. A riparian landowner's right of access to navigable waters is subject to rights of similar riparians and the public's right to navigation access on the water's surface. A permit which causes undue interference with access to, or the use of, navigable waters is generally denied.
4. Applicants for permits in navigable waters must be notified in writing where proposed activities may interfere or be incompatible with authorized federal projects. The notification shall make clear that completion of this authorized federal project may necessitate removal or reconstruction of any activity proposed under permit.
5. Department of the Army permits do not convey any property rights, either real estate or material, or any exclusive privileges. The applicant's signature on an application is an affirmation that the applicant possesses or intends to acquire property interest to undertake the activity proposed in application. The District Engineer shall not intervene in a property dispute, but shall remind the applicant of this responsibility. A dispute over property ownership shall not be a factor in the Corps public interest decision.

Coastal Zone Activities

Any permit affecting a coastal area administered by a coastal zone management program approved by the Department of Commerce, shall be evaluated with respect to that program. No permit shall be issued to a non-federal applicant until certification has been provided that the proposed activity complies with the coastal zone management program and the appropriate State agency has concurred

with its certification or waived its right to do so. The Secretary of Commerce reserves right to issue a permit to a non-federal applicant under his or her own initiative or at the request of the applicant, if the Secretary finds the proposed activity consistent with the objectives of the Coastal Zone Management Act or in the interest of national security. Indian tribe applicants for permits shall also comply to the extent possible with approved State coastal zone management programs.

Activities in Marine Sanctuaries

No permits shall be issued in marine sanctuaries established by the Secretary of Commerce under Section 302 of the Marine Protection and Sanctuaries Act of 1972, unless the Secretary finds that the proposed activity is consistent with the objectives of Title III of the Marine Protection, Research and Sanctuaries Act of 1972 and can be carried out within the regulations established by the Secretary of Commerce to control activities within marine sanctuaries.

Other Federal, State, or Local Requirements

Normal processing of Department of the Army permits proceeds concurrently with any required State, federal, or local permits or certifications. Department of the Army final permit decisions, however, are not automatically withheld awaiting arrival of decisions from other such agencies. If other federal, State, or local authorizations are denied, the District Engineer reserves right to continue processing or immediately deny without prejudice the proposed permit. If the District Engineer continues processing the permit, he or she shall conclude the process by denying the permit as contrary to the public interest or by denying it without prejudice, indicating that a Department of the Army permit could have been issued under appropriate conditions. Denied without prejudice preserves an applicant's right to reinstate the processing of a Department of the Army permit if subsequent approval is received from a previously denied authorization.

1. The primary responsibility of zoning decisions rests with State, local, and tribal units of government. District engineers generally accept decisions by such governments; however, in matters of national importance and Section 404 (b)(1) guidelines take precedence over such decisions. Matters of national importance encompass, but are not limited to, navigation, national economic development, water quality, preservation of significant aquatic areas, including those wetlands with interstate importance, and national energy concerns. A determination of whether an issue has overriding importance depends upon degree of impact in individual cases.
2. Where there are conflicting views coming from several agencies within the State, the district engineers shall request that the governor express his or her opinion or designate a State agency to represent the official State position in a particular case.

3. In the absence of matters of national importance, a permit will generally be issued if the State issues a favorable determination and the concerns, policies, and goals of 33 CFR have been considered and followed and the proposal conforms to Section 404 (b)(1) guidelines.
4. In the event that general permits are not practical, the District Engineer may develop joint permit processing procedures with other units of government which regulate activities also regulated by the Corps of Engineers.
5. The District Engineer shall also develop joint operating procedures and a means of official communication with Indian tribes within the district (51 Fed. Reg. p. 41237 (1986)).

Safety of Impoundment Structures

The District Engineer may require that all non-federal applicants demonstrate that impoundment structures meet State dam safety criteria or have been designed by qualified persons and that the design has been reviewed and modified by qualified persons.

Floodplain Management

Floodplains carry out significant natural functions and processes important to the public interest. These functions include:

1. The moderation of floods, the maintenance of water quality, and groundwater recharge;
2. As habitat for animals and plants;
3. As cultivated resource values;
4. As cultural resources values such as an open space, scientific study areas, outdoor recreation, and outdoor education.

In compliance with Executive Order 11988, the District Engineer shall avoid to the extent possible, significant long or short term impacts associated with modification or occupancy of wetlands within floodplains as well as direct and indirect support or floodplain development when feasible alternatives exist elsewhere. For those activities which in the public interest, must occur in or impact upon wetlands within the floodplain, the District Engineer must insure, to the extent possible, that potential flooding impacts to human health, safety, and welfare, be minimized, and, wherever practical, the natural and beneficial values of wetlands within floodplain be preserved and restored.

Water Supply and Conservation

Those actions affecting water quantities are subject to Congressional policy as described in Section 10(g) of the Clean Water Act. State authority to allocate water supplies shall not be superseded, abrogated, or otherwise impaired.

Energy, Conservation and Development

Because the conservation and development of energy is of national importance, district engineers shall give higher priority of processing of projects related to energy.

Environmental Benefits

Some activities which require Department of the Army Permits result in beneficial effects to the quality of the environment. The District Engineer will weigh these benefits, as well as detrimental impacts along with other factors of public interest.

Economics

It is assumed that private enterprises have completed the requisite economic evaluations prior to and have determined that a proposal is economically viable prior to applying for a permit and is verified, when appropriate, by internal or external consultants. In certain cases, however, the District Engineer may make an independent appraisal of project's need for a public interest perspective. It is recognized that economic benefits of many projects are of great importance to the local community and contribute to needed improvements in local economic base, affecting such elements as employment, tax revenue, community cohesion, community services and property values. These projects also contribute to the NED (net economic increase in value of gross national product).

Mitigation

The concept of mitigation is an integral part of the permit review and evaluation process. Consideration of mitigation shall occur throughout the process, including avoiding, minimizing, rectifying, reducing, or compensating for resource losses. This compensation may occur at an on site or off site location.

1. Project modifications are suggested by the District Engineer through an initial pre-application meeting. A project modification is an alteration considered economically feasible for the applicant and which, if adopted, would still meet the project's intended purpose. These modifications may include restrictions in project scope and size; changes in construction methods, materials, or timing; and operational practices which reflect a sensitivity to environmental quality within the context of the work proposed.
2. Mitigation measures may be required to satisfy legal requirements for Section 404 permits. All permits which are issued must fall within established Section 404 (b)(1) guidelines.
3. Additional mitigation measures may be required as a result of the public interest review process. It shall be at the District Engineer's discretion as to what mitigation measures are reasonable and justified to attain compliance with Section 404 (b)(1) guidelines.

4. Additional mitigation measure may be required as a result of the public interest review process. It shall be at the District Engineer's discretion as to what mitigation measures are reasonable and justified to be added until compliance with Section 404 (b)(1) guidelines. Only the measures necessary to ensure the project complies with the 404(b)(1) guidelines or is not contrary to the public interest may be required under this paragraph.

All compensatory mitigation shall be for significant resource losses, which are specifically identifiable, reasonably likely to occur, and of importance to the human and aquatic environment. Any mitigation shall be directly related to the impacts of the proposal, appropriate to the scope and degrees of impact, and reasonably enforceable. District engineers shall require all forms of mitigation only as identified within subsections above. Applicants may specify any further mitigation measures at their own discretion (51 Fed. Reg. p. 41237 (1986)).

Alternative Review Processes

Division and district engineers are encouraged and authorized to develop joint procedures with other Federal and State agencies with ongoing permit programs for activities regulated by the Department of the Army. These procedures may be substituted in lieu of standard procedures established for the review of permits.

General Permits

General permits are permits issued on a regional or nationwide basis for a class of activities which are substantially similar in nature and which cause minimal individual or cumulative environmental impact. This class of permit is used to avoid unnecessary regulatory duplication with State or other federal agencies (51 Fed. Reg. p. 41237 (1986)).

There are three such general permit agreements ascribed to by the Army Corps of Engineers and the Minnesota Department of Natural Resources. Two permits are authorized under Section 404 and one under Section 10. Permit GP-001-MN covers nineteen activities ranging from bank stabilization to water control structures. GP-0012-MDNR is an agreement authorizing the Minnesota Department of Natural Resources, as sole applicant, to construct specific types of boat launching facilities.

The Corps has the authority to add conditions to General Permits to protect the public interest, or to supersede a General Permit and require an Individual Review Permit when there is sufficient concern for the aquatic environment (51 Fed. Reg. p. 41258 (1986)).

General permits may be revoked if determined to be contrary to the public interest. If revoked, any subsequent applications that could have been processed under this General Permit, shall be treated and processed as Individual Review Permits.

Emergency Procedures

Division engineers are authorized to approve special processing procedures in emergency situations. An emergency is a situation which results in an unacceptable hazard to life, significant loss of property, or an immediate unforeseen and significant economic hardship which would result if a permit is not processed in less time than required through standard processing procedures (51 Fed. Reg. p. 41237 (1986)).

STATE REGULATIONS FOR THE PLACEMENT OF FILL MATERIALS

Minnesota Statutes Section 105.42 are much broader and regulate more than just placement of fill into public (protected) waters. Section 105.42 Statute requires the Minnesota Department of Natural Resources to regulate any proposed changes to the course, current and cross section of any public (protected) water. This can include any filling, excavating, placement of structure, etc.

This section of the 404 assumption report discusses Minnesota regulation of the placement of fill materials into public (protected) waters. This is regulated under Minnesota Department of Natural Resources Agency Rules 6115.0190 to 6115.0192. This regulatory approach for placement of fill materials into public (protected) waters is summarized by the following goals and rules:

It is a goal of the State to minimize the placement of any fill into protected waters in order to:

1. Minimize the encroachment, change, or damage to the environment;
2. Regulate the quantity and quality of fill material and the purposes for which filling may be allowed based upon the capability of waters to assimilate the materials;
3. Maintain consistency with floodplain, shoreland, and wild and scenic river management standards and ordinances;

Filling as used in this part involves the placement of unconfined or loosely confined materials in protected waters. Placement shall not be permitted in the following cases:

1. To achieve vegetation control;
2. To create upland areas, except where expressly provided herein;
3. To stabilize the beds of protected waters which cannot support fill materials because of excessive depths of muck, steep bank, bed slope, or other conditions;
4. To stabilize or impound the site of active springs;
5. To dispose of rock, sand, gravel, or any other solid material resulting from activities carried out above the ordinary high water level;

6. To construct a roadway or pathway, or create or improve land accesses from peripheral shorelands to islands, or to facilitate land transportation across the waters; however, where a project is proposed by Federal, State, or local government agency and this provision would prevent or restrict the project, or create a major conflict with other public purposes or interests, the commissioner may waive this provision provided: a) there are no other feasible and practical alternatives to the project that would have less environmental impact; and b) the public need for the project rules out the no build alternative (Minnesota Rules Part 6115.0190 (1987)).

Permits are required for the placement of fill material in protected waters, except as described in the State of Minnesota Federal Section 404 Assumption Feasibility Study, pages five through eight. Fill materials shall meet the following conditions:

1. The project shall involve a minimum of encroachment, change, or damage to the environment, including but not limited to fish and wildlife habitat, navigation, water supply, and storm water retention;
2. The fill material consists of clean inorganic material, free from pollutants and nutrients;
3. The existence of stable, supporting foundation is established by appropriate means, including soil boring data where deemed necessary by the commissioner;
4. Where erosion protection is deemed necessary by the commissioner, the site conditions and fill materials are capable of being stabilized by an approved method which is consistent with existing land uses on the affected protected water;
5. The proposed project must represent the minimal impact solution to a specific need with respect to all reasonable alternatives;
6. The size, shape, depths, shoreline, and bottom character and topography, and susceptibility of the bends of protected waters to action of wind, waves, and currents are such that the fill will be stable;
7. Adverse effects on the physical or biological character of the waters shall be subject to feasible and practical measures to mitigate effects;
8. The proposed filling must be consistent with applicable floodplain, shoreland, and wild and scenic rivers management standards and ordinances for waters involved;
9. The proposed filling must be consistent with water and land related management programs and plans of local and regional governments provided.

ASSESSMENT OF MAJOR REGULATORY DIFFERENCES

Upon assumption of the Section 404 program, the statutory alternative chosen has the greatest impact upon the consistency and appropriateness of the State's current rules. The State now regulates what are termed Public or "Protected" Waters and wetland Types 3, 4, and 5. The U.S. Army Corps of Engineers regulate

the same waters and the remaining 60% or so of State waters. If the State assumed the Section 404 program with just the statutory authority required by the Environmental Protection Agency (as implemented by the U.S. Army Corps of Engineers), it would automatically create a dual permitting standard. Projects such as sand blankets, for instance, would be authorized and generally pre-approved under a Section 404 general permit, provided such fill did not extend over 30 feet waterward or to a maximum depth of four feet (whichever is less). This same sand blanket in State regulated waters would require a full permit review if it extended more than ten feet waterward of the ordinary high water mark.

There are serious implications surrounding any decision to adopt the Section 404 program with just the statutory and regulatory requirements specified by EPA (as implemented by the Corps of Engineers). Applying the Corps of Engineers' current nationwide and general permits creates a dual standard for permitting. This means that an applicant could conceivably be subject to a different set of standards depending upon project location. There are also activities permitted in Section 404 waters which are expressly prohibited in "Protected" or Public Waters. The Section 404 program does not, for instance, prohibit the discharge of fill for the creation of upland areas. The State expressly prohibits filling for such purposes.

Many of these issues could be resolved if Section 404 regulations were amended to comply with the State's Public or Protected Waters program. This move would lessen jurisdictional questions surrounding activities governed in the two classes of waters. It would not, however, resolve any public confusion over the range of activities governed in any particular water body and why.

Under assumption, it should be noted, that the state would have to implement rules at least as restrictive as the Federal Governments but can be more restrictive as stated in 40 CFR Part 233.20(j)(1). The current attitude of the Minnesota DNR, if assumption was pursued, is that of creating a set of rules similiar to that of the Federal Government.

PERMIT HISTORIES

U.S. Army Corps of Engineers

From October 1, 1983 to September 30, 1988 the Corps of Engineers, St. Paul District Office, processed 1,681 General and Individual Review permit applications, of these applications, 112 were denied permits. The amount of annual denials has fluctuated from a low of 17 to a high of 28, and in the last three years the denials have averaged 25 per year. However, the applications have steadily increased by a factor of two, since 1983. Including General, Individual Review and nationwide permits, the overall average of denials is 1.75%, during this five year segment. Only using General and Individual Review permits, the overall average of denials is 6.67% in this same time frame. In addition there were 4,719 nationwide permits issued for use in the State of Minnesota. Also, 2,703 applications were received that were judged to not require a permit. These would be for activities not governed by the program. During the comment period, the COE reported that for the period 1 July 1985 through 31 December 1989, 23% of all Individual Review permit applications (excluding Section 10 Letters of Permission) were denied.

The Corps has a provision that a hearing may be requested before the issuance or denial of a permit. This option is rarely taken, usually not more than two times per year. This type of hearing serves only as a mechanism for people to defuse their concerns, since no binding decision is made in the hearing. Once the permit is issued or denied there is no administrative appeal process within the Corps rules. Any appeal would have to be handled within the court system. There are very few cases that have gone to this extreme in the past.

Minnesota Department of Natural Resources

The compiled permit history data is based on all Protected Waters permit types. There is no distinction made in the data base as to whether or not it is a 404 type permit. Also, the totals below will not add up due to the fact that historical files are based on fiscal years. Therefore, permit actions pending from a previous years application will not show up in the totals for that year.

This should not cloud the results, since the rules for evaluating permit applications are very specific. It is important to remember that the DNR also issues Protected Waters permits in approximately 53 percent of the cases where the Corps of Engineers issues Section 404 permits. Appendix "C" shows Federal/State permit comparison for 1987.

In the period from July 1, 1985 to January 12, 1989 approximately 5,507 applications for Protected Waters permits were received. Of this total, 123 (2.23%) were denied or terminated and 173 (3.14%) applications were withdrawn by the applicant. In 156 (2.83%) cases it was determined that no permit was required. There were 3,988 (72.4%) permits issued. The total applications per year have fluctuated dramatically over the same time period but the percentage of denials has remained relatively constant.

The State also provides for administrative review for:

1. appeals of violations;

2. permit denials, or;
3. if the application does not agree with the conditions of the permit.

This is an option that is requested approximately twenty times per year. This process involves an Administrative Law Judge, which issues a set of conclusions and findings. The Commissioner then must sign and issue his order based on those findings. The Commissioners' order does not have to agree with the hearing outcome, but if there is a difference it must be well documented as to why there is a difference. The Administrative Law Judge's findings do carry weight in any further court action. The Commissioners Order is binding and all other appeals must be handled within the court system.

Minnesota Pollution Control Agency (PCA) Certification

Under Section 401 the State PCA must certify all Corps of Engineers Section 404 permits before they can be issued. All General, including Regional and Nationwide, permit applications are blanket approved under an agreement with the Corps. Letters of Permission and Individual Review are approved or denied on a case by case basis.

The PCA has three certification rulings. They are as follows:

1. Approval - This means the project meets the standards and can be certified and the permit can be issued by the Corps;
2. Denial - The project does not meet the standards and cannot be certified. In this case the permit cannot be issued.
3. Waived - The project does not meet the standards but is considered to have a minimal impact and therefore does not warrant denial. In this case the permit may be issued. The PCA may also make recommendations for permit conditions to the COE.

VIOLATION PROCEDURES

U.S. Army Corps of Engineers

Section 404 (a) and (b) of the Clean Water Act authorize the Secretary of the Army, acting through the Chief of Engineers, to issue permits for the discharge of dredged fill material, in accordance with guidelines developed by the Administrator (EPA) in conjunction with the Secretary.

Federal Section 404 violations are processed in a similar manner as the State of Minnesota processes Minnesota Statutes, Section 105.42 violations. The main differences are that the USCE is not obligated to grant a public hearing and they are authorized to assess significantly larger fines (\$25,000/\$100,000 per day). The EPA and the COE are authorized to impose administrative penalties (33 USC 1319(g)) (Class I penalties are \$10,000 per violation, maximum of \$25,000 and Class II penalties are \$10,000 per day, maximum of \$25,000) on violators without permits for both unauthorized discharges and discharges in non-conformity with a permit authorization. The COE has statutory authority to only regulate violations of permitted projects, and that the EPA has the responsibility for dealing with unauthorized filling. Injunctive relief is also available to enforce restoration of project sites and to halt unauthorized discharges (also see Appendix F). Minnesota Statutes, Section 609.03 authorizes the court system to levy a maximum criminal penalty of \$700 and/or 90 days in jail for a violation of Section 105.42.

The USCE investigates an alleged violation through their Surveillance Section. If a violation is confirmed, the landowner/violator can apply for a permit and/or be fined. The USCE authorizes, through the permit process, only that which is determined to be consistent with the guidelines. Any other unauthorized activity may be required to be removed. The only recourse for an aggrieved violator is to file a suit in Federal District Court.

Minnesota Department of Natural Resources

Minnesota Statutes, Section 105.42, Subd. 1, requires that anyone proposing to change or diminish the course, current or cross-section of any public water must first obtain a permit from the Minnesota Department of Natural Resources. Subd. 1a required the Department to develop a set of agency rules by January 15, 1975 for the purpose of evaluating permit applications submitted for the above activities. In 1983, the current agency rules were revised and processed through Chapter 14 rulemaking procedures.

Any work done in public waters (lakes and many watercourses and wetlands) without first receiving a permit from the Department, or work that is done in excess of a permit, constitutes a violation of Minnesota Statutes, Section 105.42. Public waters which require prior authorization through the permit process are identified on public waters inventory maps. This inventory process was required and conducted in accordance with Minnesota Statutes, Section 105.391.

The Department of Natural Resources has offices throughout the State of Minnesota. When a violation of Section 105.42 occurs, the Department is in a good position to become aware of the violation, or at least, in a better

position than if the Department was more centralized. By being available throughout the State, violations are more likely to be reported by Department staff, local units of government or the public.

When a report of a suspected Section 105.42 violation is received by the Department, the following actions are taken.

1. The Regional and Area Hydrologist are informed of the suspected violation.
2. The Area Hydrologist and/or a Conservation Officer investigate the reported violation.
3. A determination is made by the Area Hydrologist and/or Conservation Officer as to the validity of the suspected violation.
4. If a violation is confirmed, the Conservation Officer determines if a citation is warranted.
5. The Area Hydrologist proceeds with informal negotiations with the landowner/violator. Informal negotiations attempt to result in voluntary restoration or a submitted permit application. If voluntary restoration is agreed to, the civil matter will be considered closed when the site is restored. If a criminal citation has been issued, the criminal matter will be determined in a court of law.
6. If the landowner/violator will neither voluntarily restore the site nor apply for a permit, the Department will issue a civil restoration order requiring restoration of the site.
7. If the landowner/violator submits a permit application, the application will be processed in accordance with the agency rules. Only the work that the rules allow will be authorized. Any unauthorized work will be required to be corrected through a civil restoration order.
8. If the landowner/violator is aggrieved by the Department's Order, a public hearing can be demanded. The agency's decision following a public hearing can either be accepted, or rejected and appealed to the Minnesota State Court of Appeals and on to the Minnesota Supreme Court.

Remedial Action Required

If the State of Minnesota were to assume the Federal Section 404 permit program, the only major legislative change for processing a violation would be to change or add a statute with provisions for a maximum fine similar to the Federal Government. The State of Minnesota's provision for the right to a public hearing for a landowner/violator does not require a change since the results of the hearing by the Administrative Law Judge are not binding. The State would however, be obligated to issue a Commissioner's Final Order disagreeing with the Administrative Law Judge if his determination is contrary to the original Commissioner's Order.

PUBLIC HEARING PROCEDURES

U.S Army Corps of Engineers

The United States Environmental Protected Agency and the United States Army Corps of Engineers have regulatory authority over waters of the United States. The Chief of Engineers (USCE) is authorized under Section 404 of the Federal Clean Water Act to regulate the disposal of dredged and fill materials into these waters through a permit review process. During the permit review comment period, any concerned person may request, but is not given the right to, a public hearing. In addition, if a person requests a hearing during the comment period, it must be done in writing. The request must list specific reasons as to the need for the hearing. The only legal recourse a person has to challenge an issued or denied permit application or a violation concerning waters of the United States is filing a suit in Federal District Court.

If the USCE determines to hold a public hearing one may be held to acquire information and give the public the opportunity to present views and opinions. The USCE may also hold a hearing or participate in joint public hearings with other Federal or State agencies. The District Engineer may attempt to resolve the issue informally or may set the date for a public hearing. Hearings are held at times and places that are convenient for the interested public. It is stated in USCE handouts and the Department has been told verbally that very few hearings are held (2 or 3 a year). Usually only the most controversial applications receive a public hearing.

Minnesota Department of Natural Resources

Minnesota Statutes, Chapter 105 allows for a Chapter 14 public hearing for both Chapter 105 violations and permit applications related to Department of Natural Resources Agency Rules, Parts 6115.0010 to 6115.0810 and 6115.1200 to 6115.1280. This report is concerned only with the discharge of dredged or fill materials into waters of the State or Parts 6115.0190 through 6115.0192. If a valid demand for public hearing is received by the Department of Natural Resources, and all requirements are met, the Department is obligated by law to grant and schedule the hearing.

Under Minnesota Statutes, Section 105.44, Subd. 3, the applicant, the managers of the watershed district, the board of water and soil resources or the mayor of the city may, within 30 days of mailed notice, demand a public hearing on the issuance or denial of a permit application. However, under Minnesota Statutes, Section 105.461 and 105.462 (violation without a permit application and Orders to restore) only the person issued a Commissioner's Order can demand a public hearing.

If a public hearing is demanded, Minnesota Statutes, Section 105.44, Subd. 6 (c) requires the applicant demanding the public hearing (except for a public authority) to file a corporate surety bond or equivalent security to the State of Minnesota. The Commissioner, at this time, has set the security to be filed at \$500.00. The bond or security is conditioned for the payment of certain costs and expenses of the public hearing if the commissioner's action is affirmed without material modification; however, the liability is limited to \$750.00.

A public authority, which demands the hearing and is not the applicant, is also liable for the same costs and expenses listed below if the commissioner's action is affirmed without material modification. The required costs to the hearing demander for a hearing are as follows:

1. Costs of the stenographic record and transcript
2. Rental expenses, if any, of the place of hearing
3. Costs of publication of orders made by the Commissioner

The actual costs to the demander has generally been under \$100. Any costs exceeding the liable costs, as well as other costs (including the costs for the Administrative Law Judge), are paid by the Department of Natural Resources. As reported in the Cost Section of this report, the State's low end cost for a typical hearing is approximately \$6,000.

When a Minnesota Statutes, Chapter 105 permit or violation matter cannot be resolved between the individual(s) and the Department, then a public hearing is scheduled and all relevant data is presented to and heard by an Administrative Law Judge. The Administrative Law Judge interprets the existing statutes and rules and evaluates the data submitted prior to the closing of the hearing record as set by the judge (normally no more than 30 days). The Administrative Law Judge then prepares a report consisting of his/her findings and recommendation and distributes them to the interested parties (usually 30 days). The Commissioner is obligated for the next 10 days to receive exceptions to the report.

The Commissioner may or may not agree with the Administrative Law Judge's findings and/or recommendation. In which case, the Commissioner may rewrite any part of the report when issuing the final order. Any party may appeal the decision to the Minnesota State Court of Appeals within 30 days. The original Administrative Law Judge's findings and recommendation have carried a certain amount of influence with the courts, regardless of whether or not the Commissioner rewrote any part of the report. Either party then has the option of accepting or petition the Minnesota Supreme Court to review the court's decision.

Appendix "D" of this report contains flow charts for various types of appeals concerning Minnesota Statutes, Chapter 105 regulatory matters.

VIOLATION HISTORIES

Because of the very different rules and procedures used by the Minnesota Department of Natural Resources and the U.S. Army Corps of Engineers, it is very difficult to make any value judgements between the two programs. There are too many differences to be accounted for.

U.S. Army Corps of Engineers

It should be noted that the figures stated below will not add up. This is due to the fact that some of the violations are still pending final action.

From October 1, 1983 through September 30, 1987, the Corps of Engineers received 660 reported violations of Section 404 rules. After review it was determined that only 237 (35.9%) of those reports actually constituted a violation of Section 404 rules. In 147 (62.0%) of the actual violation cases, after the fact permit application was reviewed and accepted. After the fact permit applications are handled in the same fashion as a normal permit application. The Corps noted that not all of these applications are approved. In addition, 55 (23.2%) of the violations were corrected by the violator under voluntary restoration.

There were 423 (64.0%) reported violations which did not actually constitute a violation of the Section 404 rules. The conditions for this could include the following:

1. The type of work reported falls within the bounds of an existing nationwide permit.
2. The reported violation involved work that was outside the jurisdiction of the Section 404 program.
3. The reported violation was only a perceived violation, which may have been permitted under an individual permit.

There is no formal provision for administrative review of any order to restore imposed by the District Engineer, however, people may informally present information which if it is new and not considered in the initial evaluation may lead to review of the order. This decision is made by the District Engineer. All further appeals would be handled in District Court. There have been very few cases of this happening in the past ten years (approximately five).

Minnesota Department of Natural Resources

Because of decentralization, Minnesota's enforcement structure is such that direct statistical comparisons cannot be made against the Corps of Engineers. The individual regions have separate recordkeeping; therefore, limited comprehensive data is available on violations and their outcome. However, a general assessment of the way in which violations are handled is possible.

If a reported violation is determined to be a violation, there are three general categories of procedures used individually or in combination. They are as follows:

1. Cooperative Restoration/Permit Compliance - This would entail working with the violator, to bring the violation into the bounds of permit rules so a permit may be issued, or to bring about voluntary restoration of the site by the violator.
2. Criminal Action - This involves the issuance of a citation by a Conservation Officer and the appropriate legal action taken.
3. Civil Action - Restoration Order issued by the DNR and appropriate legal steps taken.

Reported violations may not constitute an actual violation if:

1. The work was authorized under an existing Protected Waters permit.
2. The work was performed on waters not protected by the State.
3. The work did not require a State permit.

During the years 1987 and 1988 criminal action was taken against eight violators. Only one of these cases was dismissed. The others were all decided in favor of the State. Seven civil actions were started, during the same time period. Two hearings were demanded in these cases and the outcomes have not been recorded at this time. In addition, two cases were resolved by voluntary restoration.

FEDERAL CONDITIONS FOR STATE ASSUMPTION

FEDERAL CONDITIONS FOR STATE ASSUMPTION

Section 404(h) of the Federal Clean Water Act Amendments, 1972, allows the Administrator of the Environmental Protection Agency (EPA) to transfer administration of the Section 404 permit program for discharges into certain waters of the United States to qualified states (not including navigable waters or adjacent wetlands). In order for EPA to transfer Section 404 authority to a State, the Governor shall submit to the EPA Administrator a full and complete description of the program it proposes to establish and administer under State law (Section 404 (g) CWA). The State must be able to demonstrate to EPA that it is capable of administering the Section 404 program by meeting the 40 CFR, Chapter 1, Part 233 conditions/requirements as follows:

1. To develop and maintain an informational program designed to guide potential applicants as to the permit program, its requirements, and the steps required in order to obtain a permit for the placement of dredged or fill materials in Section 404 Waters (53 Fed. Reg. p. 20780 (1988)).
2. To develop a Federally approved permit application form, its conditions and required supplemental information, as well as the procedures, terms, and requirements, as specified in (53 Fed. Reg. 20777 (1988)).
3. To develop and submit a program submission to EPA. The submission must contain the following (53 Fed. Reg. p. 20777 (1988)):
 - a. A letter from the Governor requesting program approval.
 - b. A complete program description including the following:
 - 1) A narrative description of the scope, structure, coverage, permit review criteria, and processes relevant to the proposed State program.
 - 2) A description of the agency staff available for program administration.
 - 3) A description of proposed State permitting and administrative and judicial review procedures.
 - 4) A description of the sources and amounts of funding available for the State to use in this program. The Federal Government does not have funds available at this time, nor does it appear likely such funds will be available in the near future. If funds were available, a grant for a percent of the cost could be dedicated to a State assuming the program for the first two years only. The cost to the State of Michigan upon assuming the program was reported to be a little over \$1,000,000 per year. The Federal Government was able to assist Michigan with \$300,000 for the first year only.

- 5) A description of the organization and structure of State agency (agencies) which have responsibility for administering the program. If more than one agency is responsible, the description shall address responsibilities of each agency and how the agencies intend to coordinate administration and evaluation of the program.
 - 6) An estimate of the number of discharges and its impact upon the integrity of the State's waters.
 - 7) A description of the State's compliance evaluation and enforcement procedures, including strategies for coordination with EPA and the Corps.
 - 8) Copies of proposed Section 404 application, permit, and reporting forms.
 - 9) A complete description of the State's regulated waters upon Section 404 program assumption.
 - 10) A description of the specific best management practices (BMP) requirements proposed (§ 232.3, (6)) to satisfy the exemption provisions of Section 404 (f)(1)(E) of the Clean Water Act for construction and maintenance of farm and forest roads or temporary roads for moving mining equipment.
4. To submit a statement from the State Attorney General that the laws of the State provide adequate authority to carry out the program as described under § 233.11 and the requirements of § 233.12. This statement shall cite the specific statutes, administrative regulations (rules) and judicial decisions which demonstrate adequate authority. Also, the statement shall contain an appropriate analysis of the State's autocracy when a State seeks authority on Indian lands (the State of Minnesota does not regulate work in protected waters or wetlands by enrolled members of Indian tribes or communities within the boundaries of established Indian reservations). In addition, the statement shall contain an analysis of State law regarding the prohibition on taking private property without just compensation and an assessment of the effect such law will have on the successful implementation of the State's regulation of the discharge of dredged or fill materials into Section 404 waters. Finally, if more than one agency has responsibility for administering the State program, the statement shall include certification that each agency has full authority to administer the program within its category of jurisdiction and that the State as a whole has full authority to administer a complete State Section 404 program (53 Fed. Reg. p. 20778 (1988)).
5. To submit a Memorandum of Agreement (MOA) with the Regional Administrator (EPA). Such an agreement shall be executed between the State Director and Regional Administrator. The agreement shall include, but not be limited by the following:
- a. The agreement may include other terms, conditions, or agreements consistent with the administration and enforcement of the State's regulatory program; however, no language which restricts EPA's statutory oversight responsibility will be allowed.

- b. The following provisions:
- 1) Provisions specifying the frequency and content of reports, documents (i.e. permit applications and draft general permits) and supplemental information as required by the Regional Administrator. As well as an agreement establishing a submission date for an annual report.
 - 2) Provisions for coordination of compliance monitoring by EPA and the State, including routine inspection of State records, reports, and files.
 - 3) Provisions for modification of this Memorandum of Agreement by the State and/or EPA.
 - 4) Provisions specifying classes and categories of permit applications for which EPA waives right of review.
6. To submit a Memorandum of Agreement with the Secretary of the Army. The MOA shall include the following:
- a. Where more than one agency within a State has responsibility for administering the program, all agencies shall be parties to the Memorandum of Agreement.
 - b. A description of State waters where the Secretary retains jurisdiction.
 - c. To establish procedures whereby the Secretary will transfer-pending Section 404 permit applications and other relevant information to the State (upon program approval).
 - d. An identification of those general permits, if any, issued by the Secretary, the terms and conditions of which the State intends to administer and enforce upon receiving approval of its program, and a plan for transferring responsibility for these permits to the State, including procedures for the prompt transmission from the Secretary to the State Director of relevant information not already in the possession of the State Director, including support files for permit issuance, compliance reports, and records of enforcement actions. In many instances states will lack the authority to directly administer permits by the Federal government. However, procedures authorized under State law may be established to transfer responsibility for these permits (53 Fed. Reg. p. 20778 (1988)).
7. To meet Federal requirements for State permitting as follows:
- a. The Director shall assure compliance for each permit with all statutory and regulatory requirements, including the 404 (b)(1) Guidelines, applicable Section 303 water quality standards, and applicable Section 307 effluent standards and prohibitions.
 - b. Section 404 permits shall be effective for a fixed term not to exceed five years.

c. Each Section 404 permit shall include conditions meeting or implementing the following requirements:

- 1) A specific identification and complete description of the authorized activity, including the name and address of permittee, location and purpose of discharge, and the type and quantity of material discharged (does not apply to General Permits).
- 2) Only those activities specified in the permit are authorized.
- 3) The permittee shall comply with all requirements of the permit, even if that requires halting or reducing the permitted activity to maintain compliance.
- 4) The permittee shall take all reasonable steps to minimize or prevent any discharge in violation of the approved permit.
- 5) The permittee shall inform the Director of any expected or known instances of non-compliance.
- 6) The permittee shall provide information to the Director to assess compliance status and whether cause exists for permit modification.
- 7) The permittee shall protect the aquatic environment by monitoring, record keeping, and reporting as required. Requirements include reporting of any expected leachates, non-compliance, or expected changes or transfers of the permit.
- 8) The permittee shall allow the Director or an authorized representative, upon identification, at reasonable times to:
 - a) Enter the premises where a regulated activity occurs or where records are kept pursuant to the conditions of the permit.
 - b) Have access to and copy any records which are required as a condition of the permit.
 - c) Inspect operations regulated or required under permit.
 - d) For the purpose of assuring compliance, sample or monitor any substances or parameters at any location.

d. The Director shall assure that discharges are conducted in a manner which minimizes impacts on the physical, biological, and chemical characteristics of waters, including stipulations for restoration and mitigation (53 Fed. Reg. p. 20780 (1988)).

8. To develop procedures and to have statutory authority to meet the following Federal requirements for compliance evaluation programs with regards to violations and enforcement activities:

- a. In order to abate violations of the permit program, State programs shall maintain a system designed to identify persons subject to regulation or who have failed to comply with permit conditions.
 - b. The applicable State personnel engaged in compliance evaluation shall have authority to enter any site or premises subject to regulation or in which records relevant to program operation are kept in order to copy records, inspect, monitor or investigate compliance with the State program, permit conditions or other program requirements (if State law requires a search warrant before entry, then one must be obtained first).
 - c. Investigatory inspections shall be conducted, samples shall be taken and other information shall be gathered in a manner that will produce evidence admissible in an enforcement proceeding or in Court (e.g., using proper "chain of custody" procedures).
 - d. Procedures for receiving and ensuring proper consideration of information submitted by the public about violations. The State shall encourage public effort in reporting violations and shall make available information on reporting procedures (53 Fed. Reg. p. 20782 (1988)).
9. To meet the Federal requirements for enforcement authority as follows:
- a. The State shall have available the following remedies for violations of State 404 program requirements:
 - 1) To restrain immediately and effectively any person by order or by suit in a State court from engaging in any unauthorized activity which is endangering or causing damage to public health or the environment.
 - 2) To sue in Courts of Competent jurisdiction to enjoin any threatened or continuing violation of any program requirements, including permit conditions, without the necessity of a prior revocation of the permit.
 - 3) To immediately and effectively halt or remove any unauthorized discharges of dredged or fill material, including the authority to issue a cease and desist order, interim protection order, or restoration order to any person involved in an unauthorized discharge.
 - 4) To assess or sue to recover in court, civil penalties, and to seek criminal remedies, including fines, as follows:
 - a) Civil penalties shall be recoverable for any discharge of dredged or fill material without a permit; any violation of Section 404 permit conditions or filing requirements; any duty to allow or carry out inspection, entry or monitoring activities; or, any regulation or orders issued by the State Director. The penalties shall be assessable to a maximum amount of \$25,000 per day for each violation.

- b) Criminal fines shall be recoverable against any person who willfully or negligently violates any applicable standards or limitations; any Section 404 permit condition; or any Section 404 filing requirement. The fine shall be assessable in the amount of \$2,500 to \$100,000 per day for each violation.
 - c) Criminal fines shall be recoverable against any person who knowingly makes any false statement, representation of certification in any Section 404 form, notice or report required by a Section 404 permit, or who knowingly renders inaccurate any monitoring device or methods required to be maintained by the Director. The fines shall be recoverable in at least the amount of \$5,000 for each instance of violation.
- b. The burden of proof and degrees of knowledge or intent required under State law for establishing violations in paragraphs a, b, and c above or under § 233.41, a, 3, shall be no greater than the burden of proof or degree of knowledge or intent EPA must provide when it brings an action under the CWA (this requirement is not met if State law includes mental State as an element of proof for civil violations).
- c. A civil penalty assessed, sought or agreed upon by the State Director under paragraph 9 a, 4 above or § 233.41, a, 3, shall be appropriate to the violation. If EPA believes that the penalty amount or settlement is substantially inadequate in comparison to what EPA would require, then EPA may commence separate actions for penalties. In addition to the Federal requirements, the State may have other enforcement remedies such as procedures to assess or sue for costs incurred by the State or damage to the environment regarding Section 404 violations.
- d. The State shall provide for public participation in the State enforcement process by providing either:
- 1) Authority which allows intervention as of right in any civil or administrative action to obtain remedies specified in § 233.41 a, 3, by any citizen having an interest which is or may be adversely affected;
 - 2) Assurance that a State agency or enforcement authority will:
 - a) Investigate and provide written responses to all citizen complaints submitted pursuant to State procedures specified in § 233.41, 3, e, 2.
 - b) Not oppose intervention by any citizen when permissive intervention may be authorized by statute, rule, or regulation.

- c) Publish notice of and provide at least 30 days for public comment on any proposed settlement of a State enforcement action (53 Fed. Reg. p. 20783 (1988)).
10. The State must go through a Section 404 approval process with the EPA. The program submittal is distributed by EPA to other required agencies and will publish notice in various newspapers within the State. During the approval process, which may take as long as 120 days after EPA receives a complete program submission, EPA will hold a public hearing for the purpose of public comments. The Administrator (EPA) shall approve or disapprove the program based on the requirements of § 233.10, the CWA, and comments received (53 Fed. Reg. p. 20778 (1988)).
11. In the event of any needed revisions to the approved State Section 404 program, (either by the State or EPA) the State shall do the following:
- a. The State shall keep EPA fully informed of any proposed modifications to its basic statutory or regulatory authority, its forms, procedures or priorities.
 - b. If a revision of the State program is required, the State shall submit a modified program description, Attorney General's statement, Memorandum of Agreement, or such other documents as EPA determines to be necessary. A program revision shall not become effective until approved by the EPA Administrator.
 - c. States with approved Section 404 programs shall notify EPA of a proposed transfer of all or part of any program from the approved State agency to any other State agency and shall identify any new division of responsibility among the agencies involved. No transfer is authorized until approved by the EPA Administrator.
 - d. The State shall provide a supplemental Attorney General's Statement, program description or other documents or information to the EPA if the Administrator has reason to believe the circumstances have changed with respect to the State Section 404 program (53 Fed. Reg. p. 20779 (1988)).
12. The EPA Administrator may withdraw program approval when a State program no longer complies with the requirements of 40 CFR, Chapter 1, Part 233, and the State fails to take corrective action. The withdrawal criteria includes the following:
- a. When the States' legal authority no longer meets the requirements including:
 - 1) The State failing to promulgate or enact new authorities when necessary.
 - 2) State legislative action striking down or limiting State authorities.
 - b. When the operation of the State program fails to comply with the requirements including:

- 1) Failure to exercise control over activities required to be regulated, including failure to issue permits.
 - 2) The issuance of permits which do not conform to the requirements.
 - 3) Non-compliance with the public participation requirements of 40 CFR, Chapter 1, Part 233.
- c. When the State's enforcement program fails to comply with the requirements including:
- 1) Failure to take action on violations of permits or other program requirements.
 - 2) Failing to seek adequate enforcement penalties or to collect administrative fines when imposed.
 - 3) Failing to inspect and monitor activities subject to regulation.
- d. The Federal Government may order the commencement of proceedings to determine whether to withdraw approval of a State program if the State fails to comply with the requirements of § 233 as set forth in § 233.53 or in number 14 above (53 Fed. Reg. pp. 20784-20785 (1988)).
13. There are procedures for the State to withdraw from administration of the Section 404 program as well.
- a. If the State wishes to withdraw from the program, a 180 day notice and transfer plan must be submitted to the Administrator and the Secretary of the Army. After receiving the notice and approved transfer plan, the Federal Government will coordinate and make the necessary public notices for the transfer.
14. No permits shall be issued by the State Director in the following circumstances:
- a. When the conditions of the permits do not comply with the requirements of CWA, or regulations and guidelines implementing the CWA, including the Section 404(b)(1) environmental guidelines (40 CFR Part 230).
 - b. When the Regional Administrator has objected to issuance of the permit under § 233.50 (c) and the objection has not been resolved.
 - c. When, in the judgment of the Secretary of the Army acting through the Chief of Engineers, anchorage and navigation in or on any of the waters of the United States would be substantially impaired by the discharge.
 - d. When the proposed discharge would be into a defined area for which specification as disposal site had been prohibited, restricted, denied, or withdrawn by the Administrator under Section 404 (c) and the discharge fails to comply with the Administrator's action under that authority (53 Fed. Reg. p. 20779 (1988)).

15. EPA requires routine submission of the following reporting requirements:

- a. A copy of public notice for each completed application (except those exempted under the Memorandum of Agreement (MOA));
- b. A copy of every draft permit the Director intends to issue;
- c. Notice of every significant action taken with regard to a permit application;
- d. A copy of each issued permit;
- e. A copy of the State's response in regard to another State's comments/recommendations (if such comments are disregarded);
 - 1) Unless waived under Section 233.51, the EPA shall supply the U.S. Fish and Wildlife Service (USFWS), the U.S. Army Corps of Engineers (USCE), and the National Marine Fisheries Service (NMFS), with a copy of each public notice, draft general permit, and supplemental materials necessary to review such permits.
 - 2) The Federal agencies mentioned above have forty-five (45) days to notify the EPA of their desire to comment, with EPA reserving right for final permit determinations.
 - 3) If the State submits insufficient evidence to evaluate a permit application, general permit, public notice, EPA may, within thirty days (30), request the complete record of such a permit proceeding before the State, including supplemental materials deemed applicable.
 - 4) If EPA decides to comment or object to a permit application, draft permit, general permit, or the State's failure to accept recommendations/comments from another affected State, such notification shall be delivered within thirty days (30) of receipt. The issuance of the permit or application in question shall be withheld pending a ninety (90) day review period. EPA may notify the State within thirty (30) days that no comments are immediately forthcoming, but reserves right to object or comment for ninety days (90) on information divulged as a component of the public review process.
 - 5) If EPA decides to comment or object to a public notice, draft permit, or general permit, EPA shall submit a written statement of comments, objections, the justifications for such comments, and the action which shall be taken by the State to eliminate such objections (53 Fed. Reg. p. 20784 (1988)).

The State shall also prepare and submit an annual report within ninety (90) days from a mutually agreed upon yearly period. The content and production process shall include the following:

- 1) A component detailing the State's administration of the Section 404 program, problems encountered, and recommendations for resolving problems.
- 2) An assessment of the cumulative impacts of the State's permit program on the integrity of the State's waters, identification of critical areas of concern or interest, the number and nature of individual and general permits issued, modified, or denied; the number of violations and enforcement actions taken; the number of unauthorized activities reported and action taken as a result; and the number of permits awaiting processing.
- 3) A draft copy of the annual report shall be made publicly available.
- 4) EPA shall transmit comments, objections, or requests for further information, within sixty (60) days of receipt.
- 5) The State shall respond to EPA's comments and return a final copy of the annual report within thirty (30) days.
- 6) EPA shall publish public notice of availability upon acceptance of the annual report (53 Fed. Reg. p. 20784 (1988)).

16. Coordination Requirements.

a. General Coordination

- 1) At the present time no State agency is responsible for a Statewide CWA Section 208(b)(4) regulatory program which involves agricultural, mining, construction, salt water and residual waste pollution. However, the Minnesota Pollution Control Agency did develop a 208(b)(4) Report (during the 1970's) which contained recommendations mainly with "best management practices" (BMP's). If at a future date MPCA did assume the 208(b)(4) Federal regulatory program, the State Director of a 404 program will have to develop an agreement with the agency designated to administer the program which shall include:
 - a) A definition of the activities to be regulated by each program;
 - b) Arrangements providing the agencies an opportunity to comment on prospective permits, BMPs, and other relevant actions; and
 - c) Arrangements incorporating BMPs developed by the Section 208(b)(4) program into Section 404 permits, where appropriate.

- 2) Where a CWA Section 208(b)(4) program has been approved under Section 208(b)(4)(C), no permit shall be required for activities for which the Administrator has approved BMP's under such approved program except as provided in § 232.3 (a) and (b). Until such Section 208(b)(4) program has been approved by the Administrator, a person proposing to discharge must obtain an individual permit or comply with a general permit.
 - 3) The State Director shall consult with any State agency(ies) with jurisdiction over fish and wildlife resources.
- b. State Section 404 programs shall assure coordination of State Section 404 permits with Federal and Federal-State water related planning and review processes.
- 1) The State Director shall assure that the impact of proposed discharges will be consistent with the Wild and Scenic Rivers Act when the proposed discharge could affect portions of rivers designated wild, recreational, scenic, or under consideration for such designation.
 - 2) Agencies with jurisdiction over Federal and Federal-State water related planning and review processes, including the U.S. Army Corps of Engineers, the U.S. Fish and Wildlife Service, and the National Marine Fisheries Service, shall notify the Regional Administrator that they wish to comment within 45 days of receipt by the Regional Administrator of the permit application, draft permit, or draft general permit. Such agencies should submit their evaluation and comments to the Regional Administrator within 50 days of receipt by the Regional Administrator of the permit application, draft permit, or draft general permit. Upon request, the Regional Administrator may allow any such agency up to an additional 30 days to submit comments. All comments from the U.S. Army Corps of Engineers, the U.S. Fish and Wildlife Service, and the National Marine Fisheries Service, regarding permit applications, draft permits, and draft general permits, shall be considered by the Regional Administrator. If the Regional Administrator does not adopt a recommendation of any such agency, a consultation shall occur with the affected agency. The final decision to object or to require permit conditions shall be made by the Regional Administrator.
- c. If the proposed discharge may affect the quality of the waters of any State(s) other than the State in which the discharge occurs, the State Director shall provide an opportunity within the public comment period for such state(s) to submit comments, recommendations, and desired additional permit conditions. If such comments are not accepted by the State Director, these comments shall be submitted to the effected State and Regional Administrator, along with an explanation for the failure to do so (53 Fed. Reg. p. 20784 (1988)).

COSTS FOR STATE ADMINISTRATION

COSTS FOR STATE ADMINISTRATION

The costs involved in the preparation of Section 404 assumption documents are excluded from the following table. Overall assumption costs include a State responsibility for the funding and preparation of documents outlining the State's Section 404 authority and capability, as well as establishing agreements for the orderly transfer of permit records and procedures for public interest review. This process is expected to cost about \$67,400 annually and require on average two to three years for completion.

I. UNDER M.S. 105.37/105.42

A. State Waterbank Program	\$ 240,000
B. Wetland Tax Exemption Program	\$ 200,000
C. Division of Fish and Wildlife (\$60,000 is a one-time cost).	\$ 284,640
D. Rule Hearings (a one-time cost)	\$ 50,000
E. Public Hearings	\$ 72,000
F. Information Management Charges (a one-time cost).	\$ 9,000
G. Permit Processing (\$60,000 is a one-time cost).	\$ 316,992
H. Violations.	\$ 263,561
I. Computer Entry.	\$ 1,200
J. Public Notices.	\$ 45,750
K. Inter-Agency Mailings	\$ 600
L. Annual Report	\$ NA
M. Certification	\$ NA
FIRST YEAR COST TOTAL	\$1,483,743
ANNUAL TOTAL (minus one-time costs)	\$1,304,743

II. UNDER A NEW SECTION OF MINNESOTA STATUTES

Costs would be identical to those above except that (A) Waterbank, and (B) Wetland Tax Exemption would not be accrued.

FIRST YEAR COST TOTAL.	\$1,483,743
TOTAL (minus "A" and "B").	\$1,043,743
TOTAL (minus one-time costs)	\$ 864,743
ANNUAL TOTAL	\$ 864,743

One time expenditures and set up costs are expenses associated with assumption of the Section 404 program. Set up costs generally refer to the addition of new employees. Such costs include the purchase of data processing equipment, field supplies (i.e. camera, additional instrumentation, transportation, etc.) and routine office supplies. One time expenditures are costs associated with record transfers and required public hearings. Included within these figures are expenses related to converting or moving records and those associated with the rule making process. The public rule making process includes the services of the Attorney General's office, an administrative law judge, DNR hydrologists, and, at times, affiliated State personnel.

If the State Legislature approves assumption of the Section 404 program, it will require two to three years to prepare documents, reports, and agreements, required by EPA. It is the Department's belief that such assignments necessitate the support of both a Hydrologist 1 and 2, in addition to legal assistance from the State Attorney General's office.

The annual personnel expenditures (including fringe benefits) required to prepare documents necessary for assumption of the Section 404 program are listed below:

Section 404 Assumption

Hydrologist 1	=	\$ 31,400.00
Hydrologist 2	=	\$ 34,500.00
Legal Assistance	=	\$ 1,500.00
Annual Total	=	<u>\$ 67,400.00</u>
Two Year Total	=	\$134,800.00
Three Year Total	=	\$202,200.00

Were the State to assume administration of the Federal Section 404 Authority, it can expect a potential increase of 600 permit applications per year, or a 90% increase in permit activity. The figures are based upon review of fiscal 1987 permits to determine the number of permits issued by the State and those issued by the Corp of Engineers which would be added with 404 assumption (Appendix C).

Assuming the State chooses to change its definition of "public waters" and "wetlands", the effect will be an increase in the number of waters and wetlands being regulated. This will impact some 75 additional public statutes (Appendix A) which now include the term "public waters" in their language. As the State definition expands that acreage which the State must oversee, it necessarily expands the coverage of other State programs dealing with public waters and wetlands.

If the State assumes the Section 404 program and elects to create an additional section in Minnesota Statutes, then the definitions of public waters under M.S. 105.37 will not change. If the new section option is selected, the State will not be obligated to include the additional Section 404 wetlands into the State Waterbank or Wetland Tax Exemption Programs listed below. This action could save the State approximately \$440,000 per year. Also, the costs associated with the changes in 75 other statutes would be eliminated. The new section could be titled "Other Waters of the United States" and would require its own set of agency rules dealing only with the discharge of dredged or fill material. The 404 wetlands (the larger type 3, 4, or 5) currently protected under the M.S. 105.42 authority would remain under the same authority. The agency rules currently being used for processing these applications would have to be reviewed by the U.S. EPA and could require some slight modifications prior to EPA approval.

A. STATE WATER BANK PROGRAM

The Water Bank program is designed to compensate landowners for not converting wetlands into cropland. In order for an area to qualify for the program, the area must be classified as a "wetland" according to Minnesota Statutes Chapter 105 or be identified as a "qualifying wetland" by the Department. The State is obligated to offer the qualifying landowner the following choices of indemnification within 60 days of receipt of a complete drainage permit application:

1. An offer to purchase the area, provided the landowner can provide public access.
2. An offer to acquire a perpetual easement on the area.
3. An offer to acquire a limited duration easement of not less than 20 years on the area.

Payments are based on appraisal of assessed land values and average \$400 per acre. Up to one acre of adjacent property per wetland acre may be included in the terms of any offer at the option of the Department. Current program costs are estimated to double with adoption of Federal definitions. The current number of 25 applications per year could potentially double to 50. In the 1986-87 biennium, the State spent \$580,000. Expanded regulation would likely push costs over \$1 million. It would mean an increase of at least \$580,000 in the next biennium, or \$240,000 per year.

STATE WATER BANK PROGRAM

\$240,000

B. WETLAND TAX EXEMPTION

M.S. 272.02, subd. 10 provides that wetlands which meet the definition of M.S. 105.37, subd. 15 and which otherwise could be legally drained and made economically viable for agricultural production, are exempt from property taxation. Eligible wetlands are presently confined to types 3, 4 and 5 (as defined by the U.S. Fish and Wildlife Service, Bulletin #39). With assumption of the Section 404 program, all wetlands of the State are eligible for tax exempt consideration.

The total value of the wetland tax exemption credit is expected to increase significantly with assumption of the Section 404 program. State law provides tax exemption for all wetlands which satisfy the definition described under M.S. 272.02, subd. 20. Although this exemption previously applied only to types 3, 4 and 5 wetlands, adopting the Federal definition of U.S. Waters automatically obligates the State to provide tax exempt consideration for all remaining wetlands. This property tax exemption is available without regard to previous size or type restrictions.

During 1986 the value of the wetland tax exemption credit was estimated at \$200,000.00. This figure is expected to at least double with the increase in eligible wetlands associated with assumption of the Section 404 program. Overall, this increase in value is highly dependent upon any publicity generated as a result of State assumption. Landowners, for instance, may deluge public officials once they realize nearly any previously exempt wetland could be considered eligible for tax credit.

WETLAND TAX EXEMPTION VALUE

\$200,000

C. DIVISION OF FISH AND WILDLIFE

The DNR Division of Fish and Wildlife's primary responsibilities are the management of Minnesota's wildlife and fish resources. As such, this charge includes an obligation to review and comment on M.S. 105.42 permit applications. It is the Division of Fish and Wildlife's responsibility to point out detrimental resource impacts, to recommend denial or mitigation measures, and, or, to suggest alternatives or actions which protect or enhance fish and wildlife resource values.

At present, the staff resources of the Division of Fish and Wildlife are inadequate to thoroughly review M.S. 105.42 permit applications. Because of responsibilities to other program areas, Division staff are only able to review what are considered the most "significant" permit applications. Without a provision for field inspections, review comments for these significant permits are typically of little value. In most cases, field inspections are the only way to obtain an understanding of unique site or project characteristics.

It is impossible to consider imposing additional Section 404 permit review responsibilities without, first, providing sufficient staff support.

Adequate M.S. 105.42 permit review requires a capability to examine and comment on all applications, as well as regularly perform field inspections. This obligation necessitates an increase in personnel to satisfy the current level of permit applications. Meeting an anticipated increase of 600 additional Section 404 permits requires further personnel support.

The Division of Fish and Wildlife believes the addition of six Natural Resource Specialist 3 positions are required for thorough review of current M.S. 105.42 permits, as well as to accommodate Section 404 permits. To assure coordination with existing programs and to provide access for field inspections, the Division believes each Natural Resource Specialist 3 position should be dedicated to a regional office.

A summary of recommended personnel additions and associated costs are as follows:

Personnel Allowances

Natural Resource Specialist 3 - Region 1	= \$ 37,440
Natural Resource Specialist 3 - Region 2	= \$ 37,440
Natural Resource Specialist 3 - Region 3	= \$ 37,440
Natural Resource Specialist 3 - Region 4	= \$ 37,440
Natural Resource Specialist 3 - Region 5	= \$ 37,440
Natural Resource Specialist 3 - Region 6	= \$ 37,440
Setup Costs	= \$ 60,000
Total	= \$284,640

DIVISION OF FISH AND WILDLIFE

\$284,640

D. RULE HEARINGS

The State must sponsor a public rule making session with assumption of the Section 404 program. A rule making session involves legal assistance from the Attorney General's office at \$20.00 an hour; legal drafting services at \$30.00 per hour; services of an administrative law judge at \$69.00 per hour plus travel expenses; public notices at approximately \$45.00 each; and costs associated with preparation, testimony, and involvement of State personnel. The total hearing cost, based upon previous examples, ranges from \$50,000 to \$100,000 (depending upon the complexity of the hearing).

RULE MAKING HEARINGS

\$50,000

E. PUBLIC HEARINGS

If a permit application is granted with or without conditions or refused, the applicant, the mayor of the city, the managers of the watershed district, and the board of the soil and water conservation district, may demand a public hearing. Each public hearing requires the involvement of the Attorney General's office, an administrative law judge, witnesses, and any State personnel involved in the hearings themselves or consequent investigations. Costs for these public hearings have historically ranged from \$6,000 to \$20,000.

The Department anticipates an additional 12 hearing demands with assumption of the Section 404 program. The total cost of \$72,000 represents 12 new hearing demands multiplied by a minimum hearing cost of \$6,000 (a \$20,000 hearing is atypical).

PUBLIC HEARINGS

\$72,000

It is important that EPA's role in the public hearing process be recognized. EPA exercises oversight responsibility for the State's administration of the Section 404 program. This responsibility allows EPA to overrule any State decision and render its own findings.

F. INFORMATION MANAGEMENT

Access to current and historical permit actions are an important component for State assumption of the Section 404 program. EPA requires that the Secretary of the Army, acting through the Chief of Engineers, provide for orderly transfer of any pending Section 404 permit records. The Corps of Engineers are under no obligation to provide for the transfer of current and historical permit files.

The transfer of the Corps' Section 404 permit records are valuable as staff reference sources and might improve the overall efficiency of permit review. Ready access to permit files reduces the level of staff involvement in information requests and facilitates the use of historical permits as reference materials. Permit files themselves may provide clues for project and permit evaluations, historical perspectives of particular permits or resources, advance warning of anticipated problems, and a host of other values. Any costs associated with transferring these records might easily be recouped by their value and use for the State's Section 404 program.

The costs of transferring the Corps of Engineers' Section 404 records involve storing, moving, and reorganizing two years worth of paper files (at any given time only two years of paper records are available); the cost of storing, copying, and reorganizing eight years worth of microfilm records; the costs of transferring, storing, reorganizing, and distribution of computer files; and any related moving expenses. The total transfer costs, including a \$2,000 appropriation for computer training, is estimated at \$9,000. Adjustments for cost saving measures might alter the total cost accordingly.

INFORMATION MANAGEMENT

\$9,000.00

G. PERMIT PROCESSING

State assumption of the Section 404 program is expected to increase the DNR Division of Waters permit load by approximately 600. Assuming Section 404 permit applications require about the same processing time as M.S. 105.42 permits, it is anticipated that 600 new permits require an additional 3900 hours of processing time. It is recognized that a percentage of this additional permit load will be the equivalent of the Corps' Nationwide and General permits. However, even in the case of Nationwide permits, there are informal review requirements. Nationwide permit applicants typically request written determinations regardless of specific application policies.

The current review costs represent an anticipated increase of 600 permits multiplied by the \$18.25 hourly wage (including benefits) of a Hydrologist 1/2 and an average processing time of 6.5 hours (based on the average Division of Waters permit processing time). This review figure amounts to

\$71,175. The Division of Waters, however, is unable to assimilate this increase of 600 permits, along with at least an equivalent number of general inquiries, phone calls, correspondence, and preliminary investigations.

Specific requirements for disseminating Section 404 information, along with an equivalent work load of 1200 permits, justifies a request for six new Hydrologist 1 positions and a Central Office Hydrologist 2 Coordinator. The hydrologist positions are necessary to adequately address this additional permit load. A State Director (Coordinator), on the other hand, is responsible for implementing the requirements specified under a section of this report entitled "Conditions for State Assumption". A State Director is the designated liaison with EPA and other Federal agencies, along with being responsible for preparing an annual report and responding to public inquiries.

Following is a summary of costs associated with the Division of Waters' recommendation: The Division recommends that each of six new hydrologists be assigned to a regional office. This arrangement provides for continuity in the existing permit structure, as well as local Section 404 review and program access.

Permit Processing

Hydrologist 1 - Region 1	= \$ 31,400
Hydrologist 1 - Region 2	= \$ 31,400
Hydrologist 1 - Region 3	= \$ 31,400
Hydrologist 1 - Region 4	= \$ 31,400
Hydrologist 1 - Region 5	= \$ 31,400
Hydrologist 1 - Region 6	= \$ 31,400
Hydrologist 2 - Central Office	= \$ 34,450
Setup Costs	= \$ 60,000
Total	= \$282,900

DIVISION OF WATERS

\$282,900

CLERICAL ASSISTANCE

Accommodating 600 new Section 404 permits impacts the DNR Division of Waters clerical staff. It is the responsibility of the clerical staff to log each permit as it arrives; to index files; to type and verify draft permits, letters, and memorandums; to prepare and update mailing lists; to coordinate the distribution of public notices; and to assist with phone inquiries and communications. The typing and tracking type assignments require, on average, an hour per permit. Public notification requirements for the 300 anticipated Individual Review type permits will impose an estimated work load equivalent to another 3000 hours.

Clerical costs for State assumption of the Section 404 program represent a combined typing and mailing type assignment work load increase of 3600 hours multiplied by the \$9.47 hourly salary of a Clerk Typist II

(including benefits). It should be recognized that this additional work load will not be distributed evenly among the DNR Division of Waters regional offices. Actual work load increases are dependent upon the individual permit load at each regional office.

CLERICAL ASSISTANCE

\$34,092

Permit Processing Total

Division of Waters	=	\$282,900
Waters' Clerical Staff	=	\$ 34,092
Total		<u>\$316,992</u>

PERMIT PROCESSING

\$316,992

H. VIOLATIONS

An annual increase of 150 permit violations is a conservative prediction of the impacts associated with State assumption of the Federal Section 404 program. The State presently issues about 50% of the Corps of Engineers Section 404 type permits. In fiscal year 1985 some 300 violations were processed. Assuming the permit to violations ratio remains constant, a 50% increase in overall permit applications should roughly increase annual permit violations to 450.

Field work, review time, draft restoration orders, and processing, average 16 hours per case. The number of increased violations multiplied by the hourly salary of a DNR Hydrologist 2 and the combined administrative average of 16 hours are represented below: Any of these cases may also require assistance from the Division of Enforcement, as well as additional correspondence, surveying activities, contested case hearings, and other courses of action.

DIVISION OF WATERS VIOLATIONS

\$52,800

The total number of violations could be larger than predicted because of the State's enforcement structure. Minnesota's 171 conservation officers are stationed geographically throughout every county in the State. The Corps of Engineers, on the other hand, currently enforces the Section 404 program with five personnel distributed among offices in Bemidji, St. Paul and Duluth, Minnesota. The DNR's 171 person conservation officer contingent is supplemented by Waters Division employees, as well those of other divisions. DNR Waters Division personnel are advised to report suspected violations to area and regional hydrologists. Area and regional hydrologists are required to assist conservation officers in the investigation, reporting, determination, and documentation of suspected and actual permit violations.

Bruce Norton, Chief of Enforcement for the St. Paul District of U.S. Army Corps of Engineers, believes Section 404 permit violations are sure to increase with State assumption. Mr. Norton thinks residents are more likely to report a suspected violation with the DNR's local access and phone numbers. Mr. Norton reported that "violations increased dramatically for the Corps of Engineers around Green Bay, Wisconsin after opening a new Corps field office".

Survey Unit

Any increase in permit violations directly effects the DNR Division of Waters' Survey Unit. The Survey Unit's primary responsibility relates to establishing the ordinary high water mark (OHW) for public waters and investigating fill violations. In an average year some 125 OHW determinations and 15 violation sites are surveyed. Currently the Survey Unit's priorities are determined in response to specific requests or anticipated shoreland development pressure. It is impossible with current resources to engage in preemptive surveys or to instigate the development of a lake gauging network (this network would be used to substantiate normal lake levels).

State assumption of the Federal Section 404 program would roughly double the Survey Unit's work load. At present about 40% of the State's waters are regulated. Most of the remaining State waters become eligible for surveying under Section 404 assumption (regardless of whether the State decides to incorporate the program under M.S. 105.42 or within a new section). This near 60% increase in State regulated waters logically translates into a need for at least 125 additional OHW determinations, with a minimum of 26 additional violations surveys.

The complexity of surveys vary a great deal. Some survey assignments involve short morning or afternoon trips; others include overnight accommodations in remote areas of the State. All surveys involve transportation, employee salaries, use of instrumentation, and the production of official drawings. These costs averaged approximately \$3,000.00 per survey (depending on the complexity of the survey and the availability of prior survey data).

Accommodating the Section 404 program would have less impact if the Survey Unit had excess production capability. The Survey Unit, however, is fully occupied by OHW determinations, violations, and a host of other State sanctioned activities. The Survey Unit is not in a position to accept a doubling of its responsibilities. Such a volume is enough, in and of itself, to occupy an entirely new survey team.

The Division of Waters' Survey Unit recommends addition of the following personnel to meet anticipated Section 404 survey demands:

Survey Crew

Survey Technician 1	=	\$ 30,000
Survey Technician 1	=	\$ 30,000
Survey Supervisor	=	\$ 40,000
Setup Costs	=	\$ 40,000
Total	=	\$140,000

Draftsman/Woman

Technician	=	\$ 30,000
Setup Costs	=	\$ 10,000
Total	=	\$ 40,000

Survey Unit Total = \$180,000

SURVEY UNIT

\$180,000

*(Setup costs include levels, transits, electronic survey instrumentation, transportation arrangements, related hand tools, data processing equipment, storage cabinets, specialized drawing tables and computerized graphics equipment, art supplies, etc.)

Clerical Assistance

An anticipated increase of 150 Section 404 violations imposes a new set of demands upon the clerical staff. Currently an average violations case involves the preparation of letters, memorandums, draft restoration orders, Commissioner's orders, the proofreading of any such documents, file searches, and phone calls. On average, these assignments amount to one hour of clerical assistance per permit. Assuming this hourly total holds true for Section 404 violations, the overall increase in clerical work load amounts to 150 hours. This 150 hour work load increase multiplied by the \$9.47 hourly salary (includes benefits) of a Clerk Typist II represents the Section 404 program's estimated impact on clerical costs.

CLERICAL ASSISTANCE

\$1,421

Division of Enforcement

The addition of 150 Section 404 permit violations imposes new costs and demands upon the Division of Enforcement. Based upon M.S. 105.42 permit violations, the Division estimates that each new permit violation entails about 20 hours worth of a conservation officer's time. Typically each violation involves a site investigation; correspondence with area and regional hydrologists, county attorneys, State attorneys; legal

investigations; interviewing suspects and witnesses; any time involved in testifying and preparing for contested case hearings; and the completion of required forms.

Conservation officers are responsible for enforcing a gamut of natural resource laws, including those associated with M.S. 105.42 and Section 404 activities. While the number of enforcement officers and their specializations have changed little over time, the increasing number of activities and people engaging in recreational pursuits are demanding a substantial amount of enforcement action. It is increasingly difficult for officers to devote their resources to recreation demands without compromising the enforcement of other resource laws.

The cost of accommodating 150 new Section 404 violations are calculated at the average review time of 20 hours per violation multiplied by a Natural Resources II (Conservation Officer) overtime hourly rate of \$27.38. An overtime rate is used because officers are allocated 319 hours of annual overtime and Section 404 violations are an addition to already stressed enforcement responsibilities.

DIVISION OF ENFORCEMENT VIOLATIONS

\$82,140

Stationing a conservation officer in each of the six regions could be an effective option for enforcing Section 404 and M.S. 105.42 regulations. This arrangement would release currently overburdened conservation officers for enforcement of other natural resource laws, while providing an effective means of policing and protecting the State's waters. The overall cost, which is summarized below, could be lower over the long run because of consistency of enforcement and specialization. An effective program might, for instance, reduce the number of costly contested case hearings or overrulings by EPA.

		Enforcement Option	
Region I	Conservation Officer	=	\$ 39,000
Region II	Conservation Officer	=	\$ 39,000
Region III	Conservation Officer	=	\$ 39,000
Region IV	Conservation Officer	=	\$ 39,000
Region V	Conservation Officer	=	\$ 39,000
Region VI	Conservation Officer	=	\$ 39,000
Setup Costs		=	\$180,000
Total		=	\$414,000

*(The costs included the above estimate are based on the annual salary and benefits of a Natural Resources Specialist II (Conservation Officer), in addition to set-up costs, which typically include an appropriately outfitted vehicle; a boat, motor and trailer; handgun; baton; mace; etc. The above estimate is excluded from the assumption totals because it is presented as an option.

Violations Total

Waters' Survey Unit	=	\$180,000
Clerical Assistance	=	\$ 1,421
Division of Enforcement	=	\$ 82,140
Total	=	<u>\$263,561</u>
Total with Enforcement Option	=	\$595,421

VIOLATIONS

\$263,561

I. COMPUTER ENTRY

The system used for tracking M.S. 105.42 and new Section 404 permits is a combination mainframe and microcomputer system. New permits are entered directly by computer modem connection from each of the six regional offices to the State Planning Agency's Prime computer. Historical permit records are available for review or re-activation by modem connection to the St. Paul Central Office's IBM AT. Historic permit records can be activated through a series of menu controlled instructions. A system administrator then uses a utility program to transfer any activated permits to the Minnesota State Planning Agency's Prime computer.

The data management costs associated with assumption of 600 additional Section 404 permits are CPU (Central Processing Unit) time and data entry. These two expenses are estimated at approximately \$2.00 per permit or a grand total of \$1,200.00 (600 permits @ \$2.00).

COMPUTER ENTRY

\$1,200

J. PUBLIC NOTICES

The Director is required to give public notice of the following actions:

1. Submission of permit applications requiring public review.
2. Preparation of a draft general permit.
3. Consideration of a major modification to an issued permit.
4. Scheduling of a public hearing.
5. Issuance of an emergency permit.

Notice shall be given by each of the following methods:

1. By mailing a copy of the notice to the following:
 - the applicant
 - any agency with jurisdiction over the activity or disposal site, whether it issues the permit or not
 - owners of property adjoining the property where the regulated activity will occur
 - all persons who have specifically requested copies of public notices

2. By providing notice in at least one other way (such as advertisement in a newspaper of sufficient circulation) reasonably calculated to cover the area affected by the activity.

EPA requires that states conduct a full public interest review for all significant permit actions (those which are defined as Individual Review by the U.S. Army Corps of Engineers). After examining the Corps public notice process, it is estimated that 50% of the expected increase in Section 404 permits require some level of public notification. The figure arrived at for an annual mailing cost represents 300 mailings multiplied by .50 for each of the Corps' present mailing list of approximately 200 names. The State's actual mailing costs could be significantly higher with any publicity generated as a result of State assumption.

MAILING LIST NOTICES

\$30,000

Past records indicate the cost of newspaper notices range anywhere from \$30.00 to \$60.00. Using an average of \$45.00 for each of the anticipated 300 significant permits (Individual Review) and 50 miscellaneous notices (notices of contested case hearings, rule hearings, etc.), the total costs are as follows:

NEWSPAPER NOTICES

\$15,750

Public Notification Totals

Mailing List Notices	=	\$30,000
Newspaper Notices	=	\$15,750
Total	=	\$45,750

PUBLIC NOTICES

\$45,750

K. INTER-AGENCY MAILINGS

As a condition of State assumption, EPA requires that states routinely submit copies of permits, significant actions taken in regard to permits, and any supporting material deemed necessary. It is expected that most of the 600 additional permits anticipated with State assumption of the Section 404 program will require at least two mailings, or a grand total of 1200 pieces. This average mailing cost of .50 multiplied by 1200 pieces is represented below:

INTER-AGENCY MAILINGS

\$600.00

L. ANNUAL REPORT

The production of an annual report is a requirement for State assumption of the Section 404 program. The State Director or Section 404 liaison must prepare a draft copy of the annual report for submission to the Regional Administrator (EPA). The draft annual report is then returned with the Regional Administrator's comments and recommendations. The report is considered final and its availability published once the Regional Administrator determines the revisions and comments are satisfactory.

Based upon the experience of Michigan's Section 404 program, production of an annual report requires approximately 120 staff hours. The estimated cost of producing the annual report amounts to the \$18.25 hourly salary of a Hydrologist 2 multiplied by 120 hours. This is not an additional cost if the Hydrologist 2 Central Office Coordinator position is approved. An annual report would simply be an assignment required of this position.

ANNUAL REPORT

\$2,200

M. CERTIFICATION

Section 401 of the Clean Water Act specifies that any applicant for a Federal license or permit to conduct an activity which may result in the discharge of pollutants into waters of the United States, requires the certification of the State from which the discharge originates or would originate from, or from a designated interstate pollution control agency having jurisdiction over the affected waters at the point where the discharge originates or would originate. A certification for the construction of any facility must also detail the subsequent operation of the facility.

Section 401 certification is no longer a requirement under State assumption of the Section 404 program. However, in the interest of protecting State water quality, it is recommended that a process similar to that of Section 401 remain. The State desires to be active in the certification process and would be the most appropriate agency to do so. If the assuming agency decided not to utilize the MPCA for 401 type of certification for water quality issues, it would be have to develop a similar program within the assuming agency.

No significant additional costs are anticipated by State certification of Section 404 permits. MPCA staff already review and comment on most of the Corps of Engineers Individual Review permit applications. Unless State assumption precipitates a dramatic change, the proportion of permits requiring review should remain essentially unchanged.

CERTIFICATION

NA

ALTERNATIVE FUNDING STRATEGIES

ALTERNATIVE FUNDING STRATEGIES

The total State cost to administer the Federal Section 404 permit program has been estimated to range from \$864,743 to \$1,304,743 depending on which change in legislation is chosen. None of these costs have been considered in the current budget request of the Department of Natural Resources. The funding for the total estimated amount has been investigated for the following:

1. Federal Grants
2. Permit Fees
3. Fee for Services
4. Fines
5. Legislative Funding

Federal Grants. Inquiries have been made to the U.S. Environmental Protection Agency, Chicago Office, as to the availability of federal grants or funding to administer the program. The Department was informed, by Mr. Douglas Ehorn, that there are no funds available at the present time nor will it be likely that any funds will be made available to any State in the near future for the administration of the 404 program. The U.S. EPA requires that once a 404 program is assumed by a State government, it is the responsibility of the State to finance the program. Also, prior to State assumption approval by the U.S. EPA, the State must show that it has adequate funding to administer the program.

Permit Fees. At the present time, permit fee income received by the Department of Natural Resources is turned over to the State's general fund. The DNR averages approximately 1,000 M.S. 105.42 permits per year. If the State assumes the Section 404 program, an additional 600 permits can be expected. At the current permit fee rate of \$75 per permit application, the State would receive approximately \$45,000 for processing the additional 404 permit applications. If you add the present M.S. 105.42 permit fees of approximately \$75,000 to the income received from the 404 fees, the total expected would be approximately \$112,500 annually. If the legislature were to dedicate the permits fee income to the DNR, then part of the 404 program costs would be compensated (It should be noted that the Corps of Engineers charges a minimum of \$10.00 and the DNR a minimum of \$75.00 for a non-commercial permit).

Fee for Services. A "fee for services" permit system represents another alternative for funding the Section 404 program. The fee for services permit system requires that applicants be held accountable for all or a portion of the costs incurred by the State in evaluating their permit application. Applicants would be charged for permit evaluation, routine field inspections, hydrologic analyses, legal investigations, land and OHW surveys, and a host of other services currently performed below cost by the State.

The State could expect to recover \$300,000 annually, for instance, by using the State of New Jersey's \$1,000 flat fee for any Individual Review permit (Individual Review permits require a full public interest review and have potentially significant environmental impacts). Added to this sum would be incidental service revenue such as OHW determinations. Again, using New Jersey as an example, the State can expect to recover \$12,500 annually in OHW surveys.

There are a number of significant considerations associated with a "fee for services" permit system. One issue centers on the State's authority to impose such fees. With few exceptions, the State and the DNR in particular, do not have the authority to collect fees in excess of that stated in the Minnesota Statutes. Any change in this fee structure would require legislative action.

Another consideration revolves around the design of a fee for services system. It is important that a fee for services system strive to be as equitable as possible. A fee system should be responsive enough so that applicants proposing minor projects are not charged at a level appropriate to large scale alterations. Minor activities, for instance, might be exempted under a Nationwide permit or divided into categories with lesser fees.

Fines. Revenue derived from penalties are another source of funding the Section 404 program. It is the State's responsibility to enforce and collect fines for violations of the Section 404 program. Any revenue derived from fines remains the property of the State as long as EPA determines such penalties are in compliance with the Section 404 program and appropriate to the violation. If State fines are determined insufficient, EPA has absolute authority to begin its own enforcement proceedings and collect any resulting fines.

Within the 404 program the COE and the EPA have three ways to impose fines upon violators. These include civil, criminal and administrative as follows:

1. Civil fines may be imposed up to \$25,000 per day for each violation.
2. Criminal fines may be imposed up to \$100,000 per day for each violation.
3. Administrative penalties have two levels. (Also see Appendix F).
 - a. Class I has a maximum fine of \$10,000 per violation but not to exceed \$25,000.
 - b. Class II has a maximum fine of \$10,000 per day up to a maximum of \$125,000.

Although the EPA only requires that the State have statutory authority to impose civil and criminal fines, it is highly recommended that the State also have statutory authority to impose administrative penalties.

It is difficult to determine the value of fines in underwriting the State's administration of the Section 404 program. At present many State M.S. 105.42 violations are resolved without fines. Violators typically avoid fines by agreeing to voluntary restoration or mitigation. While this is usually the case with the Corps of Engineers' administration of the Section 404 program, EPA can and does exercise its oversight responsibility by imposing significant fines. Last year, for instance, EPA levied a \$60,000 administrative penalty for a blatant violation at an Andover, Minnesota development site.

Legislative Funding. It would appear that a major source of funding the Federal 404 permit program would be this option. As stated in the above "Federal Grants" paragraph, a State must show that it has adequate funding to administer the 404 program before the U.S. EPA can give approval for State assumption.

APPROPRIATE ROLES FOR STATE AGENCIES
AND
LOCAL UNITS OF GOVERNMENT

APPROPRIATE ROLES FOR STATE AGENCIES

AND

LOCAL UNITS OF GOVERNMENT

Under Section 404 of the Federal Clean Water Act, a person who wishes to place dredged or fill material into a water of the United States must first check with the Department of Natural Resources, the Army Corps of Engineers, and local units of government, for any required permits.

Under Minnesota Statutes Chapters 378 and 469, local units of government have the authority to develop a regulatory program and to require permits for work done within water basins or tributaries. At the present time most have not elected to do this. In addition, discussions with the Chicago Office of the EPA indicated that approval of State assumption with responsibility delegated to local units of government would be doubtful. Because of the potential for control and uniformity problems between local units of government, the State would be required to oversee the program and act as an intermediary to the EPA.

In order for local units of government and/or other State agencies to actually assume the Section 404 Authority, each one would have to develop a permit program and hire appropriate staff to administer the program. It should be stressed that even if the Legislature approved an agency other than the DNR, the EPA will not approve State assumption unless the agency assuming the program can demonstrate sufficient technical expertise, the resources necessary to carry out the provisions of the program and authority to enforce the 404 program.

The Department of Natural Resources already has the experience, knowledge and most of the staff required to assume the Section 404 program. Also, the redundancy of applying to the State and another unit of government would be eliminated. For these reasons, the Department of Natural Resources would be in the best position to assume the program and to solicit comments concerning permit applications from local units of government and State agencies. However, in order for the Department of Natural Resources to assume the Federal 404 program, the DNR would need at least the funding projected by the cost analysis of this study.

NECESSARY CHANGES IN CURRENT STATE LAW

NECESSARY CHANGES IN CURRENT STATE LAW

The Environmental Protection Agency requires that states have statutory authority to carry out the provisions of 40 CFR, Chapter 1, Parts 232 and 233. As such, the following amendments are changes necessary for assumption of the Federal Section 404 program. Any additional provisions may be stipulated at the discretion of the State.

GENERAL AUTHORITY

M.S. 105.39, Subd. 3 provides the Commissioner of Natural Resources with administrative authority over the allocation and control of public waters and wetlands, the establishment, maintenance and control of lake levels and water storage reservoirs, and the determination of the ordinary high water mark for public waters and wetlands.

An amendment must be added to allow the Commissioner authority to make agreements and prescribe rules in compliance with assumption of the Federal Section 404 program, such as:

The Commissioner of Natural Resources shall have authority to assume operation of the Section 404 program. As such, the Commissioner may make agreements with appropriate Federal agencies; regulate discharge of dredge and fill materials to the extent necessary for the Section 404 program, into waters of the State which are not public waters or wetlands, but which are waters of the United States as defined by the Environmental Protection Agency pursuant to Section 404 of the Federal Clean Water Act; and adopt rules as necessary to implement this section.

WATER BANK

The State Water Bank program was established to acknowledge the value and protect for future generations, the wetlands of Minnesota. As such M.S. 105.392, Subd. 1 requires the Commissioner of Natural Resources to make rules and establish compensatory payment rates necessary for the preservation and conservation of the State's wetlands. Participating land owners agree not to drain, burn, or otherwise alter the character of wetland area; to implement a wetland conservation plan if stipulated in the agreement; to abide by the agreement's financial requirements, including violations resulting in forfeiture of future payments and grants; not to adopt practices which defeat the agreement's purpose, and to abide by additional provisions as stipulated by the Commissioner.

Wetlands presently eligible for Water Bank consideration are identified in the U.S. Fish and Wildlife Service Circular #39 as types 3, 4 and 5. This authority should as a matter of fairness, be expanded to include Section 404 waters such as specified below:

The wetland no drainage and compensation provisions of M.S. 105.391, Subd. 3 shall be enlarged to cover wetlands as defined by the Environmental Protection Agency, which are not inventoried under 105.391, Subd. 1, but which are waters of United States under Section 404 of the Federal Clean Water Act.

DRAINAGE

M.S. 106A.B11, Subd. 1 provides that drainage authorities may construct and maintain drainage systems; deepen, widen, and straighten the channel of a natural waterway that is a part of a drainage system or is located at the outlet of a drainage system; extend a drainage system through a municipality for a suitable outlet; and construct dikes, dams, control structures, power appliances, and pumps, as provided by law.

State assumption of the Section 404 program requires regulation of drainage activities exempt under the provisions of M.S. 105.42, Subd. 3. Currently drainage authorities are exempt from permitting requirements for activities established under M.S. 106.005 - 108A.11, which are part of a drainage systems lawfully established and which do not substantially affect public waters. Natural altered watercourses, however, includes rivers, and, or streams regulated under the Federal Section 404 program.

The provisions of M.S. 105.42 can be amended to comply with the Section 404 program by incorporating the following clause:

Notwithstanding any other laws to the contrary, the Commissioner may regulate ditch maintenance under Chapters 106A and 112 which affect waters of the United States, to the extent necessary to qualify for Federal Section 404 assumption.

PENALTIES

M.S. 105.541 provides that any person in violation of provisions in Minnesota State Statutes, Chapter 105, is guilty of a misdemeanor. A misdemeanor is punishable by fines up to \$700.00, and, or 90 days in jail.

The Federal Section 404 program requires that M.S. 105.541 be amended to reflect penalties as specified below: The Regional Administrator (EPA) may waive these requirements if the State provides evidence of an alternative program with equivalent deterrence and compliance capability. Evidence consists of at least one year's worth of records from the alternative program.

The State shall have the authority to assess or recover civil penalties for discharges of dredged or fill material without a required permit or in violation of any Section 404 permit condition in an amount not to exceed \$25,000 per day for each instance of a violation.

The State shall have authority to seek criminal charges against any person who knowingly makes false statements, representations, or certification in any application, record, report, plan, or other document filed or required under the Act, Federal regulations or the approved State program, or who falsifies, tampers with, or knowingly renders inaccurate any monitoring device or method required to be maintained under the permit, in an amount of at least \$5,000.00 for each instance of a violation.

The State shall have authority to seek criminal fines against any person who willfully or with criminal negligence discharges dredged or fill material without a permit or in violation of any Section 404 permit condition (also see Appendix F).

The civil penalties assessed or sought by the State shall be appropriate to the violations. However, EPA may institute separate proceedings if penalties are inadequate compared to what EPA would impose.

STATUTORY ALTERNATIVES

There are two basic statutory alternatives for State assumption of the Section 404 program. One option is to amend M.S. 105.37, subd. 14 to include waters of the United States as defined by the EPA. The other alternative is to develop a new section and definitions specifically applicable to Section 404 activities.

Alternative One

Amend the definition of public waters in M.S. 105.37, subd. 14 and subd. 15 to encompass all waters of the State which are waters of the United States as defined by the Environmental Protection Agency for Section 404 of the Federal Clean Water Act.

Alternative Two

Create a new section providing the Commissioner with authority to regulate dredge and fill activities to the extent necessary for assumption of the Federal Section 404 program. The jurisdictional interpretation of waters applicable to this section might be termed "Other Waters of the United States".

DISCUSSION

There are some 75 State statutes which use the term public waters. If the definition of public waters are broadened under M.S. 105.37, the reach of each of these statutes also increases. Expanding the term public waters impacts hunting and fishing regulations, purple loosestrife control, cranberry and wild rice harvesting, shoreland protection, wildlife management, lake bed mining, demand for legal services, and a host of other regulations or programs.

This all inclusive Federal definition of "public waters", for instance, would require the State, under M.S. 97B.811B, to enforce duck decoy regulations on almost all presently unregulated State waters. Conservation officers would then be held responsible for policing such waters, with the additional costs assumed by the State.

Alternative two restricts the impact of broadening the term public waters by limiting the Commissioner's authority in these additional waters to that required for assumption of the Section 404 program. The Commissioner's authority would extend only to the regulation of dredge and fill materials. The State would not be held responsible for enforcing the gamut of activities discussed under alternative one.

As a precaution, the Department of Natural Resources, Division of Waters, also recommends that no attempt to inventory the remaining waters of the State be made. It cost the State some \$1,170,345.00 to inventory and map waters presently designated as public water (Protected Waters). Since this inventory represents approximately 40% of the State's waters, it is expected that any

effort to record the remaining waters will at least match, if not exceed the previous cost. The EPA stated, in their 15 August 1989 memo on comments to the EPA draft report, that "If the draft or final PWI are not yet available for all portions of the State, additional surveys or aerial photographs may be an interim substitute." For an example of the jurisdictional differences, see the maps in Appendix E.

APPENDIX

APPENDIX A

PUBLIC WATERS IN 001 TO 650

08/30/88

003*#736S

- 1 18 <IN> Subd. 3.
- 3 20 <IN> (n)
- 3 22 or maintain open water on the ice of PUBLIC WATERS, that is

018*#121S

- 1 15 <IN> Subd. 2.
- 1 18 the commissioner deems necessary for the protection of PUBLIC
- 1 19 WATER, wild animals and natural resources before control

018*#171S

- 2 3 <IN> Subd. 8.
- 2 3 <IN> Subd. 8. +b Land. +c "Land" includes wetlands and PUBLIC
- 2 4 WATERS.

018*#191S

- 1 14 underlying PUBLIC WATERS or wetlands designated under section
- 1 17 level of the PUBLIC WATER or wetland. The commissioner of
- 1 19 purple loosestrife on PUBLIC WATERS and wetlands designated
- 1 23 upon PUBLIC WATERS and wetlands designated under section 105.391
- 2 1 to control and eradicate purple loosestrife on PUBLIC WATERS and

018B#07S

- 2 10 <IN> Subd. 5.
- 2 10 <IN> Subd. 5. +b Use of PUBLIC WATER supplies for filling
- 2 12 equipment directly from a PUBLIC WATER supply, as defined in
- 2 13 section 144.382, unless the outlet from the PUBLIC WATER supply
- 2 17 <IN> Subd. 6.
- 2 17 <IN> Subd. 6. +b Use of PUBLIC WATERS for filling equipment. +c
- 2 19 directly from PUBLIC WATERS of the state, as defined in section
- 2 23 filling the equipment from the PUBLIC WATERS.
- 2 24 <IN> (b)
- 2 25 applications of aquatic pesticides to PUBLIC WATERS.
- 2 26 <IN> Subd. 7.
- 3 9 <IN> (b)
- 3 10 application of aquatic pesticides to PUBLIC WATERS.

040*#41S

- 1 7 PUBLIC WATERS and drainage systems, from crop production and to

040A#123S

- 1 2 <IN> Subdivision 1.
- 1 4 projects for public sanitary sewer systems, PUBLIC WATER

084*#031S

- 1 6 condition of PUBLIC WATERS beyond the boundaries of the state in

084*#09S

- 1 23 the wild rice harvesting upon all PUBLIC WATERS of the state and
- 1 25 wild rice crop upon all PUBLIC WATERS within the original

084*#091S

- 1 1 <SHN> 84.091 +a Aquatic vegetation in PUBLIC WATERS.
- 1 2 <IN> Subdivision 1.
- 1 3 wild rice and other aquatic vegetation growing in PUBLIC
- 1 4 WATERS. A person may not acquire a property interest in wild

084*#0911S

- 1 9 <IN> Subd. 3.
- 1 11 for management of designated PUBLIC WATERS to improve natural

084*#092S

- 1 3 <IN> Subdivision 1.
- 1 5 <IN> (1)
- 1 6 than wild rice from PUBLIC WATERS;
- 1 7 <IN> (2)
- 1 7 <IN> (2) transplant any aquatic plants into other PUBLIC WATERS;
- 1 8 <IN> (3)
- 1 9 organisms in PUBLIC WATERS under prescribed conditions to

084*#111S

- 1 2 <IN> Subdivision 1.
- 1 3 wild rice in any PUBLIC WATERS in this state, any water craft
- 1 17 <IN> Subd. 4.
- 1 18 PUBLIC WATERS between 3:00 p.m. and 9:00 a.m. following except
- 1 22 <IN> Subd. 5.
- 1 24 body of PUBLIC WATERS may use mechanical harvesting devices to
- 1 27 <IN> (a)
- 1 27 <IN> (a) Any body of PUBLIC WATERS greater than 125 acres in
- 2 2 <IN> (b)
- 2 2 <IN> (b) Any body of PUBLIC WATERS to which the public has
- 2 4 <IN> (c)
- 2 4 <IN> (c) Any body of PUBLIC WATERS within the original

084*#14S

- 1 21 <IN> Subd. 3.
- 1 22 the harvesting of wild rice on all PUBLIC WATERS or portions
- 2 5 be conducted on any or all PUBLIC WATERS or portions thereof.
- 2 11 <IN> Subd. 4.
- 2 14 the PUBLIC WATERS of this state and to rotate the opening of

084*#15S

- 1 2 <IN> Subdivision 1.
- 1 3 the harvesting of wild rice grain on PUBLIC WATERS of any
- 1 9 <IN> Subd. 2.
- 1 12 and replanting in PUBLIC WATERS of the state, including waters

084*#415S

- 1 2 <IN> Subdivision 1.
- 1 15 land or PUBLIC WATER under the control of the commissioner of
- 1 23 cause. All such land or PUBLIC WATER shall remain subject to
- 1 26 disposition of land or PUBLIC WATER all rights included in any

084*#43S

- 1 6 <IN> Subd. 2.
- 1 8 <IN> (1)
- 1 10 approved June 22, 1948, and all PUBLIC WATERS included therein
- 1 23 <IN> Subd. 3.
- 1 23 <IN> Subd. 3. "PUBLIC WATERS" shall mean all waters lying

084*#44S

- 1 4 area and PUBLIC WATERS therein is necessary for the protection

086*#11S

- 1 12 <IN> Subd. 2.

- 1 14 vegetation, control of algae and scum conditions on PUBLIC
- 1 15 WATERS, methods of combating and controlling the same, and shall

086A#02S

- 1 22 <IN> Subd. 4.
- 1 27 recreational activities conducted upon the PUBLIC WATERS and

089*#022S

- 1 3 <IN> Subdivision 1.
- 1 23 required for purposes of providing access to PUBLIC WATERS or

092*#45S

- 1 3 and other PUBLIC WATERS and watercourses, with the live timber
- 1 19 PUBLIC WATERS and watercourses and withdrawn from sale, a strip

092*#67S

- 1 2 <IN> Subdivision 1.
- 1 5 resources shall sell state property bordering PUBLIC WATERS that

093*#10S

- 1 4 PUBLIC WATERS within the area described by such lease.

093*#11S

- 1 3 described in section 93.08 under the PUBLIC WATERS in the state

093*#15S

- 1 2 <IN> Subdivision 1.
- 1 20 <IN> (3)
- 1 20 <IN> (3) An area of any size within the bed of any PUBLIC WATERS

093*#34S

- 1 1 <SHN> 93.34 +a Unlawful to mine under PUBLIC WATERS.

093*#43S

- 1 18 authorization for the use of PUBLIC WATERS issued by the

094*#342S

- 1 19 <IN> Subd. 3.
- 1 21 any meandered or other PUBLIC WATERS and withdrawn from sale by
- 1 25 PUBLIC WATERS in the same general vicinity affording at least
- 2 3 bordering on PUBLIC WATERS shall be subject to reservations by
- 2 15 exchange bordering on PUBLIC WATERS must be subject to the

097A#015S

- 5 27 <IN> Subd. 41.
- 5 27 <IN> Subd. 41. +b PUBLIC WATERS. +c "Public waters" means
- 5 27 <IN> Subd. 41. +b PUBLIC WATERS. +c "PUBLIC WATERS" means

097A#085S

- 2 14 <IN> Subd. 7.
- 2 18 <IN> (b)
- 2 22 PUBLIC WATERS. Where the boundary of a refuge extends more than

097A#101S

- 1 1 <SHN> 97A.101 +a PUBLIC WATER reserves and management designation.
- 1 2 <IN> Subdivision 1.
- 1 3 designate and reserve PUBLIC WATERS of the state to propagate
- 1 5 <IN> Subd. 2.

1 6 commissioner may designate, reserve, and manage PUBLIC WATERS

097A#141S

1 1 <SEN> 97A.141 +a PUBLIC WATER access sites.
 1 2 <IN> Subdivision 1.
 1 3 commissioner shall acquire access sites adjacent to PUBLIC
 1 4 WATERS and easements and rights-of-way necessary to connect the
 1 9 <IN> Subd. 2.
 1 10 not be acquired under this section adjacent to PUBLIC WATERS
 1 13 institution. Access sites adjacent to PUBLIC WATERS that
 1 16 <IN> (1)
 1 16 <IN> (1) the PUBLIC WATER contains at least 150 acres within the
 1 18 <IN> (2)
 1 18 <IN> (2) the PUBLIC WATERS are to be managed intensively for

097A#145S

1 2 <IN> Subdivision 1.
 1 10 <IN> (b)
 1 17 Circular No. 39 (1971 edition), that are PUBLIC WATERS. Lands

097A#205S

1 3 <IN> (1)
 1 4 relating to wild animals, wild rice, PUBLIC WATERS, water

097A#451S

2 5 <IN> Subd. 6.
 2 8 angling in adjacent and connected PUBLIC WATERS without a
 2 10 commissioner that describes the PUBLIC WATERS where the fishing

097A#475S

6 12 <IN> Subd. 29.
 6 19 <IN> (3)
 6 19 <IN> (3) To take sucker eggs from PUBLIC WATERS for a private
 6 22 <IN> Subd. 29a.
 6 25 <IN> (2)
 6 25 <IN> (2) to take sucker eggs from PUBLIC WATERS for a fish farm,

097B#805S

1 3 <IN> Subdivision 1.
 1 9 <IN> (b)
 1 10 rails in PUBLIC WATERS from a permanent artificial blind or sink
 1 21 <IN> Subd. 3.
 1 23 for hunting waterfowl in PUBLIC WATERS between sunset and one

097B#811S

1 2 <IN> Subdivision 1.
 1 4 PUBLIC WATERS or on public land more than one hour before the
 1 6 <IN> Subd. 2.
 1 8 in PUBLIC WATERS or on public lands more than one hour before
 1 10 <IN> Subd. 3.
 1 12 decoys in PUBLIC WATERS between sunset and one hour before
 1 18 <IN> Subd. 4.
 1 19 prohibited. +c A person may not leave decoys in PUBLIC WATERS

097C#055S

1 3 accumulate in or upon the shores of PUBLIC WATERS in quantities

097C#071S

- 1 1 <SHN> 97C.071 +a Permit required for structure in PUBLIC WATERS.
- 1 3 obstruction, except a boat pier, in or over PUBLIC WATERS

097C#205S

- 1 6 <IN> (1)
- 1 7 by seining PUBLIC WATERS;
- 1 10 <IN> (3)
- 1 10 <IN> (3) prescribe methods for stocking the fish in PUBLIC
- 1 11 WATERS that give priority to the needs of the community where

097C#211S

- 1 12 <IN> Subd. 2a.
- 1 20 acquired must be processed and not released into PUBLIC WATERS,
- 2 14 <IN> Subd. 4.
- 2 15 person may not take sucker eggs from PUBLIC WATERS for a private

105*#37S

- 2 18 <IN> Subd. 14.
- 2 18 <IN> Subd. 14. +b PUBLIC WATERS. +c "Public waters" includes
- 2 18 <IN> Subd. 14. +b PUBLIC WATERS. +c "PUBLIC WATERS" includes
- 2 24 <IN> (2)
- 2 25 determined to be PUBLIC WATERS or navigable waters by a court of
- 3 16 <IN> (9)
- 3 19 PUBLIC WATERS regardless of the size of their drainage area.
- 3 27 sections 105.38 and 105.391, the term "PUBLIC WATERS" shall
- 4 2 <IN> Subd. 15.
- 4 5 edition), not included within the definition of PUBLIC WATERS,
- 4 8 <IN> Subd. 16.
- 4 9 water level" means the boundary of PUBLIC WATERS and wetlands,

105*#38S

- 1 5 <IN> (a)
- 1 5 <IN> (a) Subject to existing rights, PUBLIC WATERS and wetlands
- 1 10 <IN> (c)
- 1 12 course, current, or cross-section of PUBLIC WATERS or wetlands,
- 1 16 structures, and waterway obstructions in PUBLIC WATERS or

105*#39S

- 1 17 <IN> Subd. 3.
- 1 19 <IN> (1)
- 1 19 <IN> (1) the use, allocation, and control of PUBLIC WATERS and
- 1 23 <IN> (3)
- 1 24 PUBLIC WATERS and wetlands.

105*#391S

- 1 2 <IN> Subdivision 1.
- 1 6 county and make a preliminary designation as to which are PUBLIC
- 1 7 WATERS and wetlands. The commissioner shall send a list and map
- 1 8 of the waters preliminarily designated as PUBLIC WATERS and
- 2 6 may challenge the designation of specific waters as PUBLIC
- 2 7 WATERS or wetlands or may request the designation of additional
- 2 8 waters as PUBLIC WATERS or wetlands, by filing a petition for a
- 3 14 to be PUBLIC WATERS and wetlands. The commissioner shall
- 3 15 complete the PUBLIC WATERS and wetlands inventory by December
- 3 18 <IN> Subd. 3.
- 3 19 Except as provided below, no PUBLIC WATERS or wetlands shall be
- 3 20 drained, and no permit authorizing drainage of PUBLIC WATERS or
- 3 21 wetlands shall be issued, unless the PUBLIC WATERS or wetlands

3 22 being drained are replaced by PUBLIC WATERS or wetlands that
 5 1 <IN> Subd. 10.
 5 3 PUBLIC WATERS for pasture or cropland during periods of drought,
 5 6 drainage of the wetlands or PUBLIC WATERS. This chapter does
 5 18 <IN> Subd. 12.
 5 19 rights or trespass law. +c The designation of waters as PUBLIC
 5 20 WATERS or wetlands under this section does not grant the public
 5 25 the designation of waters or lands as PUBLIC WATERS or wetlands,

105*#40S

3 16 <IN> Subd. 11.
 3 19 proceedings and proceedings relating to PUBLIC WATERS. The

105*#418S

1 1 <SHN> 105.418 +a Conservation of PUBLIC WATER supplies.
 1 3 by the governor and declared by order of the governor, PUBLIC
 1 4 WATER supply authorities appropriating water shall adopt and
 1 15 of any PUBLIC WATER supply authority's appropriator's permit.

105*#42S

1 1 <SHN> 105.42 +a Permits; work in PUBLIC WATERS.
 1 2 <IN> Subdivision 1.
 1 7 or waterway obstruction on any PUBLIC WATER; or in any manner,
 1 9 any PUBLIC WATERS, wholly or partly within the state, by any
 1 11 placing of materials in or on the beds of PUBLIC WATERS, without
 1 21 substantially affect PUBLIC WATERS.
 1 26 hangars in or adjacent to PUBLIC WATERS of the state except
 2 1 <IN> Subd. 1a.
 2 6 from other uses and changes in the level of PUBLIC WATERS to
 2 23 beds of PUBLIC WATERS shall be granted only where the area in
 3 1 excavation in the PUBLIC WATERS must include provisions
 3 6 <IN> (2)
 3 15 of PUBLIC WATERS under flood emergency conditions, the
 3 18 <IN> No permit that will change the level of PUBLIC WATERS shall

105*#43S

1 3 on any PUBLIC WATER and applications to establish the natural
 1 4 ordinary high water level of any body of PUBLIC WATER may be

105*#44S

1 2 <IN> Subdivision 1.
 1 6 repairs or abandonment proposed to be made, or the PUBLIC WATER
 1 24 <IN> Subd. 1a.
 1 26 PUBLIC WATERS, as provided in chapter 93.
 5 11 <IN> Subd. 8.
 5 13 PUBLIC WATERS, the soil and water conservation district may make

105*#45S

1 12 shall also fix the control levels of PUBLIC WATERS accordingly.

105*#461S

1 4 applicant to take any action necessary to restore the PUBLIC
 1 5 WATERS or their beds to the condition existing before unlawful

105*#462S

1 5 relation to PUBLIC WATERS without a permit as required by

105*#463S

- 1 5 PUBLIC WATER or in any manner change or diminish the course,
- 1 6 current, or cross-section of any PUBLIC WATERS. These actions

105*#471S

- 1 6 waters of the state as PUBLIC WATERS under sections 105.38 to

105*#48S

- 1 4 the public interest in the shore and shore lines of PUBLIC
- 1 5 WATERS, and promote public health, the commissioner may

105*#485S

- 1 2 <IN> Subdivision 1.
- 1 5 <IN> (1)
- 1 6 of PUBLIC WATERS and thus preserve and enhance the quality of
- 1 12 <IN> Subd. 2.
- 1 14 <IN> (b)
- 1 15 distances from the ordinary high water elevation of PUBLIC
- 1 16 WATERS: (1) land within 1,000 feet from the normal high
- 1 23 <IN> Subd. 3.
- 2 13 <IN> (5)
- 2 13 <IN> (5) changes in bottom contours of adjacent PUBLIC WATERS;

105*#541S

- 1 4 <IN> (1)
- 1 5 alteration in the course, current, or cross section of PUBLIC
- 1 6 WATERS or appropriates waters of the state without a permit from
- 1 10 <IN> (2)
- 1 11 alteration in the course, current, or cross section of PUBLIC
- 1 12 WATERS or appropriates waters of the state in violation or in
- 1 18 <IN> (3)
- 1 19 alteration in the course, current, or cross section of PUBLIC
- 1 20 WATERS or appropriates waters of the state after a permit to

105*#63S

- 1 3 <IN> Subdivision 1.
- 1 6 operate dams or other control works affecting PUBLIC WATERS, the

106A#005S

- 4 4 <IN> Subd. 23.
- 4 4 <IN> Subd. 23. +b PUBLIC WATERS. +c "Public waters" has the
- 4 4 <IN> Subd. 23. +b PUBLIC WATERS. +c "PUBLIC WATERS" has the

106A#011S

- 1 13 <IN> Subd. 2.
- 1 17 not PUBLIC WATERS. If a water body or watercourse is determined
- 1 18 to be PUBLIC WATERS, the drainage proceedings are subject to
- 1 19 section 105.391, subdivision 3, relating to replacing PUBLIC
- 1 20 WATERS and the water bank program.
- 1 21 <IN> Subd. 3.
- 1 21 <IN> Subd. 3. +b Permission of commissioner for work in PUBLIC
- 1 22 WATERS; application. +c (a) The drainage authority must receive
- 1 24 <IN> (1)
- 1 24 <IN> (1) remove, construct, or alter a dam affecting PUBLIC
- 1 25 WATERS;
- 1 26 <IN> (2)
- 1 26 <IN> (2) establish, raise, or lower the level of PUBLIC WATERS;
- 2 1 <IN> (3)
- 2 1 <IN> (3) drain any portion of a PUBLIC WATER.

- 2 2 <IN> (b)
- 2 4 to do work in PUBLIC WATERS or for the determination of public
- 2 4 to do work in PUBLIC WATERS or for the determination of PUBLIC
- 2 5 WATERS status of a water body or watercourse.
- 2 6 <IN> Subd. 4.
- 2 11 body or watercourse that is not PUBLIC WATERS the drainage

106A#025S

- 1 12 <IN> Subd. 2.
- 1 26 <IN> (d)
- 1 26 <IN> (d) PUBLIC WATERS may not be taken, damaged, or impaired
- 2 1 of any other law for the protection or conservation of PUBLIC
- 2 2 WATERS may not be abridged or superseded by this subdivision.

106A#245S

- 1 3 <IN> Subdivision 1.
- 1 11 <IN> (3)
- 1 13 areas that are PUBLIC WATERS; and

106A#255S

- 1 6 under the PUBLIC WATERS determination in section 105.37, and the

106A#285S

- 1 5 <IN> Subd. 2.
- 1 17 <IN> (6)
- 1 17 <IN> (6) the outline of any lake basin, wetland, or PUBLIC WATER

106A#321S

- 1 2 <IN> Subdivision 1.
- 1 11 <IN> (4)
- 1 12 by the proposed drainage of PUBLIC WATERS;
- 1 16 <IN> (7)
- 1 17 lot by the proposed drainage of PUBLIC WATERS, wetlands, and
- 1 19 <IN> (8)
- 1 22 PUBLIC WATERS under section 105.42, to excavate or fill a

106A#323S

- 1 3 <IN> Subdivision 1.
- 1 11 <IN> (3)
- 1 12 lot by the proposed drainage of PUBLIC WATERS, wetlands, and
- 1 14 <IN> (4)
- 1 17 PUBLIC WATERS under section 105.42, to excavate or fill a

106A#701S

- 1 12 <IN> Subd. 1a.
- 1 12 <IN> Subd. 1a. +b Repairs affecting PUBLIC WATERS. +c Before a
- 1 14 commissioner if the repair may affect PUBLIC WATERS. If the

106A#745S

- 1 6 <IN> (1)
- 1 7 acres of PUBLIC WATERS in Anoka county;
- 1 8 <IN> (2)
- 1 8 <IN> (2) the PUBLIC WATERS have existed for 15 or more years;

110*#31S

- 1 4 being PUBLIC WATERS of the state, where the following conditions

110*#70S

1 5 shall in no manner apply to PUBLIC WATERS of an area of more
 1 10 within a distance of 20 miles from the body of PUBLIC WATER;
 1 11 and, as to such PUBLIC WATERS, nothing contained in sections
 1 15 major portion of such PUBLIC WATERS is located.

110*#71S

1 3 <IN> Subdivision 1.
 1 5 undesirable aquatic vegetation or organisms in PUBLIC WATERS and

110A#02S

1 10 <IN> Subd. 4.
 1 17 wells, reservoirs, tanks and other appurtenances of PUBLIC WATER

115*#61S

1 9 limits, for the purpose of preventing pollution of PUBLIC WATERS

115*#71S

1 21 <IN> Subd. 7.
 1 21 <IN> Subd. 7. "Water supply system" means a PUBLIC WATER supply

116A#C

1 2 <RH> PUBLIC WATER AND SEWER SYSTEMS

116A#01S

1 2 <IN> Subdivision 1.
 1 6 maintained, PUBLIC WATER or sewer systems or combined water and
 1 9 reservoirs, tanks, and other appurtenances of PUBLIC WATER or
 1 11 not organized into cities, or in any area added to a PUBLIC
 1 12 WATER or sewer system or combined water and sewer system by
 3 20 <IN> Subd. 4.
 3 21 by any PUBLIC WATER or sewer or combined system or to be
 4 24 <IN> Subd. 5.
 4 26 PUBLIC WATER or sewer or combined system or in a district formed

116A#02S

1 2 <IN> Subdivision 1.
 1 2 <IN> Subdivision 1. +b Form. +c Before any PUBLIC WATER or

116C#41S

1 2 <IN> Subdivision 1.
 1 3 <IN> (1)
 1 3 <IN> (1) coordinate PUBLIC WATER resource management and

117*#47S

1 24 permit or authorization for the use of PUBLIC WATERS issued by

117*#48S

1 26 of any rights in PUBLIC WATERS except after permit, lease,

144*#145S

1 10 PUBLIC WATER supplies which shall include, but not be limited to

144*#382S

1 9 <IN> Subd. 4.
 1 9 <IN> Subd. 4. +b PUBLIC WATER supply. +c "Public water supply"
 1 9 <IN> Subd. 4. +b PUBLIC WATER supply. +c "PUBLIC WATER supply"
 1 13 days of the year. "PUBLIC WATER supply" includes a collection,
 1 19 <IN> Subd. 5.

1 20 owns, manages or operates a PUBLIC WATER supply.

144*#383S

1 2 <IN> In order to insure safe drinking water in all PUBLIC WATER
 1 4 <IN> (a)
 1 5 alteration of PUBLIC WATER supply;
 1 6 <IN> (b)
 1 6 <IN> (b) To enter the premises of a PUBLIC WATER supply, or part
 1 10 delivered by PUBLIC WATER supplies;
 1 11 <IN> (c)
 1 13 routine surveys, inspections, and testing of PUBLIC WATER supply

144*#385S

1 2 <IN> If a PUBLIC WATER system has violated a rule of the

160*#81S

1 2 <IN> Subdivision 1.
 1 12 <IN> (3)
 1 13 and other parking areas, tourist information facilities, PUBLIC
 1 14 WATER access points and other facilities intended to expand the

161*#27S

1 2 <IN> Subdivision 1.
 1 7 highway improvement affecting PUBLIC WATERS shall be made until

164*#15S

1 13 <IN> Subd. 2.
 1 23 be constructed. If PUBLIC WATERS are involved, the plans shall

282*#018S

1 7 PUBLIC WATERS and watercourses, and the live timber growing or
 1 23 meandered lakes and other PUBLIC WATERS and watercourses and so

296*#421S

3 4 <IN> Subd. 4.
 3 10 access and boating facilities on PUBLIC WATERS; lake and river

360*#041S

1 2 <IN> Subdivision 1.
 1 5 in, over, and upon any PUBLIC WATERS of this state within the
 1 7 submerged land under such PUBLIC WATERS, and any artificial or
 1 10 PUBLIC WATERS, and as well the power to construct and maintain
 1 15 <IN> Subd. 2.
 1 18 and upon PUBLIC WATERS, submerged land under public waters, and
 1 18 and upon PUBLIC WATERS, submerged land under PUBLIC WATERS, and

378*#20S

1 2 <IN> Subdivision 1.
 1 4 mean any public land, road or highway adjoining PUBLIC WATERS,
 1 8 <IN> Subd. 2.
 1 12 PUBLIC WATERS upon which the same immediately borders for the
 1 16 <IN> Subd. 3.
 1 21 bathing beaches and PUBLIC WATERS immediately bordering thereon

378*#22S

1 2 <IN> Subdivision 1.
 1 3 operating an aeration system on PUBLIC WATERS within the state
 1 7 <IN> Subd. 2.

1 8 system is used on the ice of PUBLIC WATERS, signs shall be
 1 13 <IN> (b)
 1 14 the shoreline of the PUBLIC WATERS at each public access point
 1 19 <IN> Subd. 3.
 1 22 periods of ice cover on PUBLIC WATERS, shall be given by the
 2 1 <IN> Subd. 4.
 2 4 periods of ice cover on PUBLIC WATERS, evidence of compliance
 2 9 <IN> Subd. 5.
 2 13 oxygen or to maintain open water on the ice of PUBLIC WATERS.
 2 14 <IN> Subd. 6.
 2 14 <IN> Subd. 6. +b PUBLIC WATERS without access. +c (a) A
 2 15 riparian landowner may aerate PUBLIC WATERS with a permit under
 2 16 this subdivision if the PUBLIC WATERS do not have a public
 2 17 access and the person aerating the PUBLIC WATERS owns all of the
 2 20 <IN> (b)
 2 21 aeration under this subdivision except the PUBLIC WATERS must be

378*#31S

2 8 <IN> Subd. 5.
 2 9 current or cross section of PUBLIC WATERS when approved by the
 3 9 <IN> Subd. 11.
 3 10 course, current or cross section of PUBLIC WATERS within

378*#51S

1 16 <IN> Subd. 3.
 2 6 <IN> (3)
 2 7 cross section of PUBLIC WATERS that are approved by the

383A#07S

6 15 <IN> Subd. 19.
 6 18 declared to be PUBLIC WATERS of the state of Minnesota, and

398*#34S

1 2 <IN> Subdivision. 1.
 1 19 PUBLIC WATERS. Every ordinance shall be recorded by the county
 1 25 <IN> Subd. 2.
 2 8 affecting PUBLIC WATERS shall be valid except with the approval
 2 10 of a proposed ordinance affects any PUBLIC WATERS, notice of the

458*#20F

1 1 <FGH> PUBLIC WATER HIGHWAYS IN CITIES OF FIRST CLASS

458*#21S

1 1 <SHN> 458.21 +a Condemned land must be PUBLIC WATER highway.
 1 3 a PUBLIC WATER highway for the travel accommodation and passage

459*#20S

1 1 <SHN> 459.20 +a Authority over PUBLIC WATERS.

473*#845S

1 8 <IN> Subd. 2.
 1 11 monitor the quality of water in PUBLIC WATER supply wells and

473H#11S

1 3 public sanitary sewer systems and PUBLIC WATER systems

475*#51S

1 14 <IN> Subd. 4.

475*#51S PUBLIC WATERS IN 001 TO 650

08/30/88

2 3 <IN> (5)

2 4 of PUBLIC WATERworks systems, and public lighting, heating or

501*#11S

2 17 <IN> (7)

3 18 preserves, public parks, public grounds, PUBLIC WATERways,

609*#68S

1 4 highway, PUBLIC WATERS or the ice thereon, shoreland areas

TOTAL DOCUMENTS = 107
TOTAL DATA RECORDS = 433

APPENDIX B

U.S. ARMY CORPS OF ENGINEERS

JURISDICTION

	SECTION 10	SECTION 404
WATERBODY	Navigable waters of the United States	Waters of the United States, e.g.: Rivers, Tributaries, Lakes, Potholes, Bogs, Marshes & Wetlands
ACTIVITY	Any work affecting the course, condition, location or capacity of the waterbody, e.g.: Structures Excavation Fill	Discharge of Dredge or Fill material

APPENDIX C

FEDERAL/STATE PERMIT COMPARISON (1987)

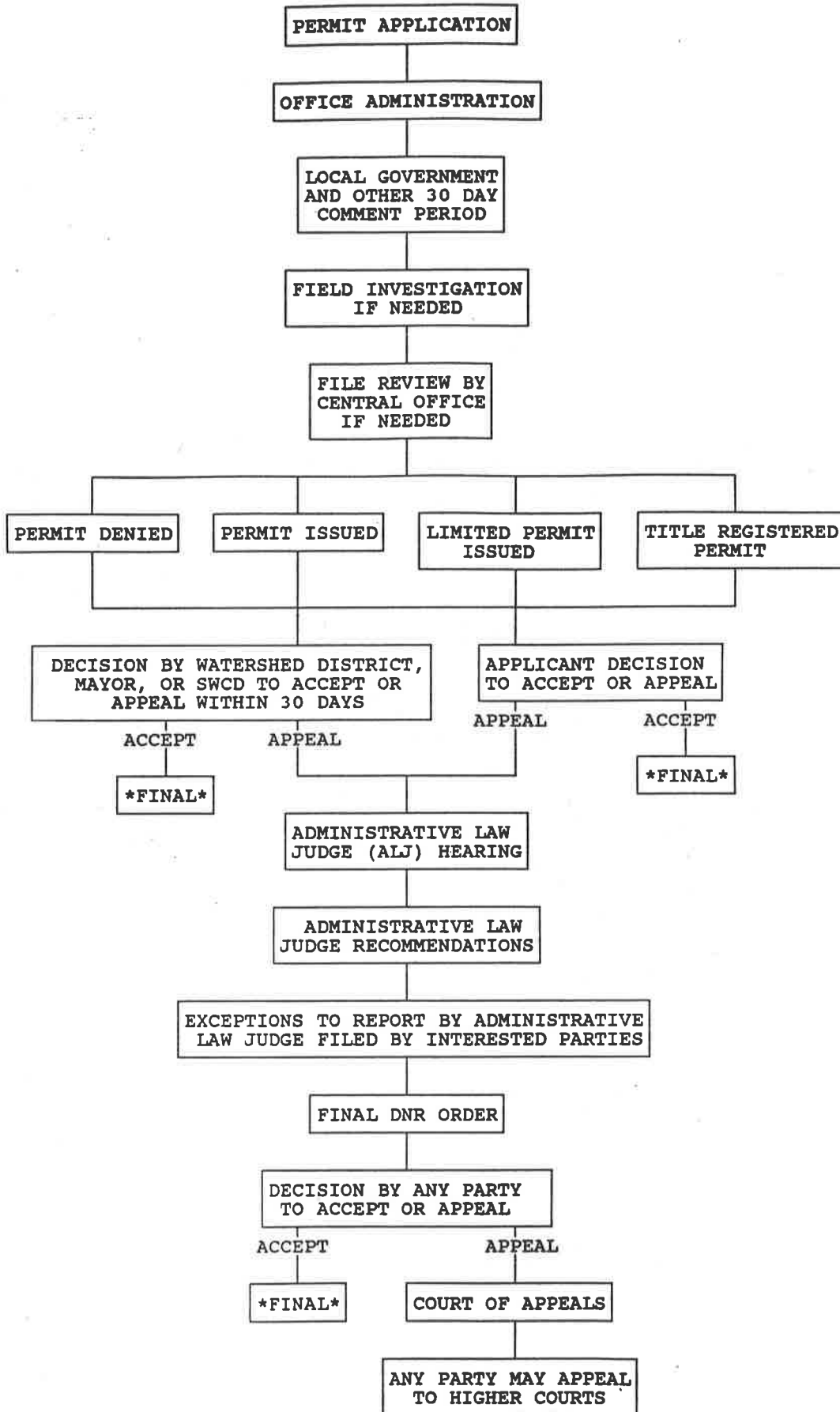
(*404 Type Permits Issued)

<u>Region</u>	<u>State</u>	<u>Federal</u>	<u>% 404 Type Permit Increase for State Assumption</u>
1	115	249	117%
2	77	144	87%
3	151	256	70%
4	85	181	113%
5	49	70	43%
6	184	356	93%

The Department of Natural Resources concurrently issues approximately 53 percent of the U.S. Army Corps of Engineer's Section 404 issued permits. The Department can expect an increase of approximately 595 Section 404 permit applications or an increase in workload of about 90 percent if the State assumes the Section 404 program.

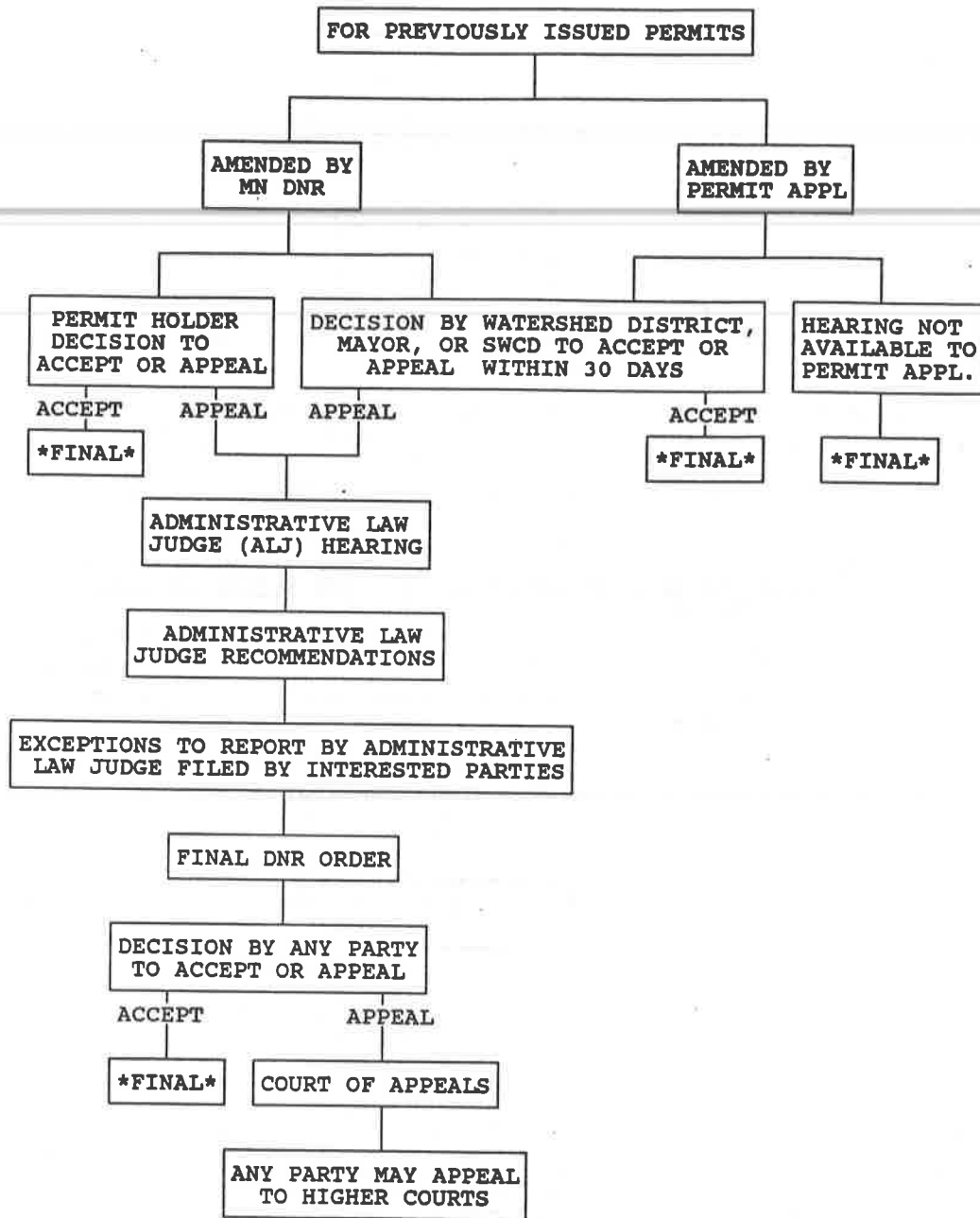
*Section 404 type permits refer to the Section 404 permits issued by the Corps of Engineers, as well as State M.S. 105.42 permits that are concurrently issued for the same Section 404 permit.

APPENDIX D
FLOW CHART FOR PROTECTED WATERS PERMIT APPLICATION - M.S. 105.42



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

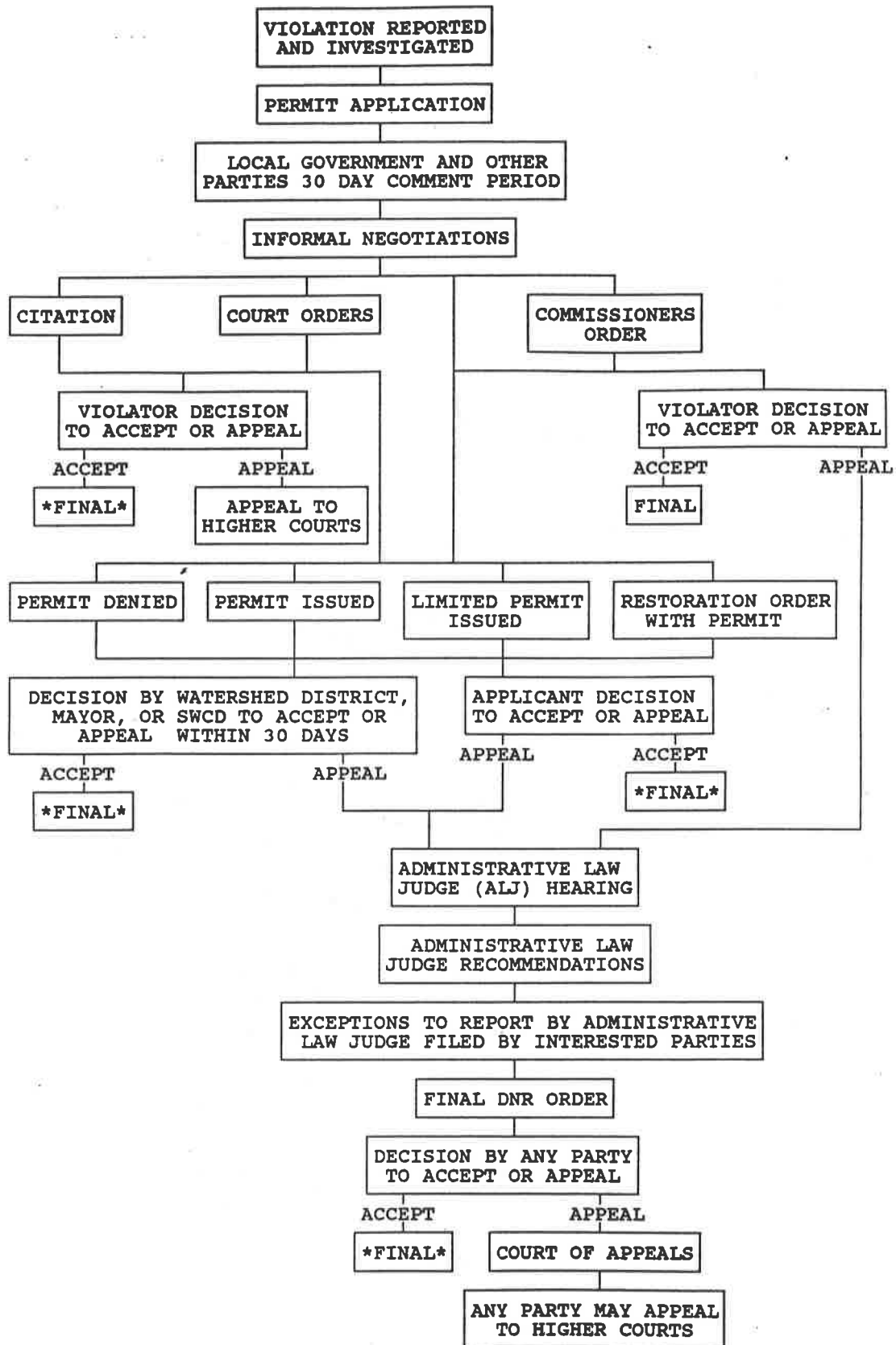
FLOW CHART FOR AMENDMENTS TO EXISTING PROTECTED WATERS PERMITS - M.S. 105.42



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

**FLOW CHART FOR VIOLATIONS OF PROTECTED WATERS - M.S. 105.42
WITH PERMIT APPLICATION**

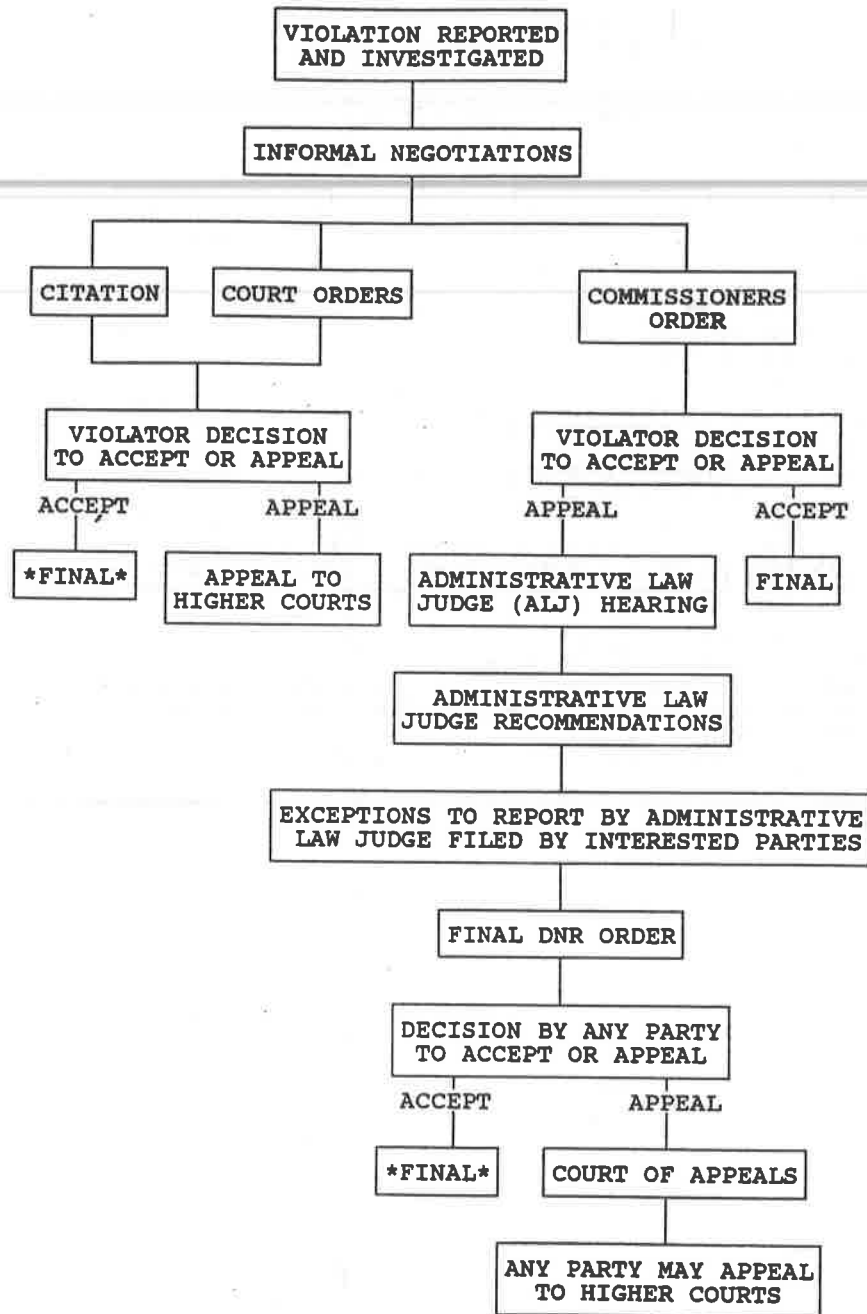
AFTER THE FACT PERMIT APPLICATION DOES NOT LIMIT THE DNR FROM PROCEEDING WITH COMMISSIONER ORDERS, CITATIONS AND/OR COURT ORDERED INJUNCTIONS.



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

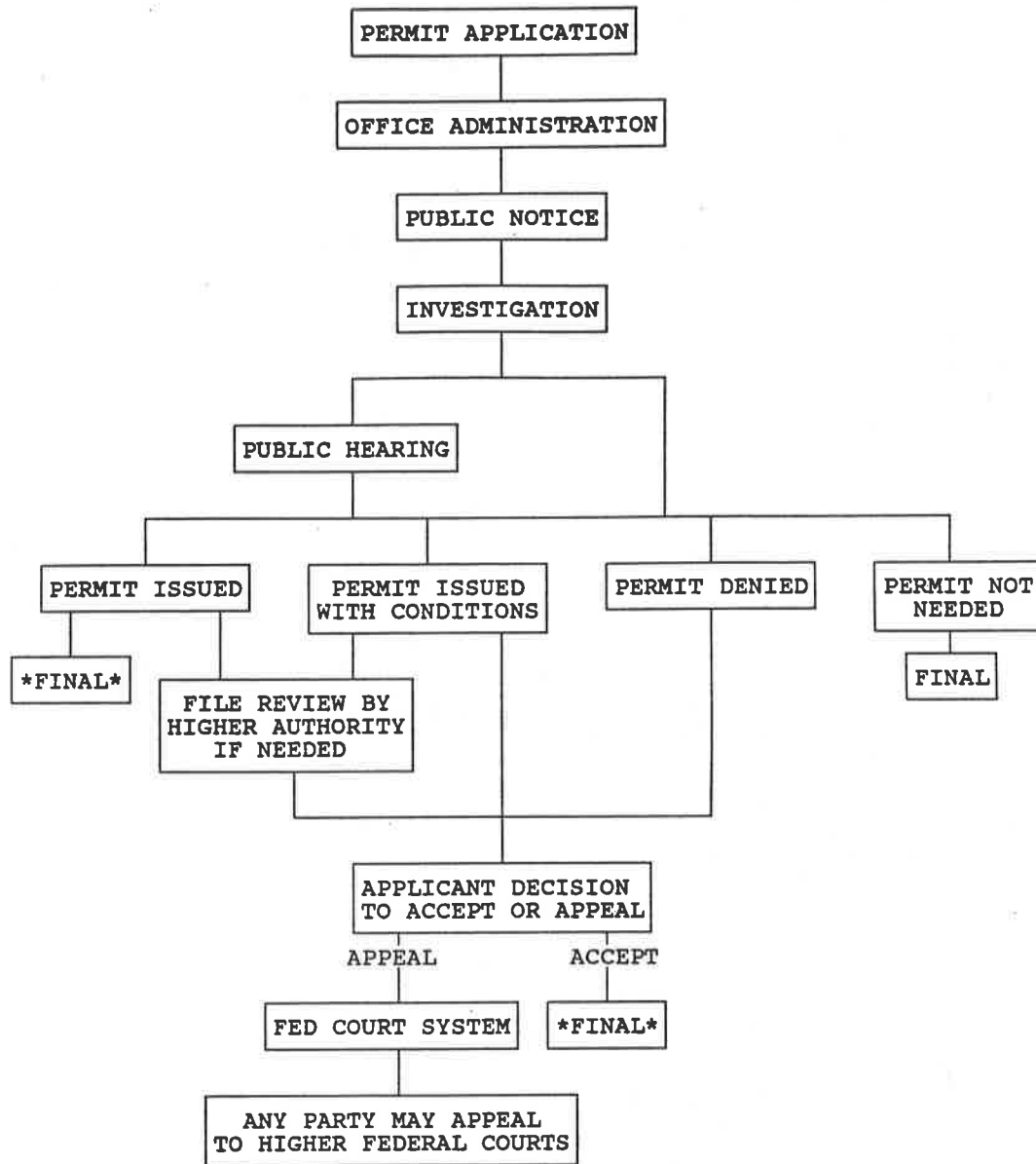
**FLOW CHART FOR VIOLATIONS OF PROTECTED WATERS - M.S. 105.42
WITHOUT PERMIT APPLICATION**

AFTER THE FACT PERMIT APPLICATION DOES NOT LIMIT THE DNR FROM PROCEEDING WITH COMMISSIONER'S ORDERS, CITATIONS AND/OR COURT ORDERS.



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

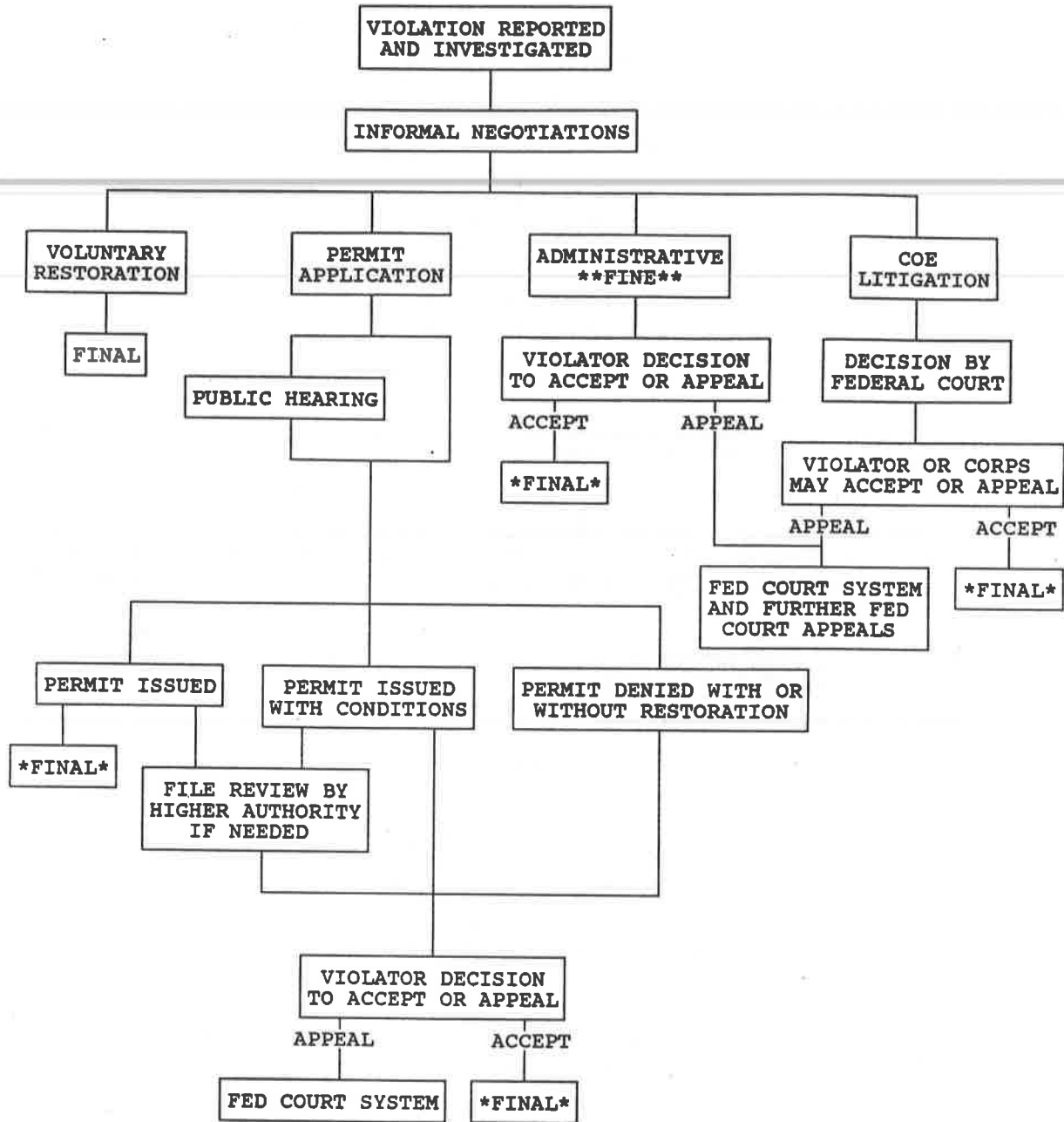
FLOW CHART FOR U.S. ARMY CORPS OF ENGINEERS SECTION 404 INDIVIDUAL REVIEW PERMITS. LETTERS OF PERMISSION, NATIONWIDE, REGIONAL AND GENERAL PERMITS ARE HANDLED SIMILARLY WITH THE EXCEPTIONS - PUBLIC NOTICE IS NOT GIVEN.



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

FLOW CHART FOR VIOLATIONS OF U.S. ARMY CORPS OF ENGINEERS SECTION 404

THIS FLOW CHART IS FOR VIOLATIONS WITH OR WITHOUT PERMIT APPLICATION. ONE OR UP TO FOUR PATHS, AS LISTED BELOW, MAY BE FOLLOWED; VOLUNTARY RESTORATION, PERMIT APPLICATION, ADMINISTRATIVE FINE AND/OR COE INITIATED LITIGATION.



FINAL : THIS MEANS FINAL, ONLY, IF THE DECISION IS NOT APPEALED BY ANOTHER PARTY.
****FINE****: THIS MEANS EPA LEVIED FINE. COE LEVIED FINES ARE ONLY PROPOSED AT THIS TIME. ADMINISTRATIVE AND CIVIL PENALTIES MAY NOT BE PURSUED AT THE SAME TIME.

APPENDIX E

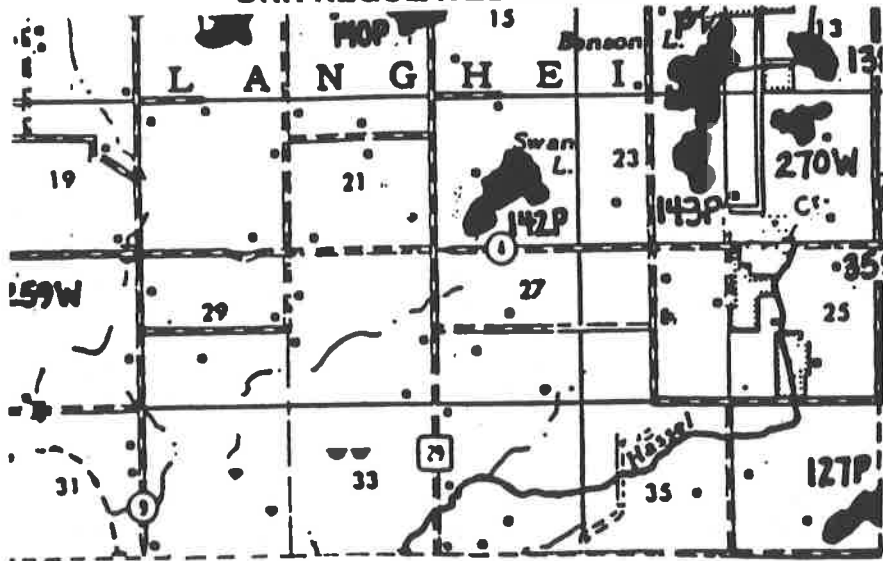
The following maps represent typical examples of jurisdictional difference between waters protected under the Section 404 program and those currently regulated by the State's Protected Waters program: It should be noted, however, that Section 404 waters are generally more comprehensive than identified by this U.S. Fish and Wildlife Service, National Wetland Inventory map.

FEDERAL SECTION 404 WATERS



Source: U.S. Fish and Wildlife Service, National Wetlands Inventory, 1980, Pope County, Minnesota, Secs. 13-36, T 123N, R 39W.

DNR REGULATED WATERS



Source: Minnesota Department of Natural Resources, Division of Waters, 1980 Protected Waters Inventory Map, Pope County, Minnesota, Secs. 13-36, T 123 N, R 39W.

APPENDIX F

During the comment period, the Corps of Engineers presented recently enhanced enforcement provisions of the Water Quality Act of 1987 (PL100-4). Three distinct remedies are available:

1. Criminal

33 USC 1319 (c)(1) Negligent Violation

First offense is punishable by fine of \$2,500 to \$25,000 per day, or imprisonment for not more than 1 year.

Second offense is punishable by fine of not more than \$50,000 per day, or not more than 2 years imprisonment, or both.

33 USC 1319 (c)(2) Knowing Violation

First offense is punishable by fine of \$5,000-\$50,000 per day, or 3 years imprisonment, or both.

Second offense is punishable by fine not to exceed \$100,000 per day, or not more than 6 years imprisonment, or both.

2. Civil

33 USC 1319 (d) Unauthorized Discharges

Penalty not to exceed \$25,000 per day.

33 USC 1344 (s) Violation of Permit Authorization

Penalty not to exceed \$25,000 per day.

3. Administrative

33 USC 1319 (g) provides for administrative assessments for both unauthorized discharges and discharges in non-conformity with a permit authorization. Class I assessment is \$10,000 per violation, but not to exceed \$25,000. Class II assessment is \$10,000 per day for which the violation continues, up to a maximum of \$125,000.

Class I penalties are administered by an agency official referred to as the "Presiding Officer" and her/his administrative order is appealable to a Federal District Court.

Class II penalties are actions governed by the Administrative Procedures Act, decisions are rendered by an Administrative Law Judge, and appeals are heard by the Federal Court of Appeals.

REFERENCES

- Christianson, Conrad. Minnesota Department of Natural Resources, Division of Ecological Services, St. Paul, Minnesota. Interview, September 21, 1988.
- Clapp, William III. Minnesota State Attorney General's Office, St. Paul, Minnesota. Interview, September 26, 1988.
- Environmental Protection Agency. Clean Water Act Section 404 Program Definitions and Permit Exemptions: Section 404 State Program Regulations. Washington, D.C.: Federal Register, Volume 53, No. 108, June 6, 1988.
- Evans, Randy. Training and Planning Coordinator, Minnesota Department of Natural Resources, Division of Enforcement, St. Paul, Minnesota. Multiple Interviews, December 6, 7 and 8, 1988.
- Hauger, Char. St. Paul District of the Corps of Engineers. "Letter from the Chief of the Permit Analysis Section to Ron Anderson, Hydrologist, Minnesota Department of Natural Resources, Division of Waters". St. Paul, Minnesota. Received August, 1988. (Typewritten).
- Huonder, Nancy,. Minnesota Department of Natural Resources, Division of Enforcement, St. Paul, Minnesota. Interview, September 20, 1988.
- Milles, David. "Public (Protected) Waters Inventory Cost", Summary of costs involved in carrying out the Public (Protected) Waters Inventory, St. Paul, Minnesota. June 22, 1987. (Typewritten page).
- Minnesota Department of Natural Resources, Division of Enforcement. "Conservation Officers' Radio Call Numbers", Directory of radio call numbers and locations for conservation officers, St. Paul, Minnesota. February 19, 1988.
- Minnesota Department of Natural Resources, Division of Waters. Minnesota's Protected Waters and Wetlands Permit Program. St. Paul, Minnesota. August, 1987.
- Minnesota Department of Natural Resources, Minnesota Rules 1987. Parts 6115.0010 to 6115.0810 and 6115.1200 to 6115.1280. St. Paul, Minnesota. November, 1987.
- Minnesota Department of Natural Resources, Office of Planning. The Stream Inventory and Data Retrieval Systems Program. St. Paul, Minnesota. November, 1981. (Mimeographed).
- Minnesota Statutes. Sections 105.37-108A.11 (1986).
- Minnesota Statutes. Section 97A.205 (1986).
- Minnesota Statutes. Section 97B.811B (1986).
- New Jersey Department of Environmental Protection, Division of Coastal Resources. Freshwater Wetland Protection Act Rules. Trenton, New Jersey. May 16, 1988.

Norton, Bruce. U.S Army Corps of Engineers, Division of Enforcement, St. Paul, Minnesota. Telephone Interview, September 8, 1988.

University of Minnesota Center for Urban and Regional Affairs. Thematic Map: Presettlement Wetlands of Minnesota. Minneapolis: CURA 1981.

University of Minnesota Center for Urban and Regional Affairs. Thematic Map: Available Wetlands for Bioenergy Purposes. Minneapolis: CURA 1981.

U.S. Department of Defense. Army Corps of Engineers, Final Rule for Regulatory Programs of the Corps of Engineers. Washington D.C.: Federal Register, Vol. 51, No. 219, November 13, 1986.

U.S. Department of Defense. Corps of Engineers, Department of the Army, Proposal to Amend Permit Regulations for Controlling Certain Activities in Waters of the United States. Washington D.C.: Federal Register, Vol. 54, No. 91, May 12, 1989.

U.S. Department of Defense. St. Paul District of the Army Corps of Engineers. Announcement of Extension of a General Permit for Temporary/Permanent Docks in Minnesota. April 16, 1982.

U.S. Department of Defense. St. Paul District of the Army Corps of Engineers. Cooperative Agreement Between the St. Paul District of the Army Corps of Engineers and the State of Minnesota Department of Natural Resources: Regional Conditioning of the Nationwide Permits. March 29, 1984.

U.S. Department of Defense. St. Paul District of the Army Corps of Engineers. General Permit GP-001-MN. January 11, 1985.

U.S. Department of Defense. St. Paul District of the Army Corps of Engineers. Announcement of Extension of A General Permit for Boat Ramps in Minnesota. January 10, 1988.

U.S. Department of Defense. St. Paul District of the Army Corps of Engineers. "Nationwide Permits in the State of Minnesota" (reproduced without date reference).

Williams, Lori. Environmental Protection Agency, Office of Wetland Protection, Washington, D.C.: Telephone Interview, August 11, 1988.