FEDERAL LAWS

CLEAN WATER ACT, SECTION 404 (33 U.S.C. § 1344)

Federal and state statutes and regulations may be found at law libraries. Ask a librarian for assistance. "U.S.C." is the United States Code and "C.F.R." is the Code of Federal Regulations.

Purpose: The Clean Water Act (CWA) was enacted with the goal of restoring and maintaining "the chemical, physical and biological integrity of the nation's waters." Section 404 regulates the discharge of dredge or fill material into waters of the United States, making it unlawful to discharge dredged or fill materials into wetlands without first obtaining a permit.

Waterbodies Covered: Section 404 applies to "navigable waters" which are defined as waters of the United States, including territorial seas. This means any waters, including wetlands, that are or could be important to interstate commerce. Even isolated wetlands can contribute to or affect interstate commerce (for example, where they are used for recreation, commercial fishing, or by migratory birds).

Activities Regulated: The Section 404 program regulates only the "discharge of dredged or fill material" (meaning the physical placement of soil, sand, gravel, and other dredged and fill materials) into wetlands. Current regulations do not cover dredging, removal of vegetation, and excavation unless a discharge occurs (e.g., when earth-moving equipment is used). Some activities that are part of normal farming, ranching, and forestry operations are exempted from further regulation. (The scope of regulated activities may change as a result of proposed changes in the governing rules.)

There are effectively two categories of Section 404 permits. Regional and nationwide general permits are blanket authorizations for projects such as placement of navigation markers, utility line structures, bank stabilization projects, minor road crossings and bridges, and minor dredge and fill projects which will have only minimal environmental effects. Individual permits are for regulated activities that exceed this minimal-effects criteria and require a more detailed review before a permit application can be granted.

In 1999 a Letter-of-Permission/General Permit combination was developed for Minnesota to replace the nationwide permits. See the Corps of Engineers web page for the latest information at: http://www.mvp.usace.army.mil/regulatory/regulatory.html.

Responsible Agencies: The Environmental Protection Agency (EPA) has overall responsibility for implementation of all provisions of the Clean Water Act. However, the Corps of Engineers, which is part of the United States Department of the Army, has primary responsibility for reviewing permit applications, issuing permits, and bringing enforcement actions under Section 404. The EPA sets guidelines, known as the 404(b)(l) guidelines, that the Corps must follow in evaluating permit applications. With respect to permitting decisions, the EPA has the authority to elevate a District Engineer's decision to a higher level in the Corps if the EPA objects to permit issuance. The EPA also has the authority under Section 404(c) to veto a Corps decision to issue a permit.

The Corps must consult with the U.S. Fish and Wildlife Service (FWS) and the National Marine Fisheries Service (NMFS) before issuing a permit. Both the FWS and the NMFS, like the EPA, have the authority to elevate a proposed Corps decision. The FWS must consider, pursuant to the Endangered Species Act, whether a proposed permit will jeopardize an endangered or threatened species.

Decision Making Criteria: The 404(b)(l) guidelines that must be followed by the Corps in considering a permit application are found at 40 C.F.R. **§** 230. Significantly, no discharge into wetlands is allowed if there is a practicable alternative which would have a less adverse impact on the aquatic ecosystem. 40 C.F.R. **§** 230.10(a). This condition includes the "water dependency test:" if a project does not require filling of a wetland or proximity to a special aquatic site (which is a specifically defined term) to fulfill its basic purpose, it is presumed that practicable alternatives are available, unless proven otherwise. Even if a project is water dependent, alternatives must still be assessed. A Memorandum of Agreement between the Corps and the EPA specifies a set of guidelines to ensure alternatives are considered that avoid, minimize, and compensate any losses to the wetlands resources (see "Wetlands Mitigation", page 23). Besides following the 404(b)(l) guidelines, the Corps must also conduct a public interest review and consider such factors as conservation, aesthetics, fish and wildlife values, and recreation. Corps regulations require that a permit cannot be granted unless "the benefits of the proposed alteration outweigh the damage to the wetlands resource." 33 C.F.R. **§** 320-4(b)(4).

Public Role: The public has the opportunity to review and comment on some general permit and all individual permit applications. The Corps issues public notices for many proposed projects, and citizens may ask to be put on the mailing list for such notices. After issuing a public notice, a comment period is usually open for 15 to 30 days. The public may also request a public hearing, although the decision to hold a hearing is within the Corps' discretion.

Enforcement: The Corps and the EPA can bring enforcement actions against those who discharge dredged or fill material without a permit or who violate permit conditions. The public can notify the Corps or the EPA of suspected unauthorized activity. The Corps and EPA can review a permit for compliance or investigate potential violations of the CWA. Enforcement can include revocation of a permit, restoration of an illegally altered area at the expense of the responsible party, and monetary fines and penalties, as well as criminal prosecution and incarceration.

CLEAN WATER ACT, SECTION 401 - WATER QUALITY CERTIFICATION PROGRAM (33 U.S.C. § 1341)

Section 401 of the Clean Water Act emphasizes water quality and sets up a water quality certification program. Under the guidance of the Environmental Protection Agency, each state is empowered to review federally licensed or permitted activities that may result in the discharge of materials into waters of that state. The Minnesota Pollution Control Agency administers the Minnesota program. See the discussion on page 16.

THE RIVERS AND HARBORS ACT OF 1899, SECTION 10 (33 U.S.C. § 403)

Purpose: The Rivers and Harbors Act of 1899 protects the navigable capacity of the nation's waters. Section lo regulates alteration or obstruction of such waterways.

Waterbodies Covered: The Rivers and Harbors Act applies to "navigable waters of the United States". Navigable waters are those waters that have supported in the past, that currently support, or could support in the future, interstate or foreign commerce. These include the Great Lakes and their connecting water bodies, navigable rivers and mouths of their major tributaries, and connected wetlands. The Rivers and Harbors Act does not cover as many waterbodies as does Section 404 of the Clean Water Act, but it covers more activities than Section 404. It also may apply to some situations exempted by Section 404.

Activities Regulated: The Act regulates all work in, on, or above navigable waters. It regulates activities that will affect the course, location, or condition of the water so as to impact its physical capacity for navigation. This includes: beach nourishment; boat ramps; breakwaters; bulkheads; dredging, filling or discharging material; placement of groins, jetties, mooring buoys, piers, riprap, and pilings; and construction of marina facilities.

Responsible Agency: The U. S. Army Corps of Engineers is responsible for permitting and enforcement.

Decision Making Criteria: The Corps evaluates the effects on navigation and the environment. Its governing regulations are found at 33 C.F.R. **§** 320 and 322.

Public Role: The administrative procedures and opportunity for public involvement are virtually identical to the Section 404 permit program.

Enforcement: The Corps can take civil or criminal enforcement action.

SWAMPBUSTER - Food Security Act (FSA) of 1985; Food, Agriculture, Conservation and Trade Act (FACTA) of 1990 (16 U.S.C. § 3821 to 3824); Federal Agriculture Improvement and Reform Act of 1996.

Purpose: Swampbuster is a program of FSA, FACTA and FAIRA which discourages the alteration of wetlands for agricultural use.

Waterbodies Covered: The U.S. Department of Agriculture - Natural Resources Conservation Service has delineated the majority of wetlands on cropland in Minnesota. The U.S. Department Agriculture - Farm Services Agency maintains a set of maps identifying the wetlands. These are available at county USDA offices.

Activities Regulated: Swampbuster prohibits farmers or producers who receive federal subsidies from draining wetlands on their land. If the farmers or producers do alter a wetland, they become ineligible for all government price and income support programs.

Responsible Agency: The USDA is responsible for the program.

Decision Making Criteria: An onsite inspection of a converted wetland by the USDA is required before government benefits are withheld. It is possible that a farmer will be exempted from Swampbuster penalties where, for example, a farmer's action has a minimal effect on the functional hydrological and biological value of a wetland.

Public Role: Questions can be directed to USDA office in the county or call the state office at (651) 290-3651.

Enforcement: A farmer or producer who converts a wetland is ineligible for government price and income support programs. A farmer who inadvertently drains a wetland may pay a fine, rather than having federal subsidies completely denied, if the farmer restores the wetland.

ENDANGERED SPECIES ACT, SECTION 7 (16 U.S.C. § 1536)

Purpose: The purposes of the Endangered Species Act (ESA) are to provide a means to conserve the ecosystems upon which endangered species and threatened species depend and to provide a conservation program for such endangered and threatened species. The Act requires the federal government to cooperate with state and local agencies to resolve water resource issues in concert with conserving endangered species. As the nation's wetlands have been reduced, many remaining wetlands have become critical habitat for species whose existence depends on wetlands.

Waterbodies Covered: See Activities Regulated.

Activities Regulated: The ESA requires all federal agencies to use their authority to further the purposes of the Act. Section 7 requires and formalizes a process of interagency consultation to insure that any action authorized, funded, or carried out by federal agencies does not jeopardize the continued existence of any endangered species or threatened species or adversely modify its critical habitat. This requires the Corps of Engineers to consult with the U.S. Fish and Wildlife Service (FWS) when it considers a Section 404 permit. Section 7 also allows the FWS to define critical habitat areas for endangered species and adopt measures to address threats to these areas.

Responsible Agencies: The FWS is primarily responsible. Other federal agencies are required to consult with it.

Decision Making Criteria: If an endangered or threatened species is likely to be affected by a

proposed activity, the FWS determines if the activity will jeopardize the continued existence of the species or adversely modify its critical habitat. Depending upon the level of jeopardy or adverse modification found, the FWS will either specify reasonable alternatives to the proposed action or will set forth the terms and conditions (including but not limited to reporting requirements) with which the agency or applicant must comply.

Public Role: With respect to Section 404 dredge and fill permit applications, public notice will be through the Corps of Engineers' notice of the Section 404 permit application. Call or write the FWS with concerns about plant or animal species in a threatened wetland. Citizens may bring injunctive actions in court against the FWS, Corps, or permittees if they are in violation of the ESA.

Enforcement: Violations may be civilly or criminally enforced.

NATIONAL ENVIRONMENTAL POLICY ACT (42 U.S.C. § 4321 et seq.)

The National Environmental Policy Act (NEPA) requires the preparation of environmental impact statements (EIS) assessing the impact of federal projects (before construction) for all federally funded, authorized, or permitted activities that would have significant environmental effects. Although protection of wetlands is not a specific purpose of NEPA, wetlands are listed among the environmental parameters to be evaluated in an EIS. The Army Corps of Engineers estimates that fewer than half of one percent of Section 404 permit applications cover projects which, because of their likely impact on the environment, will require an EIS. NEPA allows the public to review and comment on environmental assessments (which determine if an EIS is needed), the proposed scope of an EIS draft, and final documents. The Minnesota Environmental Policy Act, described on page 16, is modeled after NEPA.

EXECUTIVE ORDERS 11990 and 11988

History: Executive Orders (EO) 11990 and 11988 were issued by President Carter in 1977 and provide guidance to federal agencies.

EXECUTIVE ORDER 11990

Protection of Wetlands. EO 11990 is an overall wetland policy for all federal agencies managing federal land, sponsoring federal projects, or providing funding assistance to state and local projects. It does not apply to the issuance of licenses and permits for activities involving wetlands on nonfederal property.

EO 11990 requires agencies to consider mitigation and public involvement before proposing new construction in wetlands. How effectively these procedures are followed varies among federal agencies.

Under Section 4 of EO 11990, when federally owned wetlands are proposed for lease or sale to nonfederal parties, restrictions must be placed in the lease or conveyance to protect and enhance

wetlands on the property. The alternative is to withhold such properties from sale. For example, this applies to wetlands held by the Resolution Trust Corporation as part of the federal bailout of the savings and loan industry, and to wetlands on military installations that are targeted for closure and disposal.

EXECUTIVE ORDER 11988

Floodplain Management. Because of the crucial role that wetlands play in flood control, EO 11988 provides floodplain wetlands with a degree of protection. EO 11988 requires each federal agency to take action to reduce the risk of flood loss, to minimize the impact of floods on human safety, health, and welfare, and to restore and preserve the natural and beneficial values served by floodplains. Each agency is required to (1) consider alternatives to proposed actions to avoid adverse impacts in floodplains, and (2) modify the proposed action to minimize potential harm if the agency finds the only practical alternative is to locate in a flood plain.

Effect: Although Executive Orders 11990 and 11988 are credited with raising the awareness of federal agencies of the value of wetlands, observers believe they have had little impact on wetland preservation.