A PRELIMINARY INVESTIGATION OF SUBMERGED LANDS MANAGEMENT IN MINNESOTA

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CONFLICTING SUBMERGED LANDS IN THE DULUTH HARBOR AREA

Boundary of original Land Survey

Area of possible conflict

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EXECUTIVE SUMMARY

Lands beneath navigable waters were granted to each state from the federal government when the state entered the Union, except in rare instances when the federal government disposed of such lands prior to statehood. The determination of navigability is to be made based on a federal test of navigability to be applied to the bodies of water at the time the state is admitted to the Union. State tests or definitions of navigability play no role in determining the original title to lands beneath navigable waters. Title to these lands changes based on state common law interpretations of the doctrines of accretion, erosion, and reliction, but does not change when a watercourse alters its course via avulsion. In Minnesota, state courts attempted to use state navigability tests to determine title until this was determined to be improper by the United States Supreme Court. Minnesota, does, however employ a more liberal state definition of navigability for the purpose of determining public recreation rights. Minnesota also has a strong public trust doctrine making it very difficult for the state to dispose of large amounts of state-owned submerged lands.

There is some degree of submerged lands management being undertaken in Minnesota today. The management is sporadic and incomplete, however. The limited management by the state is administered by three components of the DNR--the Land Bureau, the Minerals Division, and the Waters Division. All three have the authority to administer some aspect of submerged lands management, and they employ this authority to varying degrees. There is a lack of coordination between these agencies. The state has no listing of its ownership of submerged lands nor does it receive any compensation for use of its submerged lands. At the federal level, the Army Corps of Engineers has regulatory authority over all waters that they consider navigable and part of a system of foreign or interstate commerce within the state.

The range and sophistication of submerged lands management across the country varies from the more advanced program of California to the nascent programs of North and South Carolina. Despite the differences among the states, Minnesota can learn from these programs which methods might be most suited to the needs determined to be important in Minnesota (e.g., income generation or resource protection). Minnesota can also learn from the mistakes and difficulties encountered by other states.

Minnesota is in need of a comprehensive and coordinated program to manage its submerged lands. The lack of a state management program is unsatisfactory from both a resource management perspective and a public trust management prospective. The content of a submerged lands program should be determined by a DNR study group with the input and statutory authority of the legislature. The program must address quieting title to past fill on state lands, a leasing program, future filling, and dredging.

INTRODUCTION

The topic of submerged lands management may strike some as odd or trivial; the exploitation of submerged lands, however, has occurred since humans wandered upon lakes, rivers, or oceans. Since that time they have gathered shellfish, algae, sand and other minerals, and later, erected structures. As society has advanced (or regressed, depending on one's perspective), the need to manage resources has increased. The resources of submerged land is an area where, until recently, management has been neglected. Interest in the area increased dramatically in the middle 1900s due to the battle over ownership of offshore hydrocarbon resources. Since this time, states across the country have been developing submerged lands management programs to deal with oil and gas and numerous other resources and activities.

In Minnesota, however, submerged lands management has been neglected. The goal of this report is to end this neglect by supplying a preliminary investigation of submerged lands management and its potential in Minnesota. The report focuses on those submerged lands that were beneath navigable waters in 1858 and thus granted to the state from the federal government. These lands are thought to be a part of the school trust lands; thus quieting title and generating revenue from these lands is of some importance. This report traces the legal history of the acquisition of these submerged lands and discusses the fragmented management program in existence today. It also examines the management programs employed by other states. Finally, the report concludes with some speculations as to the shape and substance of a submerged lands management program in Minnesota.

I. THE OWNERSHIP OF SUBMERGED LANDS: A MURKY JOURNEY THROUGH LEGAL HISTORY

THE FEDERAL TITLE TEST

The major question to be addressed in this section is who has title to the lands beneath the water--a question of major import in a state with over 12,000 lakes greater than ten acres in size, bordering Lake Superior, and bordering or including a number of major rivers, including the Minnesota, the Mississippi, the Red, and the St. Croix. In this section the legal history central to the determination of ownership of river and lake lands will be outlined. This legal history will focus predominantly on federal case law; the specifics of ownership in Minnesota will be discussed in the following section. Based on the current state of the law, each state received title to the beds of navigable waters when they achieved statehood. Let us turn now to examining how this doctrine came to be and what it means as far as ownership.

One of the major methods of transportation when the United States achieved independence (and before) was by water. Thus, so-called navigable waters played an important role in commerce, development, and exploration in colonial and early American history. The Congress recognized the importance of the navigable waters in 1796 when it passed a law stating that "All navigable rivers, within the territory occupied by the public lands, shall remain and be deemed public highways . . ." (43 U.S.C.A. Section 931).

The question of ownership of these navigable waters, and the lands under them, was ruled upon by the United States Supreme Court in 1842. In Martin v. Waddell, 41 U.S. (16 Pet.) 367, the court addressed the issue of private

versus public ownership of lands under Rarian Bay, off of the coast of New Jersey. The court found, "For when the Revolution took place, the people of each state became themselves sovereign; and in that character hold the absolute right to their navigable waters and the soils under them for their own common use, subject only to the rights since surrendered by the Constitution to the general government" (p. 410). Thus the Supreme Court held that the respective states held title to the lands under navigable waters within their jurisdiction, based on an adoption of English common law.

Technically, the Martin v. Waddell decision applied only to the original thirteen states. The substance of the decision was extended to the other states in Pollard's Lessee v. Hagan, 44 U.S. (3 How.) 212, decided in 1845. The Court stated that:

> This right of eminent domain over the shores and the soils under the navigable waters, for all municipal purposes, belongs exclusively to the states within their respective territorial jurisdictions, and they, and they only, have the constitutional power to exercise it. . . .
>
> . . .
>
> By the preceding course of reasoning we have arrived at these general conclusions: First, the shores of navigable waters, and the soils under them were not granted by the Constitution to the United States, but were reserved to the states respectively. Secondly, the new states have the same rights, sovereignty, and jurisdiction over this subject as original states. . . . (p. 230).

(This is referred to as the "equal footing" principle--states admitted to the Union after the adoption of the constitution are "admitted into the Union on an equal footing with the original states in all respects whatever." For further discussion of this principle, the reader is referred to: Shively v. Bowlby, 152 U.S. 1, 48-50, 58 (1893); Coyle v. Oklahoma, 221 U.S. 559, 566-567 (1911); Scott v. Lattig, 227 U.S. 229, 242-243 (1912); and Hawkins v. Bleakly, 243 U.S. 210, 217 (1917). See also the act admitting Minnesota to the Union, Appendix B.)

It must be noted that these decisions were based on English common law and the definition of navigable waters under this common law. In England, navigable waters were those waters affected by the ebb and flow of tides--i.e., waters lying adjacent to the coast and navigable rivers draining into the ocean which were affected by tidal action. Based on the decisions above, the status of inland navigable-in-fact waters in the United States was still in question. These waters were not navigable based on English common law, but were being used for navigation in fact. This problem was addressed in The Propeller Genessee Chief v. Fitzhugh, 53 U.S. (12 How.) 443 (1851). In this decision the Supreme Court expanded the definition of navigable waters to include inland waters based on two arguments. First, the Court argued that tidewaters and navigable waters are synonymous.

> In England, undoubtedly the writers upon the subject, and the decisions in its courts of admiralty, always speak of the jurisdiction as confined to tide-water. And this definition in England was a sound and reasonable one, because there was no navigable stream in the country beyond the ebb and flow of the tide; nor any place where a part could be established to carry on trade with a foreign nation, and where vessels could enter or depart with cargoes. In England, therefore, tide-water, with a few small and unimportant exceptions, meant nothing more than public rivers, as contradistinguished from private ones; and they took the ebb and flow of the tide as the test, because it was a convenient one, and more easily determined the character of the river. Hence the established doctrine in England, that the admiralty jurisdiction is confined to the ebb and flow of the tide. In other words, it is confined to public navigable waters (pp. 454-455).

Thus, this first argument posits that in England no inland waters are navigable, but if there were any such waters, they would be deemed navigable and covered under common law. Since there are such waters in the United States, they should be included as navigable waters under common law.

The second argument is basically related to the first, the expansion of common law navigable waters to include inland waters that were navigable in fact.

> It is evident that a definition that would at this day limit public rivers in this country to tide-water rivers is utterly inadmissible. We have thousands of miles of public navigable water, including lakes and rivers in which there is no tide. And certainly there can be no reason for admiralty power over a public tide-water, which does not apply with equal force to any other public water used for commercial purposes and foreign trade. The lakes and the waters connecting them are undoubtedly public waters; and we think are within the grant of admiralty and maritime jurisdiction in the Constitution of the United States (p. 457).

It should be noted that technically The Propeller Genessee Chief only expanded admiralty jurisdiction to waters deemed navigable in fact. The Court extended this doctrine to state ownership beneath inland navigable waters in Barney v. Keokuk, 94 U.S. 324 (1877).

To summarize thus far, based on Supreme Court decisions, the states have sovereignty over all lands beneath navigable waters, both tide-waters and inland waters. The next major issue to be determined is exactly what naviable waters means in this extended context. The Supreme Court first tackled this question in The Daniel Ball, 77 U.S. (10 Wall.) 557 (1870). The Court states:

> A different test [than ebb and flow] must, therefore, be applied to determine the navigability of our rivers, and that is found in their navigable capacity. Those rivers must be regarded as public navigable rivers in law which are navigable in fact. And they are navigable in fact when they are used, or are susceptible of being used, in their ordinary condition, as highways for commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel on water (p. 563).

It is this definition of navigability, obviously somewhat vague and imprecise, which is and has been the basis of the federal title test for submerged land ownership. And it is the federal title which is all important in the non-original states since these lands once belonged to the federal government and it is thus the federal government's test for navigability which determines whether or not title to certain submerged lands transferred to state ownership.

Since The Daniel Ball decision, the Supreme Court has dealt with the federal test for navigability as a determination for title to submerged lands in seven cases, each time reaffirming the basic definition advanced in The Daniel Ball. In Packer v. Bird, 137 U.S. 661 (1891), the court used the test in settling a title dispute involving the Sacremento River in California. In Oklahoma v. Texas, 258 U.S. 574 (1922) and Brewer-Elliott Oil and Gas Co. v. United States, 260 U.S. 77 (1922), both cases centered around the recovery of oil and gas from submerged lands, the court again relied on the test from The Daniel Ball to settle title disputes over the Red River and the Arkansas River.

A fourth case, United States v. Holt State Bank, 270 U.S. 49 (1926), concerned the title of the bed of Mud Lake in Marshall County, Minnesota which had been drained and uncovered. In this case the court concluded that the lake had been navigable when it was first meandered in 1892 (and also navigable at the time of statehood), and thus the lands underlying the lake were owned by the state.

In United States v. Utah, 283 U.S. 64 (1930), the court addressed a title dispute between the United States and Utah over the ownership of the beds of the Colorado, Grand, Green, and San Juan Rivers where they flow in Utah. The court delivered a clear and powerful statement on determining navigability based on potential rather than actual navigation at the time of statehood:

> Utah, with its equality of right as a state of the Union, is not to be denied title to the beds of such of its rivers as were navigable in fact at the time of the admission of the State either because the location of the rivers and the circumstances of the exploration and settlement of the country through which they flowed had made recourse to navigation a late adventure, or because commercial utilization on a large scale awaits future demands. The question remains one of fact as to the capacity of the rivers in their ordinary condition to meet the needs of commerce as these may arise in connection

> with the growth of the population, the multiplication of activities and the development of natural resources. And this capacity may be shown by physical characteristics and experimentation as well as by the uses to which the streams have been put (p. 83).

This statement, derived from The Daniel Ball, provides solid and useful precedent for future attempts to determine navigability at the time of statehood.

The Supreme Court again relied upon the navigability test in The Daniel Ball in deciding the title to five bodies of water in Oregon (Lake Malheur, Mud Lake, Harney Lake, the Narrows, and the Sand Reef) in United States v. Oregon, 295 U.S. 1 (1934). This same test was further employed in the most recent Supreme Court case involving a title dispute over state ownership of the lands under navigable waters, Utah v. United States, 403 U.S. 9 (1971), a dispute about the lakebed of the Great Salt Lake.

The Congress addressed this issue somewhat more concretely in 1953 when it passed the Submerged Lands Act, an act primarily geared to settling title in offshore lands for the purpose of oil and gas exploitation. The Act states that:

> The term "lands beneath navigable waters" means - (1) all lands within the boundaries of each of the respective states which are covered by nontidal waters that were navigable under the laws of the United States at the time such state became a member of the Union, or acquired sovereignty over such lands and waters thereafter, up to the ordinary high water mark as heretofore or hereafter modified by accretion, erosion, and reliction (43 U.S.C. Section 1301 (a)).

This definition basically incorporated the central features of past Supreme Court decisions into statutory form.

According to a legal scholar in the field of the federal test of navigability:

> The current federal "title test" contains five important elements. Four of them are included in the definition

> framed by The Daniel Ball. First, it is not necessary for the water body to ever have been used for navigation; it is sufficient for the water body to be "susceptible" to navigation. Secondly, it is not susceptibility to any type of navigation that will render the water body navigable; it must be susceptible to navigation "for commerce". Thirdly, the water body must be susceptible to navigation for commerce in its "natural and ordinary condition," although navigability will not be destroyed by "occasional difficulties in navigation". Fourthly, the commercial navigation can be by any "customary mode" of trade or travel. The Supreme Court has not yet defined what is meant by a "customary mode." One extreme position would be to consider commercial log floatage to be a "customary mode." Under such a view, there would not be many non-navigable streams for title purposes in the United States. The fifth element, made clear in later Supreme Court decisions, is that navigability for title purposes will be tested as of the date the particular state entered the Union. This aspect of the test presents a host of evidentary problems for courts and lawyers. One last aspect of the federal title test is that the water body need not be a highway for interstate commerce; it can be navigable for title purposes even if it is wholly landlocked (pp. 592-593, MacGrady 1975).

I think that this passage is a concise and useful summary of a complicated area of law. What does this legal journey imply for Minnesota? For the state to gain title to any stream or lakebeds (or former stream and lakebeds), it must demonstrate that the body of water in question was used for, or suitable for use in, commerce in 1858.

Having addressed how states' have attained title to submerged lands beneath navigable waters, two more issue areas need to be addressed. First, what role does state law and state definitions of navigability play in this issue. And second, how is state ownership affected by changes in the watercourse, changes termed accretion, avulsion, erosion, and reliction.

THE STATE NAVIGABILITY TEST

Prior to the clarification of the federal title test by the Supreme Court in the 1920s (in the Brewer-Elliott Oil and Gas Co. v. United States, United

States v. Holt State Bank, and United States v. Utah), state Supreme Courts applied state tests of navigability in efforts to determine title to certain submerged lands. This was quite confusing as the state tests are greatly varied, some being more liberal and some more restrictive than the federal test. The Supreme Court, however, made it clear that for title purposes the federal test of navigability must be employed. This position is made quite clear in United States v. Oregon, 295 U.S. 1 (1934):

> Since the effect upon the title to such lands [underlying navigable water] is the result of federal action in admitting a state to the Union, the question, whether the waters within the State under which the lands lie are navigable or non-navigable, is a federal, not a local one. It is, therefore, to be determined according to the law and usages recognized and applied in the federal courts . . . (p. 14).

Thus far, however, only two states west of the Mississippi River have explicitly recognized that the federal title test is the supreme test in such instances--Minnesota and North Dakota. Both of these states have abandoned more liberal pleasure boat tests and have adopted the federal test (cf, State v. Adams, 89 N.W. 2d 661 (Minn. 1957), cert denied, 358 U.S. 826 (1958) and Ozark-Mahoning Co. v. State, 37 N.W. 2d 488 (N.D. 1949)).

The state test thus cannot play a role in determing original title to these submerged lands, but it may be employed to determine title after lands have passed from the United States to the state and to allocate public and private usufructuary interests in state waters. In reference to title determination after the completion of the federal title test, state navigability laws may transfer certain of those lands to private or riparian owners. If the state navigability test is more restrictive than the federal test, the submerged lands in question will become the property of the riparian owner. Also, some states may dispose of all the lands they receive beneath navigable waters to the riparian owners.

As for the protection of public rights to recreation in certain state waters, Arkansas, California, Indiana, Maryland, Minnesota, New York, North Dakota, Ohio, Oregon, South Dakota, and Wisconsin all have adopted a navigability test more liberal than the federal test to determine the rights of public recreation. This use of the state navigability test can be quite important, as is noted by MacGrady:

> A state using a navigability test as a mechanism to allocate usufructuary interest, as opposed to using such a test to locate submerged bed title, need not comport with any federal test of navigability; allocating usufructuary interests is a wholly internal state affair . . ., an internal exercise of the state's sovereign police power. Thus the state can regulate water use, as it can land use, in any manner it pleases, subject, of course, to the usual due process requirement. Once this is recognized, it becomes clear that, absent the problem of mineral deposits in the submerged bed, the title to the bed is irrelevant because, regardless of who owns the bed, the public interest can be protected by regulating the superjacent waters. Thus, although "navigable" is one way to describe waters subject to public protection, a navigability criterion is not a necessary one at all for state regulation of public and private usufructuary rights in water (p. 605, 1975).

While it is arguable that only mineral deposits in the submerged bed presents potential problems, (e.g., marina and barge facilities, to be discussed below, may also present problems) his point is well taken.

CHANGES IN THE WATERCOURSE

The legal community uses four terms to describe changes in water courses. These terms and their definitions are as follows:

> "Accretion" is the increase of riparian land by the gradual deposit, by water, of solid material, whether mud, sand, or sediment, so as to cause that to become dry land which was before covered by water. Accretion occurs when the line between water and land bordering thereon is changed by the gradual deposit of alluvial soil upon the margin of the water. The term "alluvion" is applied to

> the deposit itself, while accretion denotes the process, although the terms are frequently used synonymously.
>
> "Reliction" (or, as it sometimes called, "dereliction") differs from "accretion" in this, that the term "reliction" is applied to land made by the withdrawal of the waters by which is was previously covered, instead of the building up of the bottom by deposits displacing the waters. Reliction connotes the uncovering of land by a permanent recession of a body of water, rather than a mere temporary or seasonal exposure of the land.
>
> The term "erosion", as used in this connection, means the gradual washing away of land bordering on a stream or body of water by the action of the water. "Avulsion" is a sudden and perceptible loss or addition to land by the action of water, or a sudden change in the bed or course of a stream (pp. 851-852, American Jurisprudence 2d, v. 78, Waters, Section 406, 1975).

What impact do these changes have on the ownership of submerged and riparian lands? Generally, title shifts with the watercourse when changes result due to accretion, erosion, and reliction, but the title does not change due to avulsion. An illustration of these changes will help to clarify this point. Assume that the state holds title to the bed under a navigable body of water and a private party owns the adjacent riparian land. If part of the bed adjoining the riparian land is filled by accretion, the riparian owner gains title to this additional land and the state loses title to what was once submerged land. If the water level in the body of water drops by some permanent recession, the title to the uncovered land transfers from the state to the riparian owner. If portions of the riparian's property are washed away by erosion and become submerged, these lands transfer from the riparian owner to the state. Lastly, if the river or stream drastically changes course, leaving part of the state-owned bed dry and inundating portions of the riparian owner's property, title is unchanged.

The effect of these changes upon boundaries is addressed in American Jurisprudence 2d:

> It is the general rule that where the location of the margin or bed of a stream of other body of water which

> constitutes the boundary of a tract of land is gradually and imperceptibly changed or shifted by accretion, reliction, or erosion, the margin or bed of the stream or body, as so changed, remains the boundary line of the tract, which is extended or restricted accordingly. The owner of riparian land thus acquires title to all additions thereto or extensions thereof by such means and in as much manner, and loses title to such portions as are so worn or washed away or encroached upon by the water, . . . But where the change takes place suddenly and perceptibly either by reliction or avulsion, as where a stream from any cause suddenly abandons its old and seeks a new bed, such a change works no change of boundary or ownership. Title to land is not lost even temporarily by avulsion.
>
> In most jurisdictions, the character of the stream or body of water as tidal, nontidal, navigable, or non-navigable is immaterial as respects the application of the foregoing rules relating to accretion, reliction, erosion, and avulsion . . . .
>
> The law of accretion and reliction applies both to waters in which the title to the bed is in the state and to those where the riparian owner's title extends to the thread of the stream . . . (pp. 856-858, v. 78, Waters, Section 411, 1975).

To summarize this discussion of title changes, title to property (either submerged or riparian) changes with the watercourse if the change is gradual or imperceptible (i.e., change is by accretion, erosion, or reliction), but the title does not change if the watercourse alters its course suddenly and dramatically (i.e., through avulsion or some instances of reliction).

Perhaps the most difficult aspect of determing title after some change in the watercourse is distinguishing accretion from avulsion, a distinction with great title implications. The Supreme Court has recently wrestled with this distinction twice. In Bonelli Cattle Co. v. Arizona, 414 U.S. 313 (1973), the court addressed a title dispute which arose following changes in the Colorado River. According to the Court,

> The issue before us is not what rights the state has accorded private owners in lands which the state holds as sovereign; but, rather, how far the State's sovereign right extends under the equal-footing doctrine and the Submerged Lands Act--whether the state retains title to

> the lands formerly beneath the stream of the Colorado River or whether that title is defeasible by the withdrawal of those waters (pp 319-320).

The court ruled in favor of the private party:

> The state's title is to the "[river] bed as a bed" and the State of Arizona will continue to hold title to the bed beneath the Colorado River to its present high-water mark. But the exposed land involved here is no longer, as described in Shively, "incapable of ordinary and private occupation . . . [whose] primary uses are public in their nature, for highways of navigation . . ." The equal-footing doctrine was never intended to provide a state with a windfall of thousands of acres of dry land land exposed when the main threads of a navigable stream is changed (p. 322).

This decision thus applied federal common law to a state title dispute, an action quite out of character with past decisions.

This departure from precedent was corrected in 1977 when the Supreme Court overruled Bonelli in State Land Board v. Corvallis Sand and Gravel Co., 429 U.S. 363, a case dealing with a title dispute in and near the Willamette River in Oregon. The court argued that:

> Our analysis today leads us to conclude that our decision to apply federal common law in Bonelli was incorrect (p. 370).
>
> . . .
>
> Since the application of federal common law is required neither by the equal-footing doctrine nor by any other claim of federal right, we now believe that title to the Bonelli land should have been governed by Arizona law, and that the disputed ownership of the lands in the bed of the Willamette River in this case should be decided soley as a matter of Oregon law (p. 372).

Based on this decision, state law is to be employed to determine ownership changes following changes in watercourses. In both Bonelli and State Land Board, the respective state courts applied the avulsion doctrine to some portion of lands with the result that Arizona and Oregon did not obtain title to the new riverbeds but did maintain title to former riverbeds which were now dry.

Before concluding this section, some discussion of natural versus artificial watercourse changes is merited. According to American Jurisprudence, "it is immaterial, as respects the effect of accretion, reliction, or erosion, whether it results from natural or artificial causes, in whole or in part. . . . provided they are not caused by the riparian or littoral owner himself, . . . Since title to land under water is not lost by avulsion, it is clear that title to such land is not lost where a river shifts to a new location as a result of unnatural forces" (pp. 855-856, American Jurisprudence 2d, v. 78, Waters, Section 410, 1975). Thus it is immaterial whether watercourse changes are produced by natural or artificial causes, except in the case when such changes may be caused by one of the riparian owners attempting to claim title to changes produced by his or her action.

SUMMARY

Lands beneath navigable waters were granted to each state from the federal government when the state entered the Union, except in rare instances when the federal government disposed of such lands prior to statehood. The determination of navigability is to be made based on a federal test of navigability to be applied to the bodies of water at the time the state is admitted to the Union. State tests or definitions of navigability play no role in determining the original title to lands beneath navigable water. Title to these lands changes based on state common law interpretations of the doctrines of accretion, erosion, and reliction, but does not change when a watercourse alters its course via avulsion.

Sources: American Jurisprudence 2d, 1975, v. 78, Waters.

MacGrady, Glenn J., 1975, "The Navigability Concept in the Civil and Common Law: Historical Developement, Current Importance, and Some Doctrine that Don't Hold Water," Florida State University Law Review, v. 3, pp. 511-615.

United States Court Cases.

United States Statutes.

II. SUBMERGED LAND OWNERSHIP IN MINNESOTA: THE MURKY JOURNEY CONTINUES

MAJOR MINNESOTA COURT CASES

After the preceding section it should be clear that determining title to submerged lands is a complicated and difficult endeavor. Like the federal courts, the state courts of Minnesota have played perhaps the major role within the state in efforts to determine title. In this section, an outline of the evolution of the submerged land issue in the Minnesota courts will be presented, including discussions of the major cases involved in that evolution.

The first important case was Lamprey v. Metcalf, 52 Minn. 181, 53 N.W. 1139 (1983). This decision is concerned primarily with determining the ownership of a dried-up bed of a formerly non-navigable lake; but it also includes an important discussion of navigation. The court argues

> if, under present conditions of society, bodies of water are used for public uses other than mere commercial navigation, in its ordinary sense, we fail to see why they ought not to be held to be public waters, or navigable waters, if the old nomenclature is preferred. Certainly, we do not see why boating or sailing for pleasure should not be considered navigation, as well as boating for mere pecuniary profit (p. 1143).

It is important to remember that at this time the states operated under the assumption that state tests of navigability controlled the determination of title to submerged lands. Thus, this liberalized definition of navigability, a definition which expanded the concept to include pleasure crafts, could have tremendous implications both in Minnesota and around the country if adopted by other states. This entire issue of state verses federal tests was clarified by the three U.S. Supreme Court cases decided

in the 1920s and discussed above (Oklahoma v. Texas, Brewer - Elliott Oil & Gas Company v. United States, and United States v. Holt State Bank).

The definition advanced in Lamprey was the basis for the decision handed down in State v. Korrer, 127 Minn. 60, 148 N.W. 617 (1914). This case involved the mining of iron ore from the bed of Longyear Lake in northern Minnesota. The court found Longyear Lake to be a public body of water, which is equated with being navigable by the court:

> Natural bodies of water are classed as navigable or non-navigable. The term "navigable", as used in this connection, has been extended beyond its technical significance and embraces many bodies of water not navigable in the ordinary sense of that term. The division of waters into navigable and non-navigable is but another way of dividing them into public and private waters, and navigable waters embrace all bodies of water public in their nature. It is not necessary that the water should be capable of commerce of pecuniary value. If a body of water is adopted to use for public purposes other than commercial navigation, it is held to be public water, or navigable water, if the old nomenclature is preferred. Boating for pleasure is considered navigation, as well as boating for more pecuniary profits (p. 618).

The pleasure boat test was employed and the court ruled that since the lake was determined to be navigable, the state had title to its bed and thus control of the iron ore.

The next major case, State v. Longyear Holding Co., 224 Minn. 451, 29 N.W. 2d 657 (1947), was decided following the numerous federal Supreme Court cases discussed above. The Minnesota court then applied the federal test of navigability: "It is well settled that the test of navigability to fix ownership of lake beds must be determined as of the date of a state's admission to the Union and under the federal decisions with reference thereto" (pp. 662-663). In this case, the dispute revolved around the navigability of Syracuse Lake and the exploitation of iron ore from its

bed. The state had drained the lake, built an alternate channel for waterflow and navigation, and had leased the lake bed to a mining company to extract iron ore. Longyear Holding Company attempted to gain title to the lake bed based on three arguments: (1) the lake was non-navigable--dismissed; (2) via reliction--dismissed, temporary drainage of a lake does not constitute reliction and thus no transfer of title had taken place; and, (3) that the state is violating its trust in allowing the exploitation of the minerals--dismissed, the state is not violating its trust by allowing the removal of iron ore from the lake bed.

The federal test is again employed in State v. Bollenbach, 241 Minn. 103, 63 N.W. 2d 278 (1954), a dispute involving the navigability of Five Lake in Otter Tail County. In this case, the Commissioner of Conservation sought to acquire by condemnation an easement over private property to gain access to allegedly public waters. The court declared that the federal navigability test must be employed as of navigability in 1858. To determine navigability at such time, "the court can consider evidence of the present use and capacity for purposes of navigation as bearing on whether it was navigable at the time" (p. 288). Upon examining historical evidence, the court concluded that

> The only uses ever made of Five Lake, besides the travel by Indians mentioned above, have been for private fishing and hunting and some trapping by the Indians. However, such activities are not commerce and provide no basis for finding that a body of water is navigable under the federal test (p. 289).

While not explicitly rejecting the use of pleasure boats to determine navigability as presented in Lamprey, the court moves strongly in that direction.

The abandonment of the recreational use test of navigability for title was explicitly made in State v. Adams, 251 Minn. 521, 89 N.W. 2d 661

(1957), cert denied 358 U.S. 826 (1958). The case involved a dispute over the title to the beds of Rabbit Lake, Rabbit River, and other connected bodies of water in Crow Wing County. This case, like the Korrer and Longyear Holding Co. cases that preceded it, revolved around the mining of iron ore from lake and river beds. In affirming the decision of the trial court, the Minnesota Supreme Court agreed that

> Rabbit was never used as a highway of commerce because it afforded no highway or avenue of practical importance for commerce. While the lake is large enough to float a good sized boat, it is not wide enough or long enough to provide a practical route for the transportation of commodities or passengers in any direction. The beginning and the end of the highway must be such that useful commerce would naturally go between them (p. 677).

Thus from now on, when the Minnesota Supreme Court applied the federal test of navigability to determine title to submerged lands it would be based on actual or potential commercial uses of the body of water in 1858.

PRE-STATEHOOD PATENTS AND DIVESTMENTS

In attempting to determine title to submerged lands in Minnesota both in 1858 and today, there are considerations besides navigation which must be addressed regarding the transfer of title to submerged lands. Prior to statehood submerged lands may have been granted to other parties by either France or Great Britian, who controlled Minnesota before it was acquired by the United States prior to statehood. Following statehood, the state itself may have transferred significant parcels of submerged lands to different owners.

Prior to becoming part of United States territory, Minnesota was under the control of France, Great Britian, and Spain in various places and at

various times. By 1804, the United States had taken possession of these lands via the Treaty of September 3, 1783 (which ended the Revolutionary War), the Louisiana Purchase, and the cession of the relinguishment of Virginia's claim to the lands in 1784. The British controlled the lands of Minnesota east of the Mississippi River for twenty years, and during that period "no real attempt at settlement was made, and little, if any, land passed into private ownership" (p. 63, Dana, Allison, and Cunningham 1960). The French, who controlled Minnesota west of the Mississippi River and Minnesota east of the Mississippi River before ceding it to the British in 1763, also did not actively colonize Minnesota. By 1689,

> On the basis of exploration, discoveries, and proclamations, French dominion over Minnesota was by this time pretty well established; but in spite of this fact, and the continuation of trapping and the establishment of trading posts, the French planted no colony in the future state. Private ownership stemming from grants by the king was still in the future (p. 64, Dana, Allison, and Cunningham 1960).

Thus both British and French activities in Minnesota were confined primarily to trapping and military outposts; the disposition of land via royal grants was extremely minimal. This is noteworthy since these grants occasionally included submerged lands and the United States courts have generally accepted the validity of title estabished under these grants. Thus, pre-United States ownership activities probably had extremely minimal or no impact on the potential amount of submerged land which Minnesota attained title to in 1858.

After acquisition from France and Great Britian, but prior to statehood, the lands of Minnesota were owned and administered by the federal government. During this period the federal government had the abilities and power to divest these lands, including the submerged lands, and it made use of these abilities and powers to greater or lesser degrees.

These powers, however, have been interpreted by the federal courts to be very limited. The court first addressed this issue in Pollard's Lessee v. Hagan (1845), in which the decision stated that

> This right of eminent domain over the shores and the soils under the navigable waters, for all municipal purposes, belongs exclusively to the states within their respective territorial jurisdiction, and they, and they only, have the constitutional power to exercise it. To give to the United States the right to transfer to a citizen the title to the shares and the soils under the navigable waters, would be placing in their hands a weapon which might be wielded greatly to the injury of state sovereignty, and deprive the states of the power to exercise a numerous and important class of police powers (p. 230).

Thus, even before statehood the United States was without power to convey title to land under navigable water and deprive future states of their future ownership.

The Court later went on to modify this decision. This is clearly expressed in Shively v. Bowlby (1893):

> We cannot doubt, therefore, that Congress has the power to make grants of lands below high water mark of navigable waters in any territory of the United States, whenever it becomes necessary to do so in order to perform international obligations, or to effect the improvement of such lands for the promotion and convenience of commerce with foreign nations and among the several States, or to carry out other public purposes appropriate to the objects for which the United States hold the Territory (p. 48).

The above statement by the Court was further clarified and strengthened in United States v. Holt State Bank (1926):

> The United States early adopted and constantly has adhered to the policy of regarding lands under navigable waters in acquired territory, while under its sole dominion, as held for the ultimate benefit of future states, and so has refrained from making any disposal thereof, save in exceptional instances when impelled to particular disposals by some international duty or public exigency. It follows from this that disposals by the United States during the territorial

> period are not lightly to be inferred, and should not be regarded as intended unless the intention was definitely declared or otherwise made very plain (p. 55).

It can be inferred from the above decisions that any disposals of submerged land by the federal government before Minnesota achieved statehood were limited.

Thus, it appears that both types of pre-statehood disposal, foreign grants and federal grants, were quite limited. Also, such grants should be easily traceable through land titles.

The State of Minnesota, as legal owner of submerged lands, does have the power to grant lands to individuals, corporations, and other governmental units, with some restrictions. The first and foremost restriction involves federal control of waters for foreign and interstate commercial navigation. The states cannot make grants which would impede or otherwise interfere with navigation. The second restriction involves the state's interpretation of the public trust doctrine. This doctrine stems from English common law when all tide-lands were held by the Crown in trust for public use in navigation, fishing, etc.

The major Supreme Court opinion dealing with public trust was delivered in 1892, Illinois Central Railroad v. Illinois, 146 U.S. 387. In this case the Court considered the Illinois legislature's repeal of its own 1869 grant of more than 1000 acres of submerged lands along the central business district of Chicago. The Court first concludes that lands underlying Lake Michigan (and all inland navigable waters) are "subject to the same trusts and limitations" as tidal waters. The Court then considers the disposal and reclaiming of the lands in question by the legislature. It is worth quoting this discussion in length:

> The question, therefore, to be considered is whether the legislature was competent to thus deprive the State of its ownership of the submerged lands in the harbor of Chicago, and of the consequent control of its waters; or, in other words, whether the railroad corporation can hold the lands and control the waters by the grant, against any future exercise of power over them by the State.
>
> . . . the State holds title to the lands under its navigable waters of Lake Michigan . . . But it is a title different in character from that which the State holds in lands intended for sale . . . . It is a title held in trust for the people of the State that they may enjoy the navigation of the waters, carry on commerce over them, and have liberty of fishing therein freed from the obstruction or interference of private parties . . . . The trust devolving upon the State for the public, and which can only be discharged by the management and control of property in which the public has an interest, cannot be relinguished by a transfer of property. The control of the State for the purposes of the trust can never by lost, except as to such parcels as are used in promoting the interests of the public therein, or can be disposed of without any substantial impairment of the public interest in the lands and waters remaining . . . . The State can no more abdicate its trust over property in which the whole people are interested, like navigable waters and soils under them, so as to leave them entirely under the use and control of private parties, except in the instance of parcels mentioned for the improvement of the navigation and use of the waters, or when parcels can be disposed of without impairment of the public interest in what remains, than it can abdicate its police powers in the administration of government and the presentation of the peace (pp. 452 - 453).
>
> . . .
>
> Any grant of this kind is necessarily revocable, and the exercise of the trust by which the property was held by the State can be resumed at any time (p. 455).

Based on this decision, some disposal of state-owned submerged lands is acceptable if it is minimal in scope and in the public interest. Massive disposals, however, appear to be unacceptable in light of the public trust doctrine. Such disposals cannot possibley be in the public interest since it terminates the state's special responsibility over such lands.

This public trust doctrine is apparent in two of the Minnesota cases discussed above. In Lamprey v. Metcalf, 52 Minn. 181, 53 N.W. 1139 (1893), the court states that

> In this state, we have adopted the common law on the subject of waters . . . and that we have repudiated the doctrine that the state has any private or proprietary right (as had the king) in navigable waters, but that it holds them in its sovereign capacity, as trustee for the people, for public use . . . where the lake is navigable in fact, its waters and bed belong to the state, in its sovereign capacity (53 N.W. 1139 @ 1143).

In a second significant case the court states

> that under the common law applicable at the time Minnesota was admitted to statehood it held absolute title, both sovereign and proprietary, to all the beds of navigable waters within its boundaries, in trust for the people of the state, primarily that they might enjoy navigation of the waters, carry on commerce on them, and have the liberty of fishing in them free from the interference of private parties. It is made clear by the decisions of the United States Supreme Court subsequent to statehood, particularly in the case of Illinois Central R. Co. v. State of Illinois . . . that in the exercise of such trust the state may dispose of partial interests in such lands, in the interest of all the people of the state, provided the primary purposes of the trust are not unduly abridged or burdened thereby (State v. Longyear Holding Co. (1947), p. 669).

The holdings of these, and other court cases, has become the common law interpretation of public trust in Minnesota. According to Dunnell Minnesota Digest 2d, Minnesota "holds the title in a sovereign and not a proprietary capacity, in trust for the benefit of the people. It cannot alienate its title" (p. 129, v. 13B, Navigable Waters, Section 5.00 (c), 3rd Ed. 1981). Thus the state owns these submerged lands as the governing authority rather than as a simple private owner. It may dispose of such lands only when it is in the public interest, and even then it maintains its sovereign authority over them.

HISTORICAL ASPECTS OF SUBMERGED LAND MANAGEMENT IN MINNESOTA

For an in-depth treatment of the history of navigable waters in Minnesota, see Rod Squires's forthcoming report on the topic.

SUMMARY

The legal history of submerged lands ownership in Minnesota is integrally related to the federal legal history outlined in the previous section. At first, Minnesota courts attempted to employ the state navigability test to determine ownership of submerged lands. Later, after the issue was determined by the United States Supreme Court, Minnesota courts applied the federal test to determine title. The courts did not, however, abandon a more liberal state test for the purpose of determining public recreation rights. A brief exploration of Minnesota history suggests that pre-statehood patents or divestments were probably of a limited nature. Finally, it is revealed that Minnesota has a strong public trust doctrine and cannot easily dispose of large amounts of state-owned submerged lands because it would not be in the public interest.

Sources:

Dana, Samuel T., John H. Allison, 2nd Russell N. Cunningham, 1960, Minnesota Lands, Washington: American Forestry Association.

Dunnell Minnesota Digest 2d, 1981 (3rd Ed.), v. 13B, Navigable Waters.

Minnesota Court Cases.

United States Court Cases.

III. THE MANAGEMENT OF SUBMERGED LANDS IN MINNESOTA TODAY

The responsibility for managing submerged lands owned by the state is located in the Department of Natural Resources (DNR). It is not, however, centrally coordinated within the Department. Three subdivisions--the Land Bureau, the Minerals Division, and the Waters Division--supplemented by the natural resources section of the Attorney General's office all play, or have the potential to play, important roles in the management process. In addition to DNR subdivisions, the United States Army Corps of Engineers, various port authorities, and municipalities are engaged in some aspect of submerged lands management.

THE LAND BUREAU

The Land Bureau is basically the real estate arm of the DNR. It handles the leasing, disposal, and acquisition of lands managed by or to be managed by DNR agencies, in conjunction with these agencies. For example, if the Forestry Division seeks to exchange some land to consolidate ownership within a state forest, they work through the Land Bureau. Thus it would appear that the Land Bureau should play a central role in the management of submerged lands owned by the state; they should be involved in any leasing or disposal of these lands. This is not the case, however. The Land Bureau is involved only in the leasing of sand and gravel deposits (see Minnesota Rules, Sections 6125.6000 - 6125.7100, reprinted in Appendix B) and the management of utility right-of-way crossings (Minnesota Rules, Sections 6135.0100 - 6135.1800, reprinted in Appendix B). Action in the sand and gravel area is virtually null, however. Two twenty-five year

leases were granted in the 1950s to mine sand and gravel deposits on submerged lands, but both of these leases have recently expired. Over the past ten years the Land Bureau has received applications for two gravel leases, but both were denied based on environmental determinations made by the Waters Division. Due to the environmental constraints involved in mining gravel from submerged lands, the costs for such leases have risen greatly and gravel users have sought and obtained the resource from other sources.

The Land Bureau is still very active in the utility right-of-way area. The fees charged for underwater and overwater crossing of public waters, a category more inclusive than navigable waters, are found in Minnesota Rules, Section 6135.0400 (see Appendix B).

The Land Bureau is not involved in leasing submerged lands for the development of marinas or port facilities or the leasing of or disposal of bottom lands to be filled. The primary reason for this lack of involvement is that Minnesota does not have a management program or strategy for submerged lands, except perhaps in the area of mineral exploitation. What policies do exist regarding submerged lands are regulatory in nature, and on the whole are implemented by the Waters Division.

WATERS DIVISION

The Waters Division is the unit of the DNR that is in charge of regulating activities in the public or protected waters of the state. The regulatory authority is based upon Minnesota Statutes, Section 105.38(3), 1984: "The State shall control and supervise, so far as practicable, any activity which changes or will change the course, current, or cross-section

of public waters or wetlands . . . ." The legislature also explicitly stated that a permit process should be implemented to protect these waters:

> It shall be unlawful for the state, any person, partnership, . . . to construct, reconstruct, remove, abandon, transfer ownership, or make any change in any reservoir, dam or waterway obstruction on any public water; or in any manner, to change or diminish the course, current or cross-section of any public waters, wholly or partly within the state, by any means, including but not limited to, filling, excavating, or placing of any material in or on the beds of public waters, without a written permit from the commissioner previously obtained . . .
>
> The commissioner, subject to the approval of the county board, shall have power to grant permits under such terms and conditions as he shall prescribe, to establish, construct, maintain and control wharfs, docks, piers, levees, breakwaters, basins, canals and hangers in or adjacent to public waters of the state except within the corporate limits of cities (Minnesota Statutes, Section 105.42, Subdivision 1, 1984).

The legislature did not leave it up to the Waters Division to determine what pubilc waters meant; the definition of public waters appears in Section 105.37, Subdivision 14 of the Minnesota Statutes (1984).

> "Public Waters" includes and shall be limited to the following waters of the state:
>
> . . .
>
> (b) All waters of the state which have been finally determined to be public waters or navigable waters by a court of competent jurisdiction;
> (c) All meandered lakes, except for those which have been legally drained;
>
> . . .
>
> (g) All waterbasins where the state of Minnesota or the federal government holds title to any of the beds or shores, unless the owner declares that the water is not necessary for the purposes of public ownership;
>
> . . .
>
> The public character of water shall not be determined exclusively by the proprietorship of the underlying, overlying, or surrounding land or by whether it is a body or stream of water which was navigable in fact or susceptible of being used as a highway for commerce at the time this state was admitted to the union.

The commissioner of the DNR was directed by the legislature to complete an inventory of public waters and wetlands by December 31, 1982, a process which was recently completed (Minnesota Statutes, Section 105.391 (1984)).

The Waters Division thus regulates activities in waters much more extensive than navigable waters or the beds of navigable waters. The statutory provisions which provide the Waters Division with their regulatory authority is based on state police power rather than the rights of a property owner. The Waters Division has adopted a set of regulations which further specify their regulatory role. (Minnesota Rules, Sections 6115.0150 - 6115.0260, reproduced in Appendix B). There is no fee involved in obtaining permits to undertake actions in public protected waters, with the exception of mineral activities (to be discussed below). Thus dredging, the operation of marinas, and the operation of commercial barging facilities in protected waters, including over state-owned submerged lands, does not cost the user any money. The state is allowing for private use of state-owned lands without compensation in these cases.

A seeming exception to the above is obtaining a permit to fill any lands below the natural ordinary low water level. According to the Waters Division, "the permitee should contact the DNR Bureau of Lands regarding the applicability of state leasing procedures or policies." When employees of the Land Bureau were questioned about any leasing program for those filling submerged lands, they knew nothing of the program. It is obvious that there is a major communication breakdown between the Waters Division and the Land Bureau regarding the management of submerged lands. This also raises a potential problem regarding the title of submerged lands. Since the party filling in the submerged land does not receive title to the property from the state nor is it leased by the state (according to the

Land Bureau), the party occupying the filled land is essentially trespassing on state property. This potential legal nightmare should be dealt with as soon as possible under a unified and coordinated submerged lands management policy.

MINERALS DIVISION

One aspect of submerged lands management which has been the subject of some attention has been the exploitation of minerals from state-owned submerged lands. State management in this area resulted from extensive iron ore deposits underlying lakes in the northern Minnesota iron ranges. If the state thought that it owned the submerged land (at this time based on a state navigability title test), they could, and did, lease these lands to mining companies. Three of the most important Minnesota court cases concerning title to submerged lands have involved the mining of these lands: State v. Korrer (1914) involving the mining of iron ore from Longyear Lake, State v. Longyear Holding Co. (1947) involving the mining of iron ore from Syracuse Lake, and State v. Adams (1957) involving the mining of iron ore from Rabbit Lake, Rabbit River, and other connected bodies of water.

The state legislature had anticipated potential controversy over such mining and passed legislation dealing with it in 1909 (see Minnesota Statutes (1984), Sections 93.06 and 93.07). Further statutes regarding minerals under navigable lakes (and thus on state lands) and the mining of such minerals, were passed in 1915 (Section 93.34), 1935 (Sections 93.08, 93.09, 93.10, 93.11, and 93.12), 1937 (Section 93.13), and 1943 (Section 93.351). Since original passage, many of these statutes have undergone

substantial revision. (These statutes appear in Appendix B.) Based on the authority of these statutes, the Commissioner of Conservation (later to become the Commissioner of the DNR) issued rules regarding the exploitation of minerals from state-owned submerged lands. These rules deal with the authority to issue permits (for Gold and Other Ores) (Section 6125.1000) and any damage which may accrue to riparian owners due to such mining operations (Section 6125.1600), Permits and Leases for Marl (Sections 6125.4500 - 6125.5700), and Permits and Leases for Sand and Gravel (Sections 6125.6000 - 6125.7100). (These rules have been reproduced and appear in Appendix B.)

Today, however, the involvement of the Minerals Division in submerged lands management has all but ceased. Following the loss by the State in the State v. Adams (1957) case, the Minerals Division stopped issuing leases for iron ore exploitation on submerged lands. The Minerals Division has continued this practice, based on the above legal reasons and also the rise in environmental concern which took place in the late 1960s and the 1970s. Currently, the Minerals Division has no outstanding leases for hard minerals on lake beds or in lakes larger than ten acres in size, and has no immediate plans to begin granting such leases. They do, however, have the statutory and regulatory authority necessary to issue such leases. The terms of such leases, as far as fees and royalties, would be quite similar to those of upland leases, although they would include more restrictions in order to protect water quality.

One exception to the above discussion is that if the state issues a lease, and within the leased area is a lake or pond of ten or less acres in size, and the submerged land is owned by the state either via riparian ownership or the retention of mineral rights when disposing of surface

lands, the lessee may exploit the resources found on these submerged lands. Copper-Nickel leases executed by the Minerals Division are the type of leases in which such inclusions occur. It should be noted that such leases would typically not include the submerged land acquired by Minnesota in 1858 since these lakes would be small and isolated and thus almost assuredly non-navigable according to the federal test.

ATTORNEY GENERAL'S OFFICE

The Attorney General's office plays the role of legal advisor to the DNR on matters pertaining to submerged land ownership and management. The Attorney General's office is usually a reserve actor, waiting to be called into play by the DNR when needed. The office would analyze potential submerged lands claims made by the state and represent the state in proceedings attempting to determine ownership status of submerged lands.

The Attorney General's office does not have any comprehensive listing of waters determined to be legally navigable in 1858, or more comprehensive listing of submerged lands owned by the state. Nor is the office actively pursuing a strategy of identifying such waters or initiating legal proceedings to settle the question of title in cases where some dispute might exist.

POLLUTION CONTROL AGENCY

It should be noted the Minnesota Pollution Control Agency (PCA) also plays a role in regulating the state's protected public waters. The PCA is concerned with the water quality in these waters, as distinguished from the

concern with water quantity and flow (and to some degree quality) by the Waters Division. The role and mission of the PCA would be unchanged by the adoption of a submerged lands management program by the DNR; the PCA would still be responsible for water quality in the waters above state-owned submerged lands.

ARMY CORPS OF ENGINEERS

The Army Corps of Engineers is the federal government agency in charge of maintaining navigation and regulating activities in the navigable waters of the United States. Thus the Corps of Engineers must become the partner of the state in any program to manage submerged lands in Minnesota. The authority for federal action in this area is located in two sections of the federal statutes, both dating from before the turn of the century. In 1796, Congress declared navigable rivers to be public highways: "All navigable rivers, within the territory occupied by the public lands, shall remain and be deemed public highways . . ." (43 U.S.C. Section 931). In 1899, Congress passed the Rivers and Harbors Act (33 U.S.C. Section 401 et seq), which established the authority for regulatory control of activities in navigable waters. Of particular importance is Section 10 (33 U.S.C. Section 403) which deals with the obstruction of navigable waters generally, e.g., construction, excavation, dredging, and filling (reproduced in Appendix A).

It must be emphasized that the Army Corps of Engineers employs a test different from the federal title test in determining navigability. The definition used by the Corps is

> Navigable waters of the United States are those waters that are subject to the ebb and flow of the tide and/or

> are presently used, or have been used in the past, or may be susceptible for use to transport interstate or foreign commerce. A determination of navigability, once made, applies laterally over the entire surface of the waterbody, and is not extinguished by later actions or events which impede or destroy navigable capacity (33 CFR Section 329.4).

Two important points must be drawn regarding this definition. First, considerations of navigability are not limited to the date statehood was achieved, but rather are inclusive of past, present, and future navigational considerations. From this aspect, waters considered navigable, and therefore under regulatory authority, by the Corps could be more extensive than waters considered navigable by the federal title test; the Corps list could never include less waters on this criterion since any waters considered navigable under the federal title test are automatically considered navigable by the Corps.

The second important point deals with the phrase "for use to transport interstate or foreign commerce." Unlike the above point, this aspect of the definition restricts the type of waters which can be considered navigable for regulatory purposes by the Corps. Waters which are used in navigation within a state but are not connected to any interstate or foreign navigation system are not considered navigable by the Corps. In this respect, the Corps' list of navigable waters in Minnesota may be less than or not inclusive of all waters considered navigable by the federal title test.

The interstate - foreign commerce phrase was at the center of a recent court case in Minnesota involving Lake Minnetonka: Minnehaha Creek Watershed Dis. v. Hoffman, 449 F. Supp. 876, (1978) affirmed in part/reversed in part 597 F. 2d 617 (1979). In this case, the St. Paul District of the Corps of Engineers sought to extend their regulatory powers

under the River and Harbors Act to Lake Minnetonka and the upper portion of Minnehaha Creek by claiming that they were navigable waters of the United States. The district court concluded that the bodies of water in question were in fact navigable, but were not navigable waters of the United States since they were not part of an interstate or foreign commerce waterway. The court stated:

> Both Lake Minnetonka and that portion of Minnehaha Creek above Minnetonka Mills are navigable waters. Their historic and current uses as set forth in the findings of fact evidence their capability of use for navigation (p. 833).

The court relied on extensive historical evidence, including a June 1945, Minnesota Attorney General statement "that Minnehaha Creek was a navigable water of the State and would be treated as such by state administrative agencies. The State of Minnesota has continued to treat Lake Minnetonka and Minnehaha Creek as navigable for the purposes of its laws and regulations" (p. 880), in making this determination. The court also concluded, as indicated above,

> that a body of water located entirely in one state and forming no navigable interstate waterway connection is not a navigable water of the United States within the meaning and scope of the Rivers and Harbors Act of 1899 (p. 884).

The United States Court of Appeals for the Eighth Circuit agreed with the District Court findings regarding the navigability question:

> Applying The Daniel Ball test to the waters at issue here, we agree with the District Court that Lake Minnetonka, and that portion of Minnehaha Creek above Minnetonka Mills are not "navigable waters of the United States" as required for federal regulatory jurisdiction under Section 10 of the River and Harbor Act of 1899 (p. 622).

The Court of Appeals thus affirmed this aspect of the decision.

The Corps of Engineers, unlike the DNR or the Attorney General's office, does maintain a list of waters that they currently consider to be navigable. The listing of waters in Minnesota claimed to be "navigable waters of the United States" is reproduced in Appendix C. This list has been unchanged for quite some time according to the Corps of Engineers. The last attempted extension of the list was the ill-fated Lake Minnetonka case described above. When the Corps determines that a body of water should be analyzed to see if it should be regulated as a navigable water of the United States, the Corps undertakes historical research on the body of water and makes a determination regarding navigability. This recommendation is evaluated through channels, and if accepted, the Corps begins to regulate those waters. This was the process followed in the Lake Minnetonka case, until the Corps determination was challenged and overturned in court.

As stated above, much of the Corps' work involves regulating and permitting activities in navigable waters, including construction, dredging, and filling. This is a responsibility shared with the Waters Division of DNR, and both agencies report good working relations. They attempt to coordinate their regulatory programs and permit procedure. Receiving or not receiving a Corps permit is not, however, contingent upon receiving any needed state or local permits. Permit applications are evaluated on their own merits and all necessary permits must be obtained before activity can begin. If and when most permits are approved, a nominal fee of $10 for non-commercial activities and $100 for commercial or industrial activities is collected.

It is apparent that any submerged lands management program initiated by the State of Minnesota must allow for interaction with the Army Corps of

Engineers. This should not prove to be a major problem since the Corps and the Waters Division already must interact with one another and appear to do so without too much conflict.

PORT AUTHORITIES

There are a number of port authorities in Minnesota, greater than twenty as of 1985 and still increasing. Most of these port authorities, however, are not involved with what would be considered typical port and shipping activities. Rather they are involved in stimulating and directing economic development within their communities. The exceptions to this generality are Duluth and St. Paul, and to a much lesser extent, Minneapolis and Winona. These port authorities are actively involved, and have been actively involved in the past, with shipping and waterfront management. They thus interact or have interacted with state-owned submerged land in some capacity.

Today any port authority activity in public waters must be permitted by the Waters Division; thus, the role of port authorities on state-owned submerged lands is subordinate to the state role. Additional approval is also required from the Corps of Engineers for certain activities in the waters the Corps regulates. In the past, however, with or without Waters Division approval, the port authorities in Duluth and St. Paul filled state-owned submerged lands for industrial development, or established commercial docks or barging facilities. Thus the port authorities either manage, or did manage at some time, parcels of state-owned submerged land. Quieting title and establishing lease arrangements on such properties is something that must be dealt with by a submerged lands program.

MUNICIPALITIES AND OTHER UNITS OF GOVERNMENT

The role of municipalities in submerged lands management is somewhat analogous to that of port authorities; any actions they take are subordinate to the management role and responsibilities of the state Waters Division and the Army Corps of Engineers (where applicable). This is the case for cities, counties, and the numberous special districts relating to waters which exist in the state (e.g., conservation districts, lake improvement districts, or rural water user districts).

EXAMPLES OF INADEQUATE MANAGEMENT OF SUBMERGED LANDS

A prominent example of significant filling of state-owned submerged lands is the Duluth Harbor - St. Louis Bay area. A comparison of the original General Land Office maps of the area, filed in May 1857, with the most recent United States Geological Survey maps of the area, photo revised in 1975, reveals that substantial fill has been placed on what was once state-owned submerged lands. The Land Bureau has an enlarged cartographic comparison of Duluth Harbor - St. Louis Bay in 1857 and 1975. In order to determine who filled these lands and how and where title claims exist, an extensive title history to the suspect properties should be completed. Of special importance would be who granted title to the first occupants of these filled lands; only the State of Minnesota had the authority to make such grants. It may be that the state granted these lands to the City of Duluth or individuals by legislative or administrative act. If so, then the state is owed no restitution. If on the other hand, no record of such transfer can be located, the occupants of the filled lands cannot have

valid title to the property. The state would still be the legal owner of the property and the present occupants would be trespassers. In such cases some method of title settlement must be developed.

The filling of submerged land is continuing in Duluth Harbor today. Approximately 2500 feet of fill is to be deposited from along the Lake Superior shoreline to Canal Park. The purpose of the fill is to provide additional lake front open space and provide shoreline protection. The project has received all required state permits, yet the City of Duluth has not leased the land or acquired title to it.

An additional use that the State could and should be receiving income for the use of state lands is barge fleeting on the Minnesota and Mississippi Rivers. Depending on the type of facility used, barge fleeting may or may not come under the regulatory powers of the Waters Division. If no dredging or construction takes place in protected waters, no permit is required. If dredging, excavating, the placing of pilings, or other such activities take place, then permits are needed. Again, however, the permitee does not pay the state for the use of state property. Even in instances where the fleeting does not involve construction or dredging on state-owned subredged lands it can be argued that the barges are in some way occupying state lands. An extreme example of private use of state lands for barge facilities that has taken place recently was the sinking of a number of barges in the Mississippi River to form a barge landing. While it is not to be assumed that this is a trespass of state-owned lands until a title search has been completed, it is quite likely that such a trespass is taking place.

The numerous marinas in and along Lake Minnetonka constitute another example of inadequate management of state-owned submerged lands. Like the

filling and barge fleeting discussed above, marinas are under the regulatory authority of the Waters Division. All new marina facilities must receive permits and pay an application fee ranging from $20 to $250, based on an evaluation of total project cost, the length of shoreline affected, and/or the amount of material filled or excavated (Minnesota Rules, Section 6115.0080, revised 1985). Existing marinas are on a backlog list and are being permitted as time and resources allow. At the risk of being repetitive, even with these permits the marina operations are still using state-owned lands (by placing piers or anchoring buoys) without paying the state.

SUMMARY

There is some degree of submerged lands management being undertaken in Minnesota today. The management is sporadic and incomplete, however. The limited management by the state is administered by three components of the DNR--the Land Bureau, the Minerals Division, and the Waters Division. All three have the authority to administer some aspect of submerged lands management, and they employ this authority to varying degrees. There is a lack of coordination between these agencies. The state has no listing of its ownership of submerged lands and also received no compensation for use of its submerged lands. At the federal level, the Army Corps of Engineers has regulatory authority over all waters that they consider navigable and part of a system of foreign or interstate commerce within the state.

Sources: Minnesota Court Cases

Minnesota Rules

Minnesota Statutes

United States Court Cases

United States Regulations

United States Statutes

IV. SUBMERGED LANDS MANAGEMENT IN OTHER STATES

Each state in the Union has at least some degree of authority over at least some amount of submerged lands beneath navigable waters. The states gained this authority either during the break from England or upon attaining statehood, and according to the public trust doctrine, they can never entirely abandon this authority. The degree and form that this authority is manifested, via submerged land management, varies throughtout the country. In this section, the management programs of several states are briefly surveyed. It should be noted that coastal states tend to have the most advanced management programs, due primarily to the importance of oil and gas exploitation on these lands, the fishing industry, and marine-oriented tourism. The resources, emphasis, and experiences of these programs are not entirely relevant to a potential Minnesota program, but such programs do supply some insight into the facets, alternatives, and problems of such programs. One neighboring State that does have a major management program is Michigan, and we begin our survey there. A discussion of Wisconsin will follow before an examination of some of the programs from coastal states.

MICHIGAN

Michigan is the Great Lake state with the most extensive program dealing with submerged lands. The program can be traced to Public Act 171 in 1899 which

> . . . set aside the submerged and swamp lands in the State of Michigan bordering upon the Great Lakes and the bayous thereof for a public park, defining the limits thereof and providing for its care and

management (P.A. 1899, No. 171, M.C.L.A. Section 317 291 et seq).

One major difference between Minnesota and Michigan is apparent from this act--a differentiation between Great Lake and inland waters. Early Michigan court cases ruled that the riparian owner has title up to the middle line of navigable lakes and streams, based on old English common law. Thus the Michigan submerged lands program deals exclusively with Great Lakes submerged lands. (This eliminates one of the major difficulties which would be faced by a Minnesota program--the identification of state ownership based on navigability at statehood.)

The statute was not rigorously enforced until the early 1950s. The Department of Conservation and State Attorney General's office began to issue injunctions and trespass citations to those filling presently or those who had filled in the past. The two main impetuses to begin enforcing the 1899 act were the passage of the Submerged Lands Act by the U.S. Congress in 1953, which confirmed the authority of the states to hold title to the submerged lands within state borders for the public interest, and a rapid acceleration of filling along the shores of Lake St. Clair.

The legislature responded in 1955 by enacting the "Great Lakes Submerged Lands Act" (P.A. 1955, No. 247, M.C.L.A. Section 322.701 et seq; full text appears in Appendix D). The major goal of this act was to set up a system whereby those who had filled Great Lake bottomlands in the past would gain title to these lands and the state could regulate future activities involving these lands, including filling, dredging, and the establishment of marinas. The act also stipulated the promulgation of Administrative Rules and Regulations by the Department of Conservation (now Department of Natural Resources) to be used in administering this program (full text appears in Appendix D).

The program today is administered by the Submerged Lands Management Unit of the Land Resource Programs Division in the Department of Natural Resources. The program is essentially twofold. First, it deals with real estate or the state's ownership of the submerged lands. This part of the program deals with title clearance, deeds, and leases. The second part of the program involves permitting and regulating functions, primarily dredging. The program grants four types of bottomland conveyances: deeds, leases, agreements, and certificates. Deeds are used in two types of situations. First, to grant title to those riparian owners who filled Great Lakes bottomland. If the fill was placed before the act or with proper permits after the act was passed, the charge shall be thirty percent of the market value of the filled bottomland or full market value of the unfilled bottomland. This thirty percent of the market value figure was a compromise reached by the legislature and incorporated into the act. It must be emphasized that Michigan did not "grandfather" in past filling. All filled lands needed to have title quieted under the act. It should be noted, however, that the state has not evicted anyone for historic trespass (i.e., occupying unquieted filled lands). Those wishing to gain title to fills placed in violation of the act "shall be charged a minimum of 100% of the value of the filled bottomlands based on their highest and best use." The second use is to grant title to those who will be filling in the future, with proper approval. Such filling is limited to straightening shoreline irregularities caused by adjacent old fill placement or for sanitation, flood, drainage, or erosion control purposes.

Leases are used predominantly for marinas. These leases usually run for a twenty-five year period with the rent adjusted every five years based

on the Consumer Price Index (CPI). A performance bond is required of the lessees.

The lease fee for marinas is based on a percentage of gross dockage income based on a four part formula. The components of the formula are the size in acres of the marina; the boats per acre density based on existing marina densities; the average dock rental cost per boat per season for varying size boats, based on a survey of the rental fees at existing marinas in the state; and lastly, a percentage of this gross dockage income, set at five percent by the DNR based on a consultant's study. This method of setting marina lease fees was adopted in 1982; before that the fee was based on the percentage of the market value of the unfilled bottomland to be leased, a value which is quite difficult to determine.

An example of this formula would be useful. A lease application is received for a five acre marina to be used by 26 foot boats (for simplicity; most marinas are set up to service a wide size variety of boats and this could be incorporated into the formula). The density of such boats is 30 per acre and the average cost is $373.00 per season. Thus the cost of the marina lease would be $2,798.00 or $560.00 per acre (5 acres x 30 boats/acre x $373 per boat per season x .05 = $2,798.00) (Source: Michigan Department of Natural Resources).

Agreements refer to conditional use conveyances for extensions into Great Lake waters. These extensions include industrial facilities such as coal or iron ore docking facilities. These agreements usually include an abandonment clause, whereby abandonment or lack of use of the facility causes the facility to revert to state ownership, and a removal clause supported by a bond. Agreement fees include a one time payment of fifteen percent of the market value of the filled bottomland, and in the case of

commercial or industrial facilities, an annual fee which is adjusted every five years based on economic indicators. The agreement covers both the dock and berthing area in industrial situations.

Lastly, certificates are granted primarily at the request of title insurance companies. The state issues certificates on boundary determinations stating that they have no interest in the title, or accretion certificates stating that title to accretions is in the hands of the upland or riparian owners. The state charges a flat fee of $200 for each of these certificates.

The funds collected by Michigan under this program are presented in Table 1. The revenues are obviously not tremendous, but it must be noted that maximizing revenue has not been and is not the goal of the Michigan submerged lands management program. Rather, the goals have been to quiet title on filled lands, encourage sound marina and commercial development along the Great Lakes, and to regulate activities such as dredging and filling along the shoreline.

What have been the experiences of the Michigan program to date? While the program has certainly been successful in quieting title to much of the filled lands and developing a functional permitting program, it has done so without much support; in the words of one administrator "Throughtout its history the program has been a paupered program in terms of both funding and personnel." Currently, the program is administered by two persons in the DNR headquarters in Lansing, Michigan. These persons process all applications for conveyances and handle other administrative aspects of the program. Field inspection and enforcement of the regulation and permit process is carried out by the field staff of the Land Resource Programs Division. There are currently thirteen field people, but an increase of

DEPARTMENT OF NATURAL RESOURCES
LAND RESOURCE PROGRAMS DIVISION

Submerged Lands Management Unit

Great Lakes bottomland conveyance applications approved by Natural Resources Commission, from June 11, 1956, to February 7, 1985,* under authority of Act 247, P.A. 1955, as amended.

DEEDS	APPROVED	CONSIDERATION**	ACREAGE
Erie	7	$ 3,100.00	6.27
Huron	157	399,890.33	775.05
Michigan	72	156,830.00	409.30
St. Clair	346	634,759.30	215.41
Superior	12	47,910.00	79.24
TOTAL	594	$1,242,489.63	1,485.27

LEASES	APPROVED	ANNUAL RENTAL	ACREAGE
Erie	0	$ 0	0
Huron	20	5,980.00	39.83
Michigan***	18	11,550.00	197.03
St. Clair	17	20,960.00	60.01
Superior	0	0	0
TOTAL	55	$ 38,490.00	296.87

(Total rentals collected to date: $276,625.00)

AGREEMENTS	APPROVED	CONSIDERATION	ACREAGE
Erie	2	$ 100.00	11.01
Huron	20	6,660.00	81.33
Michigan	10	14,200.00	134.84
St. Clair	18	1,050.00	17.87
Superior	7	11,550.00	61.66
TOTAL	57	$ 33,560.00	306.71

CERTIFICATES	APPROVED	STATUTORY FEE
Erie	0	$ 0
Huron	10	2,000.00
Michigan	5	1,000.00
St. CLair	6	1,200.00
Superior	1	200.00
TOTAL	22	$ 4,400.00

*This summary may be adjusted once all files are entered into computer storage.
**Includes value of bottomland conveyed by exchange.
***Includes CPC 'pump storage' lease.

(Total monies collected to date approximates $1,557,074.00

TABLE 1

twenty officers is planned. It is estimated that currently 20-30 percent of field officers time is spent dealing with wetlands, inland waters, and Great Lake programs. This percentage is somewhat higher than usual due to the record high water levels in the Great Lakes. These employees must process and administer the 6,000-7,000 applications estimated to have been received in 1985. This number is also somewhat high due to the water levels. The program is funded out of general funds and funds received from the federal government under the Coastal Zone Management Act (CZMA) of 1972. The funds received under CZMA have been quite important to the functioning of the program.

Another problem has been the determination of Great Lake shorelines in 1837, the time Michigan achieved statehood. Michigan has relied on a variety of methods to determine this shoreline: the original meander lines from government mapping done between 1815 and 1858, aerial photos, dating trees, and common sense. These techniques are used primarily to discover filling of lakebed. The state has adopted a statutory ordinary high-water mark to be used in determining the boundary between bottomland and riparian upland. These levels are based on international Great Lakes datum of 1955. A related problem is that of land grants made prior to United States possession of Michigan. A number of grants made by the French when they controlled Michigan included portions of Great Lake submerged Land. The courts have respected the title transfered with these grants.

Lastly, Great Lakes dredging is under regulatory control in Michigan. When inland channels are created by dredging, the beds remain in private ownership (unlike Minnesota), although the newly created waters come under state permit authority. Michigan also encourages the development of inland

marinas or facilities since such facilities do not impinge upon navigable waters and are less costly to maintain.

WISCONSIN

The submerged lands Wisconsin acquired in 1848 when it gained statehood are considered to be public trust lands and cannot be disposed of. Three entities are involved in the management of these lands in Wisconsin. The Board of Commissioners of Public Lands can lease state-owned bottomlands to riparian owners, the legislature can grant submerged lands to municipalities, and the Department of Natural Resources regulates the filling and dredging of these lands. Thus, Wisconsin has a management program, although not a very coordinated one.

The Board of Commissioners of Public Lands administers two types of leases: a municipal lease and a commercial lease. Municipal leases are issued to municipalities at no cost and are primarily used for establishing marinas. The marinas are established and managed either by the municipalities themselves or by private companies by agreement with the municipality. In both cases, all economic benefits from the operation of the marina are captured by the municipalities. The commercial leases require some fee, but they usually are not very expensive. In the past, the leases were based on a flat rate, e.g., $150 per year for a fifty year lease, but more recent leases have been based on a percentage of some estimate of the value of the land. Examples of such commercial leases include the ore docks in Superior and coal unloading facilities along the Mississippi River. According to Wisconsin personnel, the state has no coordinated policy, rather they deal with things on a case-by-case basis.

For instance, the last commercial lease was issued in 1983. The leasing program generates some revenue, but not very much. Wisconsin has not issued many leases and estimates that there are probably many activities taking place on state submerged lands without a lease.

The legislative role in submerged land management is similar to that of the Board of Commissioners of Public Lands in issuing municipal leases. The legislature can grant submerged lands to municipalities to develop in some manner, with the municipalities capturing the economic benefits. The DNR role in the management process leads to some of the coordination difficulties in Wisconsin. A potential lessee must obtain any necessary permits for submerged lands development or use (e.g., dredging or filling) before approaching the Board of Commissioners of Public Lands to obtain a lease. This makes the leasing action appear to be almost after the fact, a mere technicality.

CALIFORNIA

California has one of the largest and most complete submerged lands management programs in the country. The program has been in existence for approximately fifty years. Much of the involvement and direction of the management program has been dictated by the state courts in California. California has a strong public trust doctrine and has not disposed of submerged lands since 1903. The management program, administered by the State Lands Commission, employees seventy-two persons to manage submerged and filled submerged lands and another eighty-five persons for minerals management (predominantly oil and gas). The oil and gas leases currently generate approximately $500 million a year in revenue for the state while

the other aspects of the management program generate approximately $1 million annually. The state still permits filling some state-owned submerged lands, but this filling must be for purposes to further the public interest and be water-oriented (i.e., filling for fish canning facilities, hotels, or marina offices are allowed, but filling for residences or general office space is not allowed).

California issues four types of leases or permits that can apply to submerged lands: a general lease, a general permit, a private recreational pier permit, and a salvage permit. The general lease is used for commercial, industrial, and right-of-way purposes. The lease fee in these instances is either 9 percent of the appraised value of the leased land, or 5 to 12 percent of the gross annual income of the activity. Marinas are treated as a commercial use and currently lease rates are based on 25 percent of the gross annual income. The average annual lease fee of 24 marinas in the early 1980s was $22,500. General permits are used for public agency uses, protective structures, and non-income producing structures. These permits require a processing charge and may include an annual rental fee of 9 percent of the appraised value of the leased land. This rental fee may be waived if the State Lands Commission determines that a statewide public benefit accrues from the permitted activity.

Free permits (i.e., no annual rent) are issued to littoral owners for docking and mooring boats under the private recreational pier permit program. Finally, the fees for salvage are $25.00 per acre for the salvage site and 25 percent of net salvage value up to $25,000 and 50 percent of all such value over that amount.

TEXAS

Like California, Texas has an extensive submerged lands management program. The Texas program deals with marine water--waters under the Gulf of Mexico and rivers up to the point they are affected by the ebb and flow of the tide. The vast majority of this acreage is managed for the benefit of the state's public school trust fund. The state General Land Office administers the program and is aided by the School Land Board in determining the fees to be charged for leases and permits. These two entities recently revised the Texas fees. These revised fees, which took effect June 17, 1983, are given in Table 2. Even a casual glance at this table indicates the sophistication of the Texas management program. Again, however, its coastal nature limits its relevance to a potential Minnesota program.

TABLE 2

	Filing Fee	Annual Fee	Term
COASTAL LEASE			Negotiable
No fee public use	$5.00	no charge	
No fee nonprofit organization	$5.00	negotiable; $5.00 minimum	
Fee for public use or nonprofit organization	$50.00	negotiable percent of revenue or coastal easement rate; $100 minimum	
STRUCTURE REGISTRATION			
Private/Noncommercial pier or dock less than 100 ft. long and 25 ft. wide requiring no dredging or filling	$5.00	no charge	perpetual
COASTAL EASEMENT			
Piers/docks			
Private/noncommercial	$5.00	no charge	5 years

101-300 ft. long and less than 2500 sq. ft.			
greater than 300 ft. long and/or greater than 2500 sq. ft.	$50.00	$.10/sq. ft for all area exceeding 300 ft. long or 2500 sq. ft.; $100 minimum	not to exceed 5 years
Public	$5.00	no charge	negotiable
Commercial	$50.00	$.20/sq. ft. or negotiable; $100 minimum	not to exceed 5 years
Breakwater, Jetty and Groin			
Private			
less than 300 ft. long	$5.00	no charge	5 years
greater than 300 ft. long	$50.00	$.10/sq. ft.; $25 minimum	not to exceed 5 years
Commercial	$50.00	$.20/sq. ft. or negotiable; $100 minimum	not to exceed 5 years
Public	$5.00	no charge	5 years
Wharf	$50.00	$.30/sq. ft. or negotiable; $100 minimum	not to exceed 5 years
Dredging			
Mineral interest holder	$50.00	$.02/sq. ft. for first year and $.005/sq. ft. for remaining years; $100 minimum	1-5 years
private activity	$50.00	$.03/sq. ft. for first year and $.005/sq. ft. for remaining years; $100 minimum	1-5 years
commercial activity	$50.00	$.04/sq. ft. for first year and $.005/sq. ft. for remaining years; $100 minimum	1-5 years
public agencies	$5.00	no charge	not to exceed 5 years
Marina			negotiable
Clear Lake	$50.00	$3.60/lin. ft. of boat slip or negotiate for value of specific use	
other	$50.00	$2.88/lin. ft. of boat slip or negotiate for value of specific use	

FLORIDA

Florida initiated a comprehensive leasing program for submerged lands in 1970. The program "grandfathered" existing and past users, requiring only new commercial users to obtain permits. Originally, all uses were charged at the rate of $.02 per square foot per year. The Bureau of State Land Management soon realized that such a fee structure was arbitrary and has spent a number of years attempting to develop a more sophisticated fee structure. During that time the general fee was increased by the Board of Trustees of the Internal Improvement Trust Fund, first to $.037 per square foot and later to $.045 per square foot per year. The state has since devised a lease fee formula based on both land appraisal and area encumbered:

$$\text{Annual Fee} = \frac{\text{Appraised value of unimproved uplands}}{\text{Upland area } (Ft^2)} \times \text{Lease Area } (Ft^2) \times .35 \times .12$$

.35 - division of rights between State and owner of riparian uplands

.12 - rate of return

This fee has not been employed in all areas of Florida because it greatly increased the fees in some areas. Florida also examined the idea of charging a percentage of income fee in their marina leases, but rejected the idea due to the unacceptably high costs involved in auditing the income reports filed by marina owners.

NEW YORK

Submerged lands management in New York is primarily administered by the Land Management Office of the General Services Department. The situation in New York is complicated by a weak public trust doctrine and

the existence of colonial grants of submerged lands to municipalities. The weak public trust doctrine allows for somewhat more extensive disposal of submerged lands while the colonial grants limit state powers over submerged lands management in some locations.

The state has an easement and grant program, mainly for tidal areas, to quiet or transfer title of submerged lands that have been filled. Only riparian owners can purchase the submerged land adjacent to his or her property. Right-of-ways crossing submerged lands require a fee of $9.45 per linear foot with leases issued for twenty-five to fifty year periods. Marinas are handled in one of two ways. If the marina consists of floating docks, no lease is needed; this is recognized as a riparian right. If the docks are not floating, a lease is required and the fee is 25 percent of the appraised upland value of the land adjacent to the marina. Leases for other commercial/industrial facilities are also leased using this method. A relatively new development, dockominiums--long-term exclusive use slip agreements--are granted easement with fees based on a percentage of upland value and a per slip unit value. Current prices average approximately $60 per year per slip on a twenty-five year lease. The Department of Environmental Conservation also administers a leasing program for aquaculture uses, primarily shellfish production.

NORTH CAROLINA

North Carolina is in the process of developing a submerged lands management program for its tidal lands. The state granted the submerged lands under inland navigable waters to riparian owners. The Attorney General's office is involved in quieting title to approximately 10,000 submerged lands claims filed by 1965 (the cut-off date for making claims).

Approximately 60 percent of the claims have been examined, and the state has accelerated the process in order to complete this aspect of the program. At present, there is no management program for tidal lands; no fees are charged for occupied bottoms except for exclusive shellfish use. An executive task force on submerged lands has recommended that the issue be further studied by the legislature, and it is hoped that this study will lead to a management program.

SOUTH CAROLINA

Like their neighbor to the north, South Carolina does not have a comprehensive submerged lands management program, but they are in the process of developing one. The only leasing authority that now exists is for shellfish exploitation and phosphate mining (for which no leases have been issued in over twenty years). The South Carolina Coastal Council, however, has conducted a number of studies on submerged lands management and hope to have an approved leasing program for commercial activities in approximately two years.

WASHINGTON

The State of Washington employs a complex appraisal process in determining the fees it charges for its submerged lands leases. The submerged lands are appraised based on a method incorporating (1) market data for similar properties, (2) the estimated future income which could be obtained from the property, (3) substituting similar data for uplands for unattainable data on submerged lands, (4) the contribution of upland

properties to the values of submerged lands, and (5) extending the value of adjacent upland property to submerged lands. Once these components are examined, an appraised value for each specific property is determined. The lease fee is then set at 10 percent of the appraised value for leased submerged lands.

OREGON

Oregon has had a submerged lands leasing program since 1907. The program today, administered by the Division of State Lands, is based on a competitive bid system with a minimum value set via appraisal in case there is only one bidder for a specific tract. Except for those lands to be offered for sale, lands involving easement, or lands involving riparian ownership, lands may be leased only to the highest bidder. Before leases are granted, the Division evaluates the potential impacts of the lease on factors such as health, safety, recreation, aesthetics, pollution, wildlife. and navigation. Public hearings are held when the lease site or activity is deemed controversial.

Riparian owners have special privileges in Oregon. They have the right of first refusal on all leases and can often acquire leases at the minimum fee. Additionally, the riparian owner can then sublet this property and earn a profit on the transaction. The minimum rates (as of 1982) vary with use with an absolute minimum of $150 per lease. For log handling and storage sites, the minimum fee is $150 for the first acre and $90 per additional acre. Leases designed to extend adjacent uplands (e.g., restaurants or shops built on piles over the water) include a minimum calculated by multiplying the number of acres times six percent of the per

acre value of the adjacent uplands. Water-dependent uses, such as marinas or large private docks, have a minimum fee of three percent of the potential occupancy times the annual average occupancy times the slip or moorage fees. Lastly, new or miscellaneous uses have two minimum fees determined based on state appraisal. It should be noted that these minimum fees (and the formulas used in determining them) are under review and substantial increases are expected.

LOUISIANA

The Division of State Lands in the Louisiana Department of Natural Resources has recently begun a submerged lands management program. The program is fairly basic with any structure (e.g., wharf, commercial pier or dock, marina) charged a lease fee of $100 for the first 500 square feet and $.10 per square feet for additional square footage.

VIRGINIA

In the Commonwealth of Virginia the Environmental Division of the Maring Resources Commission administers the submerged lands management program. The program originally relied upon a leasing system in which fees were set based on appraisals. This method was abandoned, however, due to the inexperience of appraisers in valuing this type of land. In its place the Virginia program employs a range of royalties, specific fees depending on the specific project. The royalty system is as follows:

	One-Time Charge	Annual Rent
Commercial Pier or dock	$.10-.30/sq. ft.	$.01-.03/sq.ft.
Public Pier or dock	$.05-.20/sq. ft.	$.005-.02/sq. ft.
Wharf	$.30-.70/sq. ft.	$.03-.07/sq. ft.
Channel or ship basin	$0-.05/sq. ft.	$0-.005/sq. ft.
Breakwaters, Groins and Jetties	$0-.20/sq. ft.	$0-.02/sq. ft.

In 1982 this program generated approximately $750,000, all of which was used to fund the Oyster Replenishment Program.

SUMMARY

As this brief survey indicates, the range and sophistication of submerged lands management across the country varies greatly, from the more advanced programs like California to the nascent programs of North and South Carolina. The characteristics of each state--geologic, hydrological, legal, etc.--are different, something that is reflected in the respective programs. This does not suggest that Minnesota can learn nothing from these programs; quite the contrary. Minnesota could, and should, analyze the structure of some of the programs from other states. This analysis should determine which methods might be most suited to the needs determined to be important in Minnesota (e.g., income generation or resource protection). Also, the analysis should focus on historical aspects of programs so that Minnesota might be spared the difficulties previously endured by other states. One advantage Minnesota enjoys in getting a late

start in the submerged lands management area is that it can learn from the experience of others and apply this learning in creating an excellent management program.

Sources: Discussions with and documents from the Michigan Department of Natural Resources, Summer 1985.

South Carolina Coastal Council, The Programs of Coastal States for the Leasing of Submerged Lands, 1982.

Texas General Land Office, Analysis of General Land Office Fee Assessment Process, 1982.

V. FUTURE POTENTIAL FOR THE MANAGEMENT OF SUBMERGED LANDS IN MINNESOTA

IDENTIFYING STATE-OWNED LANDS

As should be clear by now, no one really has a good handle on the extent of state ownership of submerged lands in Minnesota. Thus one of the first steps in any management program would be to develop a through listing of submerged lands owned by the state: lands acquired from the federal government at statehood, lands acquired by purchase, and lands controlled by the state under riparian doctrine.

The first step in this identification process would be for the DNR (a submerged lands management structure within the DNR will be discussed below) to thoroughly examine the waters of the state and prepare a listing of those submerged lands which the DNR considers the state to hold title to. Such a list could be generated by consulting a number of sources. The St. Paul District of the Army Corps of Engineers listing of waters considered navigable waters of the United States in Minnesota would be a good point of departure. This listing includes a number of bodies of water obviously considered navigable in 1858, e.g., the Mississippi River and Lake Superior. Historical evidence could be examined regarding less obvious bodies of water to determine if they were navigable in 1858. This Corps listing contains all past, present, and future navigable waters in Minnesota connected to an interstate or foreign commercial highway. Thus the listing produced based on this Corps list should contain a large amount of the state's navigable waters in 1858.

Determining what waters were intrastate navigable waters in 1858 will prove to be more difficult. The DNR will need to consult the present

listing of protected waters recently completed by the Waters Division, original General Land Office (GLO) maps of Minnesota, and additional historical evidence. The listing of public waters is much more inclusive than a listing of navigable waters, so while it will include many non-navigable waters it is sure to include all navigable waters. One limitation of the protected waters listing is that it is a historically-bounded list: it only includes the present waters of the state. Since title transfer occurred in 1858, the waters of the state in 1858 must be examined.

Perhaps the best way to determine candidates for inclusion on the 1858 navigable waters list would be to examine the original maps of the territory and state done by the GLO. These maps would probably include most, if not all, waters considered navigable at statehood. These maps would include lakes which have since been drained and original river courses, both potentially important in future ownership disputes. For example, the Holt State Bank Supreme Court case involved title claims to Mud Lake which had been drained and uncovered. Also, if rivers change course by means of avulsion, ownership of the bed remains unchanged, i.e., if the river is a navigable water then the state retains ownership to the original bed and the new bed is owned by those who held title to the lands prior to the avulsive shift. In addition to these GLO maps, other historical evidence must be consulted to determine whether potentially navigable waters were in fact used for navigation or had the potential to be navigated. In any court case to determine title, historical evidence will play a critical role in the judge's decision.

A final source to be consulted are past court cases and Attorney General decisions in Minnesota regarding the navigability of specific

waters. As discussed above, the courts have already declared Longyear Lake, Syracuse Lake, Mud Lake, and Lake Minnetonka as navigable and Five Lake and Rabbit Lake-Rabbit River as non-navigable. Similarly, the Attorney General declared the St. Louis and the Cloquet Rivers navigable in 1894 and Lake Minnetonka and the upper portions of Minnehaha Creek navigable in 1945.

To complete the process, state title records should be examined to determine state ownership of submerged lands based on acquisition or riparian ownership. When this has been accomplished, a comprehensive listing of all the submerged lands owned by the state of Minnesota will exist. The management program to be developed will then be applied to these lands.

As the reader must realize by this time, legal challenges to such a listing of submerged lands title claims, many based on claims of navigability in 1858, are sure to be mounted. These cases should be dealt with as they arise, unless the state or the DNR determines it to be in its best interest to instigate a priori legal proceedings in a few important instances to quiet title to certain submerged lands tracts. In any legal proceeding the DNR will join forces with the Attorney General in an effort to demonstrate navigability (or the potential for navigability) in 1858. (Due to the cloudy nature of state title to submerged lands acquired from the federal government at statehood, it is probable that most of the court cases will involve title to these types of lands--as opposed to those acquired by purchase or riparian submerged lands.) It must be emphasized that the court's decision is the ultimate determinant of navigability. As the Corps of Engineers regulations state,

> Precise definitions of "navigable waters of the United States"; or "navigability" are ultimately dependent on

> judicial interpretation, and cannot be made conclusively by adminstrative agencies (33 CFR Section 329.3).

The number of legal challenges will probably be highest immediately after management begins on the comprehensive list of submerged lands. After this initial series of cases to clarify title to these lands, judicial activity in this area should decrease dramatically.

A potential problem in this area is clarifying title disputes with the federal government. In 1972, the Quiet Title Act (28 U.S.C. Section 2409a (f)) became law. This act waived the federal government's immunity from lawsuites involving land disputes brought by either private parties or states for a period of twelve years after it "knew or should have known" about the federal claim. The states did not think that this twelve year limitation applied to them, but the Supreme Court ruled otherwise in Block v. North Dakota, 103 S. Ct. 1811 (1983). This ruling has made the act essentially useless to the states.

Prior to the passage of the Quiet Title Act, suits against the federal government were barred without its consent. Thus the only way to settle title disputes between a state and the federal government was for the federal government to file suit against the state or for the federal government to agree to let a state file suit against it. This method has been useful in some instances, e.g., United States v. Utah (1930) and Utah v. United States (1971), but it is obviously not useful in instances where the federal government does not wish to clear up title disputes. The twelve year limitation serves to effectively block the states from suing the federal government under the Quiet Title Act because most of the title disputes stemmed from sovereignty lands acquired from the United States upon statehood. Included in this group of lands are the submerged lands under navigable waters. As it stands, Minnesota and other states cannot

initiate title dispute settlements with the federal government without the agreement of the federal government. The states are currently working to amend the Quiet Title Act so that the twelve year limitation would not apply to the states.

ESTABLISHING A MANAGEMENT PROGRAM

Two bodies are central to the establishment of a submerged lands management program: the DNR and the legislature. The DNR would design, implement, and administer the program while the legislature would supply the necessary, though perhaps superfluous, statutory authority to create such a program.

The first step within the DNR is to determine or create an entity which would be responsible for a coordinated and comprehensive submerged lands policy. As discussed above, three agencies in the DNR are currently involved in some aspects of submerged lands management--the Land Bureau, the Minerals Division, and the Waters Division. A study group or task force on submerged lands management should be created from these agencies, with representatives from the Commissioner's office and perhaps the Attorney General's office. The mission of this study group would be twofold: to determine the direction and the substance of a submerged lands management program and to determine the operational structure of such a program.

The existence of this report reflects what is assumed to be dissatisfaction with the current state program in this area. Thus, it is assumed that the study group will recommend that a number of changes and expansions in state policy be made. The study group will have to examine

past practices and determine if changes in these practices are needed. They will also need to determine what aspects the program will address and focus on--resource protection, revenue generation, title clarification, etc. (A discussion of the substance of a potential submerged lands management program is presented in the following section.) Once the study group produces a substantive program that they feel will best satisfy state goals and needs, this tentative program should be evaluated by the Commissioner's office. If satisfactory at that level, the study group should determine what, if any, legislation is needed to implement the program. The legislation should be drafted and passed on to sympathetic legislators.

The study group must also determine how the submerged lands program will be organized and administered within the DNR. It is not recommended that a new bureau or agency within the DNR be formed since much of the program will involve increased coordination of existing programs, and due to the existence of expertise in management areas in already existing bureaus and divisions. The best structure may be a permanent submerged lands group which would include members from the Land Bureau, the Minerals Division, and the Waters Division. This group would be composed of the persons in the three parts of the DNR who dealt with submerged lands. From the Land Bureau the persons responsible for issuing leases to marinas or quieting title on filled lands would be included. Minerals Division representatives would include anyone responsible for considering any leases on submerged lands. And finally, the persons in the Waters Division who deal in Public Waters Administration would be part of the program group.

Certain details about the functioning of this group would need to be worked out by the study group. Some meeting schedule must be decided upon.

At the start of the program, the permanent group should probably meet at least once a week so that the different divisions familarize themselves with the workings and personnel of the other branches and the program itself. After an initial period, and the establishment of structured communication channels, the frequency of these meetings could be reduced to perhaps once a month. The study group will also have to determine some type of executive structure within the permanent submerged lands group. This could be as simple as appointing a chairman and vice-chairman who could be replaced as needed by the Commissioner. A final detail to be considered is the need for and location of any additional employees necessitated by the submerged lands program. Additional employees will probably be needed to aid in the listing process (discussed above) and in the administration of a new comprehensive program. It might also be wise to hire a secretary or clerk to handle and direct inquiries and applications exclusively for the submerged lands group.

The legislature will also probably play a major role in the adoption of a new submerged lands program. It is debatable whether the DNR needs legislative authority to implement a managment program. The lands to be managed are owned by the state and are arguably under DNR jurisdiction at present. Due to the size, scope, and potential public impact of such a program, however, it would be wise to gain legislative cooperation and consent. As discussed above, the DNR study group should draft what it considers to be needed legislation and have it introduced in the legislature. At the hearings that would follow, the DNR should make every effort to explain the program and the need for its adoption. Hopefully, the legislature will react favorably and pass the necessary legislation. If they fail to do so, two options are available. The first is to abandon the program and return to status quo management. Such an option, however,

would be irresponsible from both a resource management perspective and a public trust perspective. The second option would be to implement the program, either wholly or partially, without legislative approval. Such an approach could lead to lawsuits by private citizens challenging the validity of the new program, and legislative ire. The legislature may then choose to act on submerged lands, but it may be to legislatively dismantle the DNR program. Thus, if the legislature does not pass the needed legislation the DNR could be caught between the proverbial rock and a hard place. If it did not act, it would be neglecting the public trust and be liable to lawsuits because of it. If it did act, it would be acting without legislative assent (at the least) or needed authority (at the most) and would be vulnerable to lawsuits or legislative attack. It is thus apparent that the DNR must attain legislative approval of this program.

One area which should be addressed by the legislature is the public land classification status of the submerged lands. While stated no where explicitly, submerged lands acquired in 1858 are now managed as part of school trust lands (discussed in greater detail below). The legislature should make it clear that these lands are or are not school trust lands. If they decide to continue to manage these lands as part of the school trust, the legislature should also address the issues of disposal of title to lands filled in the past, lands to be filled in the future, and any land exchange. Lastly, the legislature should play an active role in determining the structure of a leasing program.

One final group to be consulted in the establishment process is the federal government. As discussed above, any change in the status quo regarding submerged lands management should be discussed and coordinated

with the Army Corps of Engineers. It is doubtful that the state submerged lands program would conflict with Corps regulations or its mission.

Another organization within the federal government may be of some help in financing the state program: the Office of Coastal Zone Management in the National Oceanic and Atmospheric Administration. In 1972, the Coastal Zone Management Act (16 U.S.C. Section 1451 et seq) became law. This act provided federal funds to coastal and Great Lakes states to assist the states in developing and administering management plans in their coastal zones. Funding was available to cover planning, administration, resource management improvement, and other areas, with the federal government covering up to 80 percent of state expenses. Planning funds were available through 1979; other grants are still available but a state must have a federally approved program to be eligible to receive these grants. Minnesota does not have such an approved program. Efforts to develop and adopt a program were scuttled due to political opposition along the shore of Lake Superior. The Coastal Zone Management Program is still functional, however, and a coastal program for Minnesota could still be approved. If such an event occurs, Minnesota would be eligible to receive approximately $500,000 per year for planning, administration, and construction projects incorporated in its program. As mentioned above, Michigan incorporated submerged lands management into its coastal zone program and uses this federal funding to finance much of its program. A similar path could be followed in Minnesota.

SUBSTANTIVE CONSIDERATIONS OF A SUBMERGED LANDS PROGRAM

While considering the substantive areas to be addressed by a submerged lands program, four themes should be kept in mind: (1) what trade-off

should the program make between resource protection and economic development?, (2) what is the importance of revenue generation in the program?, (3) how should the program be coordinated?, and (4) should the program be used to stimulate resource enhancement? A disucssion of these themes follows the consideration of the substantive areas of the program below.

A comprehensive submerged lands program must address a certain core of issues. At a minimum, the program must deal with quieting title to submerged lands claimed by the state, a leasing program, future disposal of submerged trust lands, future filling of submerged trust lands, and the dredging of submerged lands.

The first concern that a submerged lands program must address is quieting title to submerged lands claimed by the state. This aspect of the program follows directly from the identification and listing process discussed above. Once the state has identified submerged (and drained) lands it claims title to, a considerable number of title disputes will develop. Title problems will result in areas where riparian owners claim title to lake or river beds because the lake or river is non-navigable, where riparian owners have filled, or possess, lands on state-owned submerged lands, and where 1858 navigable waters have been drained and occupied without title from the state. The first type of dispute--ownership based on navigability--will probably be dealt with via the courts in a manner similar to the cases discussed in previous sections.

The second and third variety of title disputes will be more complicated. Boundary determination will be one major problem. Boundaries of the original water bodies must be determined so that fill areas and drained areas can be identified. This will be a difficult and

time-consuming process that will involve studying original General Land Office maps, aerial photography, and satellite photography. It should be noted that meander lines do not identify the boundaries of navigable waters. The courts have ruled that meander lines are not precise enough to be used in settling title claims for submerged lands under navigable waters. More recent fills may be identified from the permit records of the Corps of Engineers and the Waters Division.

Once the DNR has identified these filled lands on state-owned submerged lands, three options are available to the state to settle these title disputes: the person(s) occupying the filled site would have to buy it from the state, the occupants would have to vacate the property and remove the fill, or the occupants could obtain title from the state by acquiring and transferring to the state other properties desired by the state.

The first option appears to be the most straightforward way to handle the problem. It is, however, much more complicated than it appears on the surface. One major difficulty involved is determining the value of the submerged land that was filled. The value of the land filled is much greater than when it was submerged. Any program must determine how upland owners will be assessed for their filled lands. The assessment could be based on the value of submerged lands, or on the value of adjacent upland. It must also be determined what percentage of the appraised value will be charged. In Michigan, for instance, those occupying lands filled prior to the exactment of the Great Lakes Submerged Lands Act are required to pay 30 percent of the value of the filled bottom land. The determination of such a fee schedule required a trade-off between the goals of revenue generation and simple title clarification.

A second major difficulty involved with a potential disposal system is based on the restricted sale of trust lands in Minnesota. While it is not stated explicitly in the Constitution or the statutes, the submerged lands under navigable waters are considered to be part of the school trust lands. In 1909 the state legislature directed that proceeds from the sale of minerals from the beds of navigable waters be deposited in the Permanent School Fund (PSF) (Minnesota Statutes 93.07). Similar legislation regarding prospecting permits (MS 93.08) and iron ore exploitation (MS 93.356) was passed in 1935 and 1943. Additionally, DNR regulations for utility right-of-ways (Minnesota Rules 6135.0100 - 6135.1800) and sand and gravel mining (DNR Rules 114) direct proceeds to be deposited in the PSF. This statutory evidence suggests that these submerged trust lands are to be considered as school trust lands.

Lands that are part of the school trust lands may be sold only under certain restrictions: "No portion of these lands [school trust lands] shall be sold otherwise than at public sale, and in the manner provided by law" (Minnesota Consitution, Article XI, Section B). Thus, occupants of filled submerged trust lands would only be able to acquire their lands through a risky public auction. If they have placed improvements on these lands they are somewhat protected by state law. If the present occupant is not the high bidder for the property, the high bidder must pay the appraised value of the improvements to the former owner at the time of the sale, in full (MS 92.06, Subdivision 4). This subdivision serves as a strong disincentive to non-occupant bidders. Nevertheless, based on present circumstances there is no guarantee that present occupants could successfully gain title to the filled submerged trust lands. Such a

guarantee could only come by way of the legislature or the courts (e.g., ruling submerged trust lands not to be part of school trust lands and thus exempt from the sale restrictions).

The second option for dealing with occupants of filled submerged trust lands would be to have the occupants vacate the land and remove the fill. This option is somewhat drastic, bound to be politically unpopular, and would often work against the interests of the state. In most instances, this option would simply penalize the occupant without greatly benefiting the state. The state could usually be better served by receiving cash payment for the filled land, or receiving additional properties via exchange (to be discussed below). Under some circumstances, however, removal of the fill may prove to be in the public interest. Examples of such circumstances include areas of great value to fisheries and wildlife and areas valuable for recreation.

The final possible method to settle these title questions is land exchange. The state could transfer title to the occupant of the submerged trust land in exchange for lands desired by the state. This process, however, is also very complicated. Land is classified as either Class A, Class B, or Class C. Class A lands "include school, swamp, internal improvement, and other land granted to the state by acts of congress . . ." (Minnesota Statutes, Section 94.342 Subdivision 1). While submerged trust lands are not mentioned explicitly, all other types of trust lands are and it may be deduced that submerged trust lands are Class A lands. Class C lands include lands which may be exchanged only with certain restrictions, specifically:

> No land bordering on or adjacent to any meandered or other public waters and withdrawn from sale by law shall be given in exchange unless expressly authorized by the legislature or unless through the same exchange

> the state acquires land on the same or other public waters in the same general vicinity affording at least equal opportunity for access to the waters and other riparian use by the public (Minnesota Statutes, Section 94.342 Subdivision 3).

Again, submerged trust lands are not referred to explicitly and some ambiguity exists as to whether they could be classified as Class C lands. Such ambiguity, regarding both Class A and Class C classifications, could only be resolved by either legislative or judicial action.

The conditions for the exchange of Class A lands are rather involved (Minnesota Statutes, Section 94.343): the land "shall be exchanged only for land of at least substantially equal value to the state"; "Before giving final approval to any exchange of Class A land, the board [Land Exchange Board] shall hold a public hearing thereon at the capital city or at some place which it may designate in the general area where the lands involved are situated"; "No exchange of Class A land shall be consummated unless the attorney general shall have given his opinion in writing that the title to the land proposed to be conveyed to the state is good and marketable", and "Land received in exchange for Class A land shall be subject to the same trust, if any, and shall otherwise have the same status as the state land given in exchange." Currently an exchange of Class A lands takes approximately one year from start to finish.

A significant reliance on land exchange to dispose of title disputes stemming from filled submerged trust lands would overwhelm the current system. If the exchange process is to be utilized, additional staff would be required and special procedures (e.g., public hearings involving a number of exchanges) should be adopted to expidite the process.

An additional complicating factor in identifying submerged lands ownership is the fluctuation of water levels. This factor has been discussed to some degree earlier (see the discussion of accretion, erosion,

and reliction in section I), but in certain instances, water levels may fluctuate to such a degree that some level should be set as the official level for determining submerged lands ownership. Such an approach has been adopted by Michigan, which uses the water levels based on international Great Lakes datum of 1955. Minnesota may wish to establish such levels for reasons of ownership on water bodies that fluctuate often.

A second essential area that must be addressed by the program is leasing. A leasing program should address such submerged trust land uses as marinas, right-of-ways, industrial facilities, and minerals exploitation. Any leasing program must consider four questions: (1) what areas will be available for leasing?, (2) what purposes may areas be leased for?, (3) what rates will be charged for these uses?, and (4) how will the program be enforced and administered? (to be discussed in the next section).

With some important exceptions, it is probably not wise that the DNR analyze all of the state-owned submerged lands and classify it for potential uses at the outset of a program. Rather, it is suggested that the DNR focus on determining the scope and purposes of leasing in critical environmental, economic, and resource areas first, and deal with non-critical areas as applications arise. Examples of critical areas to be analyzed include submerged trust lands under or adjacent to productive wetlands (e.g., Minnesota River Valley), Duluth harbor and the St. Paul riverfront, and areas known or suspected of containing significant minerals deposits.

Submerged lands leasing programs in other states have employed one of five methods to determine lease fees, or some combination of the five methods: (1) appraisal, (2) bidding, (3) fixed value rate, (4) revenue

taxation, or (5) free leasing. Each of these methods has certain advantages and disadvantages. The appraisal method allows flexibility in that fees will be determined on a site-specific basis. This technique will also serve to maximize income to the state from valuable sites and should encourage optimal management by the lessee. The appraisal method has two major drawbacks. First, it is costly. Additional staff must be hired (or contracted) to undertake an appraisal for each perspective lease. And second, due to the relative novelty of major interest in submerged lands development, the appraisal expertise to accurately value these lands is not very well developed. (The state of Washington, however, has developed an appraisal technique for submerged lands which employs market data, future income stream, substitution, shore contribution, and extension).

The bidding technique seeks to utilize the attractive features of free-market capitalism in determining lease fees. Competitive bidding, the argument runs, allows the market to determine the optimal price for the land (i.e., an automatic appraisal); this method will maximize economic efficiency and the revenues received by the state. The problems associated with competitive bidding tend to duplicate the problems of any free market in a complex society: imperfect information, market entry and exit restrictions, monopolies, etc. In addition, the competitive bidding process requires at least two parties interested in acquiring the same tract of land to be useful; otherwise the state will lease the land at a minimum price, similar to the fixed rate method discussed below. In Minnesota, the Minerals Division employs a competitive bidding system to issue prospecting permits. It also charges its lessees based on both royalties (revenue taxation) and a fixed rate.

Revenue taxation offers the advantages of being easy to administer and being flexible to the land use. Unlike appraisal or competitive bidding, this method would not require setting a specific rate for each lease; a taxation rate (e.g., eight percent of gross revenue generated on the site) would be set administratively and applied to each lessee. This method would also provide lease fee and return flexibility in that more profitable activities would pay higher lease fees. The disadvantages of this method are the potential loss of revenues to the state by poor management or accounting manipulation by the lessee and the potential difficulty of separating income generated on submerged lands from associated income generated on uplands.

An even simpler method of determining lease fees is the fixed rate approach. A rate is set administratively for either all leased lands, or a separate rate is established for different categories and/or areas of use, and this fee is collected annually (or once per lease tenure). The advantage of this technique is its simplicity. This simplicity carries costs with it, however. A fixed rate lacks the flexibility to charge different rates for different land values. This can lead to inefficient allocation of resources. Also, this technique will fail to maximize state income. The Land Bureau uses a fixed rate method to determine the fees for utility right-of-ways.

The final technique of setting lease fees is not to set any fees: granting free leases. Such a program is useful in that it allows the state to exert and execute its sovereignty over these submerged lands. It also allows the state to achieve some management control of these lands (a goal that can also be achieved through already existing permit programs). The obvious drawback of such a program is that the state does not receive any revenues for the use and exploitation of its lands and resources.

The DNR study group on submerged lands and the legislature should also discuss the merits and possibilities of a hardship exclusion for commercial activities which began before implementation of the submerged lands program and would be caused severe economic hardship by the imposition of any lease fee. This is a complicated question involving issues of equity, employment, and economics. Based upon DNR and legislative thinking, such a hardship exemption may or may not be incorporated into the submerged lands program.

Which of these techniques, or combination of these techniques, should be employed, which uses should be covered by which technique, and the actual rates charged is something to be discussed and determined by the DNR study group on submerged lands and the legislature.

A related topic is whether the state should permit the disposal of any submerged trust lands, except in instances of past filling or presently approved filling. It is recommended that no such disposals take place. Any project involving submerged lands and deemed desirable by the state should be dealt with under the leasing program rather than a sales program. Any disposal of such lands (except in those instances discussed above) would impair future management of the lands adjacent to the disposed parcel and the waters which flowed above the parcel.

A fourth major area that needs to be addressed by a comprehensive submerged lands program is filling. Significant aspects of this part of the program are already addressed by the regulatory programs of the Waters Division. Any filling in public waters currently requires a permit (Minnesota Statutes, Section 105.42), and based on the rules promulgated on this statutory authority, it is a state policy "to limit the placement of any fill material into public waters in order to preserve the natural

character of public waters and their shorelands, and maintain suitable aquatic habitat for fish and wildlife" (Minnesota Rules, Section 6115.0190). It is recommended that this current policy of minimizing fill be continued. Filling that is allowed is limited to such minor private purposes as beach development, erosion protection, and recovery of shoreland lost by erosion. Filling is not permitted "to create upland areas for development or subdivision."

What is currently lacking, however, is some mechanism to recognize that this filling is taking place on state-owned lands (when the fill is to be placed on submerged trust lands). The lands to be filled must either be leased or sold to the prospective permitee, both of which would be complicated transactions. A long-term lease could be granted, but such a lease would have to be renewed periodically. Maintaining records to keep track of the location and status of innumerable fill leases makes the desirability of this option rather dubious. The sale of these lands encounters the problems discussed above regarding the disposal of trust lands. This method would involve the public sale of small tracts of submerged lands to be filled. While this would be a time-consuming and laborious task, once the sale took place the administrative costs to the state would cease. The sale option would involve a one-time rather than multiple state cost. A preferred alternative would be for the legislature to pass an act allowing for the disposal of small tracts (under one acre) of submerged trust lands by direct sale to the riparian owner.

Like filling, dredging and excavating are also currently regulated in public waters by the Waters Division (Minnesota Rules, Section 6115.0200). Three major purposive types of dredging should be considered: public navigation, private navigation, and resource exploitation. The first type

of dredging is that required to maintain sufficiently wide and deep navigational channels. Usually such dredging will be undertaken at the request of the Corps of Engineers or the state of Minnesota. A permit is all that is and should be required for such dredging. Private navigational dredging involves maintaining channels from private marinas, docks, or other facilities to other navigable public waters. This type of dredging should require both permit and fee since the prospective permittee will be altering state-owned submerged lands for his or her private benefit. The state should receive some remuneration for this dredging, based on either the amount of material removed or the extent of the area dredged. Lastly, dredging to recover resources, such as sand and gravel, should be covered under the general mineral leasing provisions to be discussed and determined by the DNR study group and the legislature. Aside from these types of dredging (and other public purpose dredging, such as lake improvement), the state policy "to discourage the excavation of materials from the beds of public waters" should be continued.

Inland excavations to be connected to public waters also can impact submerged trust lands by affecting water levels and necessitating the need for additional public or private navigational dredging. These concerns can be addressed through the current permit process, and any additional dredging required by any approved inland excavation should be treated in the same manner as the dredging discussed above.

A number of additional aspects of a submerged lands management program bear some mention. One such aspect is the question of private dock facilities for riparian owners. It is suggested that the state program guarantee such a right, provided the dock complies with certain established

guidelines. Guaranteeing this private access would reduce any public opposition to the management program and reduce any potential lawsuits by riparian owners.

Three additional topics are important, yet perhaps not as pressing. That is, they need to be addressed but are not essential components to an initial management plan. These topics are the ownership of submerged lands adjacent to Indian lands, underwater parks and reserves, and the salvage of sunken vessels. Legal questions remain concerning submerged lands and Indian lands, questions involving federal establishment of reservations, federal treaties, and the state's role in these questions. These questions include: in treaties signed and reservations created prior to 1858, did the federal government transfer sovereignty of submerged lands under navigable waters to the Indians, or did they reserve these lands for the state? Could the federal government's Indian policies after 1858 in any way impact submerged lands ownership? Did the state at any time transfer ownership of submerged lands to any Indian tribes? These are complicated questions that can only be answered after much time and effort.

The state may also wish to establish state parks on state-owned submerged lands. Such parks could center around shipwrecks or outstanding underwater geological or biological locations. The state could model its park system after the system of other entities, such as the National Park Service, Florida, or Michigan. A policy on the ownership of man-made items sitting on state-owned submerged lands, such as shipwrecks, is also needed. Some period of time should be specified, before which the material could be privately salvaged, after which the material would belong to the state.

Let us now return to the four themes of a submerged land trust program listed at the outset of this discussion. The program must address the

trade-off between resource protection and economic development in some coherent fashion. These two ends are not mutually exclusive and each can best serve the public interest in certain situations. The state must, however, establish at the outset some general policy as to the circumstances and locations in which resource protection is to be maximized, in which economic development is to be maximized, and in which (and how) the two should be balanced.

A consistent policy position on revenue generation must also be contained in any submerged lands program. The state must determine what its main objectives in implementing a management program are: quiet title with minimum controversy, maximize economic return to the state for the use of submerged lands, achieve an active and inclusive state presence in the management of submerged lands, encourage recreational and economic development, or some combination of the above and/or other objectives. A consistent approach throughout the program would make the program more administratively and logically attractive, although it is of course recognized that such an approach may be politically infeasible.

Internal and external coordination must be a strong point of the submerged lands program. It should be designed so that all of the state actors involved have thorough knowledge of the submerged lands activities of the other actors. Within the DNR such coordination may take the form of the permanent submerged lands group and a lease process requiring approval by the Land Bureau, Minerals Division, and Waters Division for all activities on state-owned submerged lands. External coordination might involve a joint leasing-permitting procedure with the Pollution Control Agency and the Army Corps of Engineers (where necessary). Such a procedure would help to maximize coordination and reduce public discontent.

A final theme which should be discussed is whether the submerged lands program should be used to achieve resource enhancement in any way. For example, those seeking title to filled submerged trust lands might have to purchase desirable wetlands for exchange with the state; or in certain cases, fill occupants might be ordered to remove the fill and restore the submerged land to its original condition. This latter example is somewhat drastic and might only be applied in areas of critical environmental significance. The state may or may not elect to achieve resource enhancement through the submerged lands program, but such an option should be considered.

THE IMPLEMENTATION OF A MANAGEMENT PROGRAM

The first issue to be dealt with in implementing a submerged lands program is how to initiate such a program. It is suggested that the program begin by establishing a time period, perhaps a year, during which members of the public who think that they are occupying filled submerged land and those who are operating commercial ventures using state submerged lands, could apply to the DNR to quiet title or receive a lease. During this period the DNR would also be dealing with those wishing to use submerged lands in the future. After this initial one year period, the DNR would begin to actively pursue other occupants and users of state submerged lands so that any title or leasing difficulties could be cleared up.

It is suggested that no "grandfather clause" be included in the program, i.e., all those occupying filled state-owned submerged lands must quiet title and all those operating commercial ventures at the time the program begins must obtain a lease--they should not be excused from the

management program because their activities took place or began before the sumberged lands program was adopted. Any program should be inclusive. Due to the great number of backlogged cases which will have to be processed, it will be many years before the submerged lands program is working on current activities only. Such a delay is unavoidable due to the filling activities that have taken place over a period exceeding 100 years.

The submerged lands program, as discussed above, would be administered by the permanent submerged lands group--the Land Bureau, the Minerals Division, and the Waters Division would each oversee their designated area. Administrative coordination would be achieved by regular group meetings and reports, and a leasing procedure involving approval or check-off by each division.

The program would be enforced by personnel working out of the DNR field offices. To a certain extent, existing personnel would be able to assume these enforcement responsibilities. For example, the Minerals Division has staff to enforce any lease they offer and the Waters Division has staff to oversee its permitting process. There may be some need, however, especially in the Waters Division, to add personnel for program enforcement. The Land Bureau will also need additional employees in the field, both to aid in identifying fill sites and commercial activities on state-owned submerged lands, and to valuate lands for quieting title via sale or exchange. Lands personnel will also be needed to enforce lease conditions, and if leasing is to be based on appraisal, they will be needed to do the appraising.

Two enforcement penalties should be incorporated into a submerged lands program: fines and the threat of legal proceedings. Fines would be used primarily to penalize those pursuing activities which require a DNR

lease (e.g., engaging in commercial activities, filling, or dredging on state-owned submerged lands). Legal proceedings would be used to quiet disputed titles and to gain injuctions where parties are violating aspects of the submerged lands program.

SUMMARY

The state of Minnesota is in need of a comprehensive and coordinated program to manage its submerged lands. The program should be housed in the DNR and administered by a management group including the Land Bureau, the Minerals Division, and the Waters Division. The content of a submerged lands program should be determined by a DNR study group with the input and statutory authority of the legislature. The program must address quieting title to past fill on state lands, a leasing program, future filling, and dredging. The development and initiation of a successful submerged lands program will require some additional employees to identify state-owned submerged lands, and to identify and rectify past and current encroachments.

Sources:

Minnesota Constitution

Minnesota Rules

Minnesota Statutes

South Carolina Coastal Council, The Programs of Coastal States for the Leasing of Submerged Lands, 1982.

United States Court Cases

United States Regulations

United States Statutes

CONCLUSION

The purpose of this report is to introduce the reader to the issue of submerged lands management. Even a casual reading of this report suggests the complicated nature of this topic. For example, this report has focused on the ownership of submerged lands under navigable waters received by Minnesota in 1858. The discussion of this topic is complicated by three major different definitions of navigability employed by different governmental actors: (1) the definition used by the federal government to determine title, (2) the definition used by the Army Corps of Engineers to determine regulatory authority, and (3) the definition used by the state of Minnesota to determine its regulatory authority. This report does not seek to discuss or clarify all of the complexities of this topic, rather it seeks to make the reader literate on the topic--introduce he or she to the history of submerged lands, the management (or lack thereof) of submerged lands in Minnesota today, submerged lands management programs in other states. Following this exposition of information, a preliminary discussion of a submerged lands management program in Minnesota is presented. It should be clear that this discussion is not intended to serve as a program proposal, but rather as a starting point for a more thorough analysis and program formulation. Indeed, this entire report should be viewed as a beginning of the development of a submerged lands management program for Minnesota.

APPENDICES

A. RELEVANT FEDERAL STATUTES AND REGULATIONS

B. RELEVANT MINNESOTA STATUTES AND RULES

C. WATERS IN MINNESOTA REGULATED AS NAVIGABLE WATERS BY THE ARMY CORPS OF ENGINEERS

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16 U.S.C. Sections 1452 - 1453: Coastal Zone Management Act (portions)

33 U.S.C. Section 403: Obstruction of Navigable Waters Generally

43 U.S.C. Section 931: Navigable Rivers Public Highways

43 U.S.C. Sections 1301 - 1315: Submerged Lands Act (portions)

33 CFR Section 320: General Regulatory Policies

321: Permits for Dams and Dikes in Navigable Waters of the United States

322: Permits for Structures or Work in or Affecting Navigable Waters of the United States

323: Permits for Discharges of Dredged or Fill Material into Waters of the United States

324: Permits for Ocean Dumping of Dredged Material

325: Processing of Department of the Army Permits

326: Enforcement, Supervision, and Inspection

327: Public Hearings

329: Definition of Navigable Waters of the United States

330: Nationwide Permits

384: Intergovernmental Review of Department of the Army Corps of Engineers Programs and Activities

APPENDIX B. RELEVANT MINNESOTA STATUTES AND RULES

Act Authorizing a State Government

Act of Admission into the Union

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Article XI, Section 10: Exchange of Public Lands; Reservation of Rights

Section 93.06 : Reservation of Minerals Under Navigable Lakes

93.07 : Disposal of Funds

93.08 : Prospecting for Minerals Under Waters of Meandered Lakes and Streams

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93.10 : Right of Lessee to Prospect for Minerals

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93.12 : Forfeiture of Permits and Leases

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93.34 : Unlawful to Mine Under Public Waters

93.351: Prospecting for Iron Ore in Bed of State Waters

105.37 : Water Resources, Conservation; Definitions--Subdivision 14, "Public Waters"

105.38 : Declaration of Policy

105.391: Waters Inventory and Classification

105.42 : Permits; Work in Public Waters

MINNESOTA RULES

Sections 6115.0150 - 6115.0260: Review of Permit Applications (for activities in public protected waters)

Sections 6115.1000 - 6115.1080: Watercourses

Section 6125.1000: Authority to Issue Permits (for Gold and Other Ores)

Section 6125.1600: Damage to Riparian Owners

Sections 6125.4500 - 6125.5700: Permits and Leases for Marl

Sections 6125.6000 - 6125.7100: Permits and Leases for Sand and Gravel

Sections 6135.0100 - 6135.1800: Utility Crossing of Public Lands and Waters

APPENDIX C. WATERS IN MINNESOTA REGULATED AS NAVIGABLE WATERS BY THE ARMY CORPS OF ENGINEERS

Red River of the North
Red Lake River
Upper Red Lake
Lower Red Lake
Bois de Sioux River
Lake Traverse (including Mud Lake)
Big Stone Lake
Minnesota River (including Lac Qui Parle and Marsh Lake)
Lake of the Woods (including Four Mile Bay, Zippel Bay, Moose Bay, Youngs Bay, North West Angle Inlet, Sand Point Bay)
Rainy River
Big Fork River (including Dora Lake)
Little Fork River
Vermillion River
Vermillion Lake (including Head of the Lakes Bay, Wakemup Bay, Black Bay, Norwegian Bay, Larsons Bay, Big Bay, Daisy Bay, Everetts Bay, Pike Bay, Stuntz Bay, Swedetown Bay, Greenwood Bay, Frazier Bay, Smart Bay, Canfield Portage Bay, Bystrom Bay, Wolf Bay, Nites Bay, Muskego Bay, Waconda Bay, Indian Bay, Rice Bay, Bass Bay, Armstrong Bay, Cable Bay, Mattson Bay, Mud Creek Bay)
Pike River
Kawishiwi River (including Kawishiwi Lake, Square Lake, Kawasachong Lake, Lake Polly, Koma Lake, Malberg Lake, Amber Lake, River Lake, Fishdance Lake, Alice Lake, Insula Lake, Hudson Lake, Lake Four, Lake Three, Lake Two, Lake One, South Kawishiwi River, Birch Lake, White Iron Lake, North Fork Kawishiwi River, Farm Lake, South Farm Lake, Garden Lake, Fall Lake, Newton Lake)
International Boundary Waters Flowing West through Cook, Lake, St. Louis, and Koochiching Counties (including North Lake, Francis Bay, Little North Lake, Little Gunflint Lake, Gunflint Lake, Magnetic Lake, Pine River, Pine Lake, Clove Lake, Granite Bay, Granite River, Gneiss Lake, Devils Elbow Lake, Ambush Lake, Prayer Lake, Morris Lake, Maraboeuf Lake, Saganaga Lake, James Bay, Sea Gull River, Red Rock Bay, Red Rock Lake, Swamp Lake, Cypress Lake, Mud Bay, Knife Lake, South Arm Knife Lake, Toe Lake, Portage Lake, Knife River, Seed Lake, Melon Lake, Carp Lake, Birch Lake, Sucker Lake, Newfound Lake, Moose Lake, Inlet Bay, Basswood Lake, Rice Bay, Wind Bay, Hoist Bay, Back Bay, Jackfish Bay, Pipestone Bay, Basswood River, Horse River (navigable 1 mile upstream), Wednesday Bay, Crooked Lake, Thursday Bay, Friday Bay, Saturday Bay, Sunday Bay, Iron Lake, Peterson Bay, Bottle Lake, Bottle River, Lac LaCroix, Tiger Bay, Boulder Bay, Boulder River, Never Fail Bay, Fish Stake Narrows, Lady Boot Bay, Toe Lake, Snow Bay, North Lake, South Lake, Loon Lake, East Loon Lake, Little Loon Lake, Little Indian Sioux River (navigable 2 miles upstream), Loon River, Little Vermillion Lake, Little Vermillion Narrows, Sand Point Lake, Crane Lake, Grassy Bay, East Bay, Rollick Bay, Rollick Creek (navigable 1 mile upstream), North West Bay, King Williams Narrows, Harrison Narrows, Staege Bay, Browns Bay, Swansons Bay, Namakan Narrows, Namakan Lake, Hammer Bay, Blind Pig Channel, Deep Slough, Randolph Bay, Junction Bay, Hoist Bay, Moose Bay, Moose River (navigable 1 mile upstream), Kabetogama Lake, Old Dutch Bay, Sullivan Bay, Ash River (navigable 2 miles upstream), Blind Ash Bay, Nebraska Bay, Mud Bay,

Daley Bay, Bowman Bay, Irwin Bay, Duck Bay, Tom Cod Bay, Black Bay, Moose Bay, Blue Fin Bay, Lost Bay, Elks Bay, Long Slough, Lost Lake, Kohler Bay, Blind Indian Narrows, Kettle Channel, Rainy Lake, Anderson Bay, Finger Bay, Browns Bay, Kempton Bay, Kempton Channel, Hitchcock Bay, Finlander Bay, Marion Bay, Saginaw Bay, Brule Narrows, Lost Bay, Alder Creek, Olson Bay, Cranberry Bay, Dove Bay, Black Bay Narrows, Tilson Bay, Frank Bay, Tilson Creek, Jackfish Bay, Grass Narrows)

Pigeon River (including South Lake, Rat Lake, Rose Lake, Rove Lake, Watap Lake, Mountain Lake, Fan Lake, Vaseux Lake, Moose Lake, North Foul Lake, South Foul Lake)

St. Louis River (navigable to the mouth of the Embarrass River, including St. Louis Bay, Spirit Lake, Mud Lake, Thomson Reservoir)

Mille Lacs Lake

Rum River

Snake River (including Cross Lake, Pokegama Lake, Groundhouse River, Ann River, Knife River)

Kettle River (including Willow River, Moose River, West Branch of the Moose River, Grindstone River)

St. Croix River (navigable to the mouth of the Namekagon River, including Kettle River Slough, Folsom Lake, Peaslee Lake, Lower Lake, Lake Mallalieu, Lake St. Croix)

Mississippi River (navigable to outlet of Lake Bemidji, including numerous lakes, sloughs, channels, runs, and ponds. Along the main stem some of the larger adjoining waters between Guttenberg and St. Cloud include: Lake Winneshiek, Big Lake, Lake Onalaska, Lake Robinson, Peterson Lake, Lake Pepin, Lower Lake, Upper Lake, Sturgeon Lake, North Lake, Mill Pond. Some larger adjoining waters between St. Cloud and Lake Bemidji include: Zebulon Pike Lake, Half Moon Lake, Rice Lake, Little Rabbit Lake, Lake Sylvan, Paper Mill Reservoir, Little White Oak Lake, White Oak Lake, Stump Lake, Wolf Lake, Lake Andrusia, Cass Lake, Ose Lake, Little Lake Winnibigoshish)

Mississippi River Headquarter Reservoirs

(1) Leech Lake and Leech Lake River (including Turtles Lake, Steamboat Lake, Steamboat River, Kabekona River (navigable upstream to Oak Lake), Boy Lake, Boy River (navigable upstream to Swift Lake), Steamboat Bay Lake, Gould Lake, Shingobee River and Bay (navigable upstream to County 50 Bridge), Sucker Creek (navigable upstream 1 mile of Sucker Bay), Lost Lake, Skelly Lake)

(2) Lake Winnibigoshish (including Lake Harry, Deer Lake, Cut Foot Sioux Lake, First River, Third River Flowage, Sugar Lake, Pigeon Dam Lake, Rabbits Lake, Third River (navigable upstream 1 mile), Egg Lake, Raven Creek, Little Cut Foot Sioux Lake)

(3) Pokegama Lake (including Aitkin Lake, Davis Lake, Steamboat Lake, Flowage Lake, Sandy River Lake, Sandy River (navigable upstream to Steamboat Lake))

(5) Pine River Reservoir (including Lower Whitefish Lake, Upper Whitefish Lake, Big Trout Lake, Cross Lake, Daggett Lake, Little Pine Lake, Rush Lake, Island Lake, Loon Lake, Pig Lake, Arrowhead Lake, Clamshell Lake, Hay Creek (1 mile upstream), Upper Hay Lake, Lower Hay Lake, Bertha Lake, Pine River (from the Dam to the Mississippi River))

(6) Gull Lake and Gull River (including Love Lake, Round Lake, Roy Lake, Upper Gull Lake, Bass Lake, Margaret Lake, Nisswa Lake, Spring Lake, Gull River (from Dam to Mississippi River), Steamboat Bay, Wilson Bay)

Lake Superior

NOTE: According to the Army Corps of Engineers,

> Navigable waters of the United States are those waters that are subject to the ebb and flow of the tide and/or are presently used, or have been used in the past, or may be susceptible for use to transport interstate or foreign commerce. A determination of navigability, once made, applies laterally over the entire surface of the water body, and is not extinguished by later actions or events which impede or destroy navigable capacity (33 CFR 329.4).

Thus this listing of waters may include waters not considered navigable in 1858 and does not include navigable waters used exclusively in intrastate commerce.

SOURCE: United States Army Corps of Engineers, St. Paul District Office

APPENDIX D. MICHIGAN 1955 PUBLIC ACT 247 AND ADMINISTRATIVE RULES

§ 1452. Congressional declaration of policy

The Congress finds and declares that it is the national policy—

(1) to preserve, protect, develop, and where possible, to restore or enhance, the resources of the Nation's coastal zone for this and succeeding generations;

(2) to encourage and assist the states to exercise effectively their responsibilities in the coastal zone through the development and implementation of management programs to achieve wise use of the land and water resources of the coastal zone, giving full consideration to ecological, cultural, historic, and esthetic values as well as to needs for economic development, which programs should at least provide for—

(A) the protection of natural resources, including wetlands, flood plains, estuaries, beaches, dunes, barrier islands, coral reefs, and fish and wildlife and their habitat, within the coastal zone,

(B) the management of coastal development to minimize the loss of life and property caused by improper development in flood-prone, storm surge, geological hazard, and erosion-prone areas and in areas of subsidence and saltwater intrusion, and by the destruction of natural protective features such as beaches, dunes, wetlands, and barrier islands,

(C) priority consideration being given to coastal-dependent uses and orderly processes for siting major facilities related to national defense, energy, fisheries development, recreation, ports and transportation, and the location, to the maximum extent practicable, of new commercial and industrial developments in or adjacent to areas where such development already exists,

(D) public access to the coasts for recreation purposes,

(E) assistance in the redevelopment of deteriorating urban waterfronts and ports, and sensitive preservation and restoration of historic, cultural, and esthetic coastal features,

(F) the coordination and simplification of procedures in order to ensure expedited governmental decisionmaking for the management of coastal resources,

(G) continued consultation and coordination with, and the giving of adequate consideration to the views of, affected Federal agencies,

(H) the giving of timely and effective notification of, and opportunities for public and local government participation in, coastal management decisionmaking, and

(I) assistance to support comprehensive planning, conservation, and management for living marine resources, including planning for the siting of pollution control and aquaculture facilities within the coastal zone, and improved coordination between State and Federal coastal zone management agencies and State and wildlife agencies; and

(3) to encourage the preparation of special area management plans which provide for increased specificity in protecting significant natural resources, reasonable coastal-dependent economic growth, improved protection of life and property in hazardous areas, and improved predictability in governmental decisionmaking; and

(4) to encourage the participation and cooperation of the public, state and local governments, and interstate and other regional agencies, as well as of the Federal agencies having programs affecting the coastal zone, in carrying out the purposes of this chapter.

(Pub. L. 89-454, title III, § 303, as added Pub. L. 92-583, Oct. 27, 1972, 86 Stat. 1281, and amended Pub. L. 96-464, § 3, Oct. 17, 1980, 94 Stat. 2060.)

AMENDMENTS

1980—Pub. L. 96-464 expanded declaration of policy to provide for higher level of protection for significant natural coastal resources and added provisions for special area management planning to increase predictability for necessary coastal-dependent economic growth, improve hazard mitigation, and improve predictability in government decision making.

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in sections 1455, 1455a, 1456a, 1458 of this title.

§ 1453. Definitions

For purposes of this chapter—

(1) The term "coastal zone" means the coastal waters (including the lands therein and thereunder) and the adjacent shorelands (including the waters therein and thereunder), strongly influenced by each other and in proximity to the shorelines of the several coastal states, and includes islands, transitional and intertidal areas, salt marshes, wetlands, and beaches. The zone extends, in Great Lakes waters, to the international boundary between the United States and Canada and, in other areas, seaward to the outer limit of the United States territorial sea. The zone extends inland from the shorelines only to the extent necessary to control shorelands, the uses of which have a direct and significant impact on the coastal waters. Excluded from the coastal zone are lands the use of which is by law subject solely to the discretion of or which is held in trust by the Federal Government, its officers or agents.

(2) the [1] term "coastal resource of national significance" means any coastal wetland, beach, dune, barrier island, reef, estuary, or fish and wildlife habitat, if any such area is determined by a coastal state to be of substantial biological or natural storm protective value.

(3) The term "coastal waters" means (A) in the Great Lakes area, the waters within the territorial jurisdiction of the United States consisting of the Great Lakes, their connecting waters, harbors, roadsteads, and estuary-type areas such as bays, shallows, and marshes and (B) in other areas, those waters, adjacent to the shorelines, which contain a

[1] So in original. Probably should be "The".

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IN OTHER SECTIONS

in sections 1371, 1418 of

-IN GENERAL

ges, causeways, dams or ons

to construct or com- of any bridge, cause- or in any port, road nal, navigable river, or of the United States gress to the building of ave been obtained and he bridge or causeway ed to and approved by ortation, or (2) the dam submitted to and ap- ngineers and Secretary such structures may be of the legislature of a other waterways the hich lie wholly within tate, provided the loca- re submitted to and ap- y of Transportation or rs and Secretary of the on is commenced. When r other structure have ecretary of Transporta- Engineers and Secretary ot be lawful to deviate before or after comple- less modification of said en submitted to and re- the Secretary of Trans- of Engineers and the . The approval required ocation and plans or any any bridge or causeway bridge or causeway over ject to the ebb and flow re not used and are not eir natural condition or ement as a means to foreign commerce.

9, 30 Stat. 1151; Oct. 15, title I, § 107(b), 96 Stat. 1582; Jan. 12, 1983, Pub. L. 97-449, § 2(f), 96 Stat. 2440.)

CODIFICATION

Section was part of the Rivers and Harbors Appropriation Act of 1899, and together with section 403 of this title superseded act Sept. 19, 1890, ch. 907, § 7, 26 Stat. 454, as amended by act July 13, 1892, ch. 158, § 3, 27 Stat. 88, which prohibited the erection of obstructions to navigation, and prohibited the erection of bridges over navigable waters under State legislation before the approval of the plans by the Secretary of War, and prohibited the alteration of channels unless authorized by that Secretary.

AMENDMENTS

1983—Pub. L. 97-449 amended section generally to reflect the transfer of certain functions, powers, and duties of the Secretary of the Army under this section to the Secretary of Transportation. See Transfer of Functions note below.

1982—Pub. L. 97-322 added last sentence relating to exemption.

TRANSFER OF FUNCTIONS

Enforcement functions of Secretary or other official in Department of Transportation related to compliance with permits for bridges across navigable waters issued under this section with respect to pre-construction, construction, and initial operation of transportation system for Canadian and Alaskan natural gas were transferred to the Federal Inspector, Office of Federal Inspector for the Alaska Natural Gas Transportation System, until the first anniversary of date of initial operation of the Alaska Natural Gas Transportation System, see Reorg. Plan No. 1 of 1979, §§ 102(c), 203(a), 44 F.R. 33663, 33666, 93 Stat. 1373, 1376, effective July 1, 1979, set out in the Appendix to Title 5, Government Organization and Employees.

All functions, powers, and duties of the Secretary of the Army [formerly War] and other offices and officers of the Department of the Army [formerly War] under this section to the extent that they relate generally to the location and clearances of bridges and causeways in the navigable waters of the United States were transferred to and vested in the Secretary of Transportation by Pub. L. 89-670, § 6(g)(6)(A), Oct. 15, 1966, 80 Stat. 941. Pub. L. 97-449 amended this section to reflect the transfer made by section 6(g)(6)(A) of Pub. L. 89-670, and repealed section 6(g)(6)(A).

CROSS REFERENCES

Portion of west arm of South Fork of the South Branch of Chicago River in city of Chicago not to be subject to this section, see section 27 of this title.

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in sections 27, 59s, 402, 406, 412, 413, 418, 530, 1293a of this title; title 23 section 144; title 42 section 1962d-11a.

§ 402. Construction of bridges, etc., over Illinois and Mississippi Canal

The provisions of section 401 of this title are made applicable alike to the completed and uncompleted portions of the Illinois and Mississippi Canal. Whenever the Secretary of the Army shall approve plans for a bridge to be built across said canal he may, in his discretion, and subject to such terms and conditions as in his judgment are equitable, expedient, and just to the public, grant to the person or corporation building and owning such bridge a right of way across the lands of the United States on either side of and adjacent to the said canal; also the privilege of occupying so much of said lands as may be necessary for the piers, abutments, and other portions of the bridge structure and approaches.

(June 13, 1902, ch. 1079, § 10, 32 Stat. 374.)

CODIFICATION

Section was part of the River and Harbor Appropriation Act of 1902.

CHANGE OF NAME

The Department of War was designated the Department of the Army and the title of the Secretary of War was changed to Secretary of the Army by section 205(a) of act July 26, 1947, ch. 343, title II, 61 Stat. 501. Section 205(a) of act July 26, 1947, was repealed by section 53 of act Aug. 10, 1956, ch. 1041, 70A Stat. 641. Section 1 of act Aug. 10, 1956, enacted "Title 10, Armed Forces" which in sections 3010 to 3013 continued the Department of the Army under the administrative supervision of a Secretary of the Army.

TRANSFER OF FUNCTIONS

All functions, powers, and duties of the Secretary of the Army and other offices and officers of the Department of the Army under section 401 of this title to the extent that they relate generally to the location and clearances of bridges and causeways in the navigable waters of the United States were transferred to and vested in the Secretary of Transportation by Pub. L. 89-670, § 6(g)(6)(A), Oct. 15, 1966, 80 Stat. 941. Pub. L. 97-449 amended section 401 of this title to reflect the transfer made by section 6(g)(6)(A) of Pub. L. 89-670, and repealed section 6(g)(6)(A).

§ 403. Obstruction of navigable waters generally; wharves; piers, etc.; excavations and filling in

The creation of any obstruction not affirmatively authorized by Congress, to the navigable capacity of any of the waters of the United States is prohibited; and it shall not be lawful to build or commence the building of any wharf, pier, dolphin, boom, weir, breakwater, bulkhead, jetty, or other structures in any port, roadstead, haven, harbor, canal, navigable river, or other water of the United States, outside established harbor lines, or where no harbor lines have been established, except on plans recommended by the Chief of Engineers and authorized by the Secretary of the Army; and it shall not be lawful to excavate or fill, or in any manner to alter or modify the course, location, condition, or capacity of, any port, roadstead, haven, harbor, canal, lake, harbor or refuge, or inclosure within the limits of any breakwater, or of the channel of any navigable water of the United States, unless the work has been recommended by the Chief of Engineers and authorized by the Secretary of the Army prior to beginning the same.

(Mar. 3, 1899, ch. 425, § 10, 30 Stat. 1151.)

CODIFICATION

Section was part of the Rivers and Harbors Appropriation Act of 1899.

PRIOR PROVISIONS

Act Sept. 19, 1890, ch. 907, § 10, 26 Stat. 454, was probably omitted from the Code as superseded by this section but it was held by the Circuit Court of Appeals in Wishkah Boom Co., Wash. 1905, 136 F. 42, 68 C.C.A. 592 (appeal dismissed [1906] 26 S. Ct. 765, 202 U.S. 613, 50 L. Ed. 1171), that it was not superseded so far

as it related to the continuance of obstructions. It provided that:

"The creation of any obstruction, not affirmatively authorized by law, to the navigable capacity of any waters, in respect of which the United States has jurisdiction, is hereby prohibited. The continuance of any such obstruction, except bridges, piers, docks, and wharves, and similar structures erected for business purposes, whether heretofore or hereafter created, shall constitute an offense and each week's continuance of any such obstruction shall be deemed a separate offense. Every person and every corporation which shall be guilty of creating or continuing any such unlawful obstruction in this act mentioned, or who shall violate the provisions of the last four preceding sections of this act, shall be deemed guilty of a misdemeanor, and on conviction thereof shall be punished by a fine not exceeding five thousand dollars, or by imprisonment (in the case of a natural person) not exceeding one year, or by both such punishments, in the discretion of the court, the creating or continuing of any unlawful obstruction in this act mentioned may be prevented and such obstruction may be caused to be removed by the injunction of any circuit court [district court] exercising jurisdiction in any district in which such obstruction may be threatened or may exist; and proper proceedings in equity to this end may be instituted under the direction of the Attorney-General of the United States."

This section and section 9 of act Mar. 3, 1899 (section 401 of this title), superseded provisions of act Sept. 19, 1890, ch. 907, § 7, 26 Stat. 454, as amended by act July 13, 1892, ch. 158, § 3, 27 Stat. 110, which prohibited the erection of obstructions to navigation, and prohibited the erection of bridges over navigable waters under State legislation before the approval of the plans by the Secretary of War, and prohibited the alteration of channels unless authorized by said Secretary.

CHANGE OF NAME

The Department of War was designated the Department of the Army and the title of the Secretary of War was changed to Secretary of the Army by section 205(a) of act July 26, 1947, ch. 343, title II, 61 Stat. 501. Section 205(a) of act July 26, 1947, was repealed by section 53 of act Aug. 10, 1956, ch. 1041, 70A Stat. 641. Section 1 of act Aug. 10, 1956, enacted "Title 10, Armed Forces" which in sections 3010 to 3013 continued the Department of the Army under the administrative supervision of a Secretary of the Army.

TRANSFER OF FUNCTIONS

Enforcement functions of Secretary of the Army, Chief of Engineers, or other official in Corps of Engineers of the United States Army related to compliance with permits for structures in navigable waters issued under this section with respect to pre-construction, construction, and initial operation of transportation system for Canadian and Alaskan natural gas were transferred to the Federal Inspector, Office of Federal Inspector for the Alaska Natural Gas Transportation System, until the first anniversary of date of initial operation of the Alaska Natural Gas Transportation System, see Reorg. Plan No. 1 of 1979, §§ 102(b), 203(a), 44 F.R. 33663, 33666, 93 Stat. 1373, 1376, effective July 1, 1979, set out in the Appendix to Title 5, Government Organization and Employees.

All functions, powers, and duties of the Secretary of the Army and other offices and officers of the Department of the Army under section 401 of this title to the extent that they relate generally to the location and clearances of bridges and causeways in the navigable waters of the United States were transferred to and vested in the Secretary of Transportation by Pub. L. 89-670 § 6(g)(6)(A), Oct. 15, 1966, 80 Stat. 941. Pub. L. 97-449 amended section 401 of this title to reflect the transfer made by section 6(g)(6)(A) of Pub. L. 89-670, and repealed section 6(g)(6)(A).

CROSS REFERENCES

Bridges over navigable waters, see section 491 et seq. of this title.

Expenses of investigations by Department of the Army, see section 417 of this title.

Portion of west arm of South Fork of the South Branch of Chicago River in city of Chicago not to be subject to this section, see section 27 of this title.

Secretary of the Army to make navigation rules for—

Ambrose channel, see section 453 of this title.

South and Southwest Passes of Mississippi River, see section 2 of this title.

Violations as misdemeanors, see section 406 of this title.

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in sections 27, 406, 412, 413, 418, 465, 1371, 1503 of this title.

§ 403a. Omitted

CODIFICATION

Section, acts Sept. 19, 1890, ch. 907, § 10, 26 Stat. 454; Mar. 3, 1911, ch. 231, § 291, 36 Stat. 1167, related to obstruction of navigable waters. See Prior Provisions note set out under section 403 of this title.

§ 404. Establishment of harbor lines; conditions to grants for extension of piers, etc.

Where it is made manifest to the Secretary of the Army that the establishment of harbor lines is essential to the preservation and protection of harbors he may, and is, authorized to cause such lines to be established, beyond which no piers, wharves, bulkheads, or other works shall be extended or deposits made, except under such regulations as may be prescribed from time to time by him: *Provided*, That, whenever the Secretary of the Army grants to any person or persons permission to extend piers, wharves, bulkheads, or other works, or to make deposits in any tidal harbor or river of the United States beyond any harbor lines established under authority of the United States, he shall cause to be ascertained the amount of tidewater displaced by any such structure or by any such deposits, and he shall, if he deem it necessary, require the parties to whom the permission is given to make compensation for such displacement either by excavating in some part of the harbor, including tidewater channels between high and low water mark, to such an extent as to create a basin for as much tidewater as may be displaced by such structure or by such deposits, or in any other mode that may be satisfactory to him.

(Mar. 3, 1899, ch. 425, § 11, 30 Stat. 1151.)

CODIFICATION

Section was part of the Rivers and Harbors Appropriation Act of 1899.

PRIOR PROVISIONS

This section and section 406 of this title, superseded act Aug. 11, 1888, ch. 860, § 12, 25 Stat. 425, as amended by act Sept. 19, 1890, ch. 907, § 12, 26 Stat. 455, which authorized the establishment of harbor lines, and prescribed a penalty for a violation of the section or any rule made in pursuance of it.

Section also superseded act Aug. 18, 1894, ch. 299, § 9, 28 Stat. 364, which contained provisions for com-

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§ 931. Navigable rivers as public highways

All navigable rivers, within the territory occupied by the public lands, shall remain and be deemed public highways; and, in all cases where the opposite banks of any streams not navigable belong to different persons, the stream and the bed thereof shall become common to both.

(R.S. § 2476.)

Codification

R.S. § 2476 derived from acts May 18, 1796, ch. 29, § 9, 1 Stat. 468; Mar. 3, 1803, ch. 27, § 17, 2 Stat. 235.

§ 931a. Authority of Attorney General to grant easements and rights-of-way to States, etc.

The Attorney General, whenever he deems it advantageous to the Government and upon such terms and conditions as he deems advisable, is authorized on behalf of the United States to grant to any State, or any agency or political subdivision thereof, easements in and rights-of-way over lands belonging to the United States which are under his supervision and control. Such grant may include the use of such easements or rights-of-way by public utilities to the extent authorized and under the conditions imposed by the laws of such State relating to use of public highways. Such partial, concurrent, or exclusive jurisdiction over the areas covered by such easements or rights-of-way, as the Attorney General deems necessary or desirable, is ceded to such State. The Attorney General is authorized to accept or secure on behalf of the United States from the State in which is situated any land conveyed in exchange for any such easement or right-of-way, such jurisdiction as he may deem necessary or desirable over the land so acquired.

(May 9, 1941, ch. 94, 55 Stat. 183.)

Section Referred to in Other Sections

This section is referred to in section 421c of this title.

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§ 1301. Definitions

When used in this subchapter and subchapter II of this chapter—

(a) The term "lands beneath navigable waters" means—

(1) all lands within the boundaries of each of the respective States which are covered by nontidal waters that were navigable under the laws of the United States at the time such State became a member of the Union, or acquired sovereignty over such lands and waters thereafter, up to the ordinary high water mark as heretofore or hereafter modified by accretion, erosion, and reliction;

(2) all lands permanently or periodically covered by tidal waters up to but not above the line of mean high tide and seaward to a line three geographical miles distant from the coast line of each such State and to the boundary line of each such State where in any case such boundary as it existed at the time such State became a member of the Union, or as heretofore approved by Congress, extends seaward (or into the Gulf of Mexico) beyond three geographical miles, and

(3) all filled in, made, or reclaimed lands which formerly were lands beneath navigable waters, as hereinabove defined;

(b) The term "boundaries" includes the seaward boundaries of a State or its boundaries in the Gulf of Mexico or any of the Great Lakes as they existed at the time such State became a member of the Union, or as heretofore approved by the Congress, or as extended or confirmed pursuant to section 1312 of this title but in no event shall the term "boundaries" or the term "lands beneath navigable waters" be interpreted as extending from the coast line more than three geographical miles into the Atlantic Ocean or the Pacific Ocean, or more than three marine leagues into the Gulf of Mexico;

(c) The term "coast line" means the line of ordinary low water along that portion of the coast which is in direct contact with the open sea and the line marking the seaward limit of inland waters;

(d) The terms "grantees" and "lessees" include (without limiting the generality thereof) all political subdivisions, municipalities, public and private corporations, and other persons holding grants or leases from a State, or from its predecessor sovereign if legally validated, to lands beneath navigable waters if such grants or leases were issued in accordance with the constitution, statutes, and decisions of the courts of the State in which such lands are situated, or of its predecessor sovereign: *Provided, however,* That nothing herein shall be construed as conferring upon said grantees or lessees any greater rights or interests other than are described herein and in their respective grants from the State, or its predecessor sovereign;

(e) The term "natural resources" includes, without limiting the generality thereof, oil, gas, and all other minerals, and fish, shrimp, oysters, clams, crabs, lobsters, sponges, kelp, and other marine animal and plant life but does not include water power, or the use of water for the production of power;

(f) The term "lands beneath navigable waters" does not include the beds of streams in lands now or heretofore constituting a part of the public lands of the United States if such streams were not meandered in connection with the public survey of such lands under the laws of the United States and if the title to the beds of such streams was lawfully patented or conveyed by the United States or any State to any person;

(g) The term "State" means any State of the Union;

(h) The term "person" includes, in addition to a natural person, an association, a State, a political subdivision of a State, or a private, public, or municipal corporation.

(May 22, 1953, ch. 65, title I, § 2, 67 Stat. 29.)

SHORT TITLE

Section 1 of act May 22, 1953 provided that: "This Act [enacting subchapters I and II of this chapter] may be cited as the 'Submerged Lands Act'."

Section 1 of act Aug. 7, 1953, ch. 345, 67 Stat. 462, provided that: "This Act [enacting subchapter III of this chapter] may be cited as the 'Outer Continental Shelf Lands Act'."

SEPARABILITY OF PROVISIONS

Section 11 of act May 22, 1953, provided that: "If any provision of this Act [enacting subchapters I and II of this chapter], or any section, subsection, sentence, clause, phrase or individual word, or the application thereof to any person or circumstance is held invalid, the validity of the remainder of the Act and of the application of any such provision, section, subsection, sentence, clause, phrase or individual word to other persons and circumstances shall not be affected thereby; without limiting the generality of the foregoing, if subsection 3(a)1, 3(a)2, 3(b)1, 3(b)2, 3(b)3, or 3(c) [section 1311(a)(1), (a)(2), (b)(1), (b)(2), (b)(3), (c) of this title] or any provision of any of those subsections is held invalid, such subsection or provision shall be held separable and the remaining subsections and provisions shall not be affected thereby."

NAVAL PETROLEUM RESERVE

Section 10 of act May 22, 1953, revoked Ex. Ord. No. 10426, Jan. 16, 1953, 18 F.R. 405, "insofar as it applies to any lands beneath navigable waters as defined in section 2 hereof [this section]". Ex. Ord. 10426 set aside certain submerged lands as a naval petroleum reserve and transferred functions with respect thereto from the Secretary of the Interior to the Secretary of the Navy.

APPLICATION TO STATE OF ALASKA

Admission of Alaska into the Union was accomplished Jan. 3, 1959, upon issuance of Proc. No. 3269, Jan. 3, 1959, 24 F.R. 81, 73 Stat. c16, as required by sections 1 and 8(c) of Pub. L. 85-508, July 7, 1958, 72 Stat. 339, set out as notes preceding section 21 of Title 48, Territories and Insular Possessions.

Applicability of subchapters I and II of this chapter to the State of Alaska, see section 6(m) of Pub. L. 85-508, set out as a note preceding section 21 of Title 48.

APPLICATION TO STATE OF HAWAII

Applicability of this chapter to the State of Hawaii, see section 5(i) of Pub. L. 86-3, Mar. 18, 1959, 73 Stat. 6, set out as a note preceding section 491 of Title 48, Territories and Insular Possessions.

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SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in sections 1302, 1331, 1340, 1811 of this title; title 16 section 1432.

§ 1302. Resources seaward of the Continental Shelf

Nothing in this subchapter or subchapter II of this chapter shall be deemed to affect in any wise the rights of the United States to the natural resources of that portion of the subsoil and seabed of the Continental Shelf lying seaward and outside of the area of lands beneath navigable waters, as defined in section 1301 of this title, all of which natural resources appertain to the United States, and the jurisdiction and control of which by the United States is confirmed.

(May 22, 1953, ch. 65, title II, § 9, 67 Stat. 32.)

§ 1303. Amendment, modification, or repeal of other laws

Nothing in this subchapter or subchapter II of this chapter shall be deemed to amend, modify, or repeal the Acts of July 26, 1866 (14 Stat. 251), July 9, 1870 (16 Stat. 217), March 3, 1877 (19 Stat. 377), June 17, 1902 (32 Stat. 388), and December 22, 1944 (58 Stat. 887), and Acts amendatory thereof or supplementary thereto.

(May 22, 1953, ch. 65, title II, § 7, 67 Stat. 32.)

REFERENCES IN TEXT

Act July 26, 1866 (14 Stat. 251), referred to in text, is act July 26, 1866, ch. 262, 14 Stat. 251, which is not classified to the Code.

Act July 9, 1870 (16 Stat. 217), referred to in text, is act July 9, 1870, ch. 235, 16 Stat. 217, which is not classified to the Code.

Act March 3, 1877 (19 Stat. 377), referred to in text, is act Mar. 3, 1877, ch. 107, 19 Stat. 377, as amended, which enacted sections 321 to 323, 325, and 327 to 329 of this title. For complete classification of this Act to the Code, see Tables.

Act June 17, 1902 (32 Stat. 388), referred to in text, is popularly known as the Reclamation Act, which is classified generally to chapter 12 (§ 371) of this title. For complete classification of this Act to the Code, see Short Title note set out under section 371 of this title and Tables.

Act December 22, 1944 (58 Stat. 887), referred to in text, is act Dec. 22, 1944, ch. 665, 58 Stat. 887, as amended, which enacted section 390 of this title, sections 460d and 825s of Title 16, Conservation, and sections 701-1, 701a-1, 708, and 709 of Title 33, Navigation and Navigable Waters, amended section 701b-1 of Title 33, and enacted provisions set out as notes under section 701f of Title 33. For complete classification of this Act to the Code, see Tables.

SUBCHAPTER II—LANDS BENEATH NAVIGABLE WATERS WITHIN STATE BOUNDARIES

SUBCHAPTER REFERRED TO IN OTHER SECTIONS

This subchapter is referred to in sections 1301, 1302, 1303, 1335, 1631, 1632 of this title; title 16 section 742i; title 33 section 941.

§ 1311. Rights of the States

(a) Confirmation and establishment of title and ownership of lands and resources; management, administration, leasing, development, and use

It is determined and declared to be in the public interest that (1) title to and ownership of the lands beneath navigable waters within the boundaries of the respective States, and the natural resources within such lands and waters, and (2) the right and power to manage, administer, lease, develop, and use the said lands and natural resources all in accordance with applicable State law be, and they are, subject to the provisions hereof, recognized, confirmed, established, and vested in and assigned to the respective States or the persons who were on June 5, 1950, entitled thereto under the law of the respective States in which the land is located, and the respective grantees, lessees, or successors in interest thereof;

(b) Release and relinquishment of title and claims of United States; payment to States of moneys paid under leases

(1) The United States releases and relinquishes unto said States and persons aforesaid, except as otherwise reserved herein, all right, title, and interest of the United States, if any it has, in and to all said lands, improvements, and natural resources; (2) the United States releases and relinquishes all claims of the United States, if any it has, for money or damages arising out of any operations of said States or persons pursuant to State authority upon or within said lands and navigable waters; and (3) the Secretary of the Interior or the Secretary of the Navy or the Treasurer of the United States shall pay to the respective States or their grantees issuing leases covering such lands or natural resources all moneys paid thereunder to the Secretary of the Interior or to the Secretary of the Navy or to the Treasurer of the United States and subject to the control of any of them or to the control of the United States on May 22, 1953, except that portion of such moneys which (1) is required to be returned to a lessee; or (2) is deductible as provided by stipulation or agreement between the United States and any of said States;

(c) Leases in effect on June 5, 1950

The rights, powers, and titles hereby recognized, confirmed, established, and vested in and assigned to the respective States and their grantees are subject to each lease executed by a State, or its grantee, which was in force and effect on June 5, 1950, in accordance with its terms and provisions and the laws of the State issuing, or whose grantee issued, such lease, and such rights, powers, and titles are further subject to the rights herein now granted to any person holding any such lease to continue to maintain the lease, and to conduct operations thereunder, in accordance with its provisions, for the full term thereof, and any extensions, renewals, or replacements authorized therein, or heretofore authorized by the laws of the State issuing, or whose grantee issued such lease: *Provided, however,* That, if oil or gas was not being produced from such lease on and before December 11, 1950, or if the primary term of such lease has expired since December 11, 1950, then for a term from May 22, 1953 equal to the term remaining unexpired on December 11, 1950, under the provisions of such lease or any extensions, renewals, or replacements authorized therein, or heretofore au-

thorized by the laws of the State issuing, or whose grantee issued, such lease: *Provided, however,* That within ninety days from May 22, 1953 (i) the lessee shall pay to the State or its grantee issuing such lease all rents, royalties, and other sums payable between June 5, 1950, and May 22, 1953, under such lease and the laws of the State issuing or whose grantee issued such lease, except such rents, royalties, and other sums as have been paid to the State, its grantee, the Secretary of the Interior or the Secretary of the Navy or the Treasurer of the United States and not refunded to the lessee; and (ii) the lessee shall file with the Secretary of the Interior or the Secretary of the Navy and with the State issuing or whose grantee issued such lease, instruments consenting to the payment by the Secretary of the Interior or the Secretary of the Navy or the Treasurer of the United States to the State or its grantee issuing the lease, of all rents, royalties, and other payments under the control of the Secretary of the Interior or the Secretary of the Navy or the Treasurer of the United States or the United States which have been paid, under the lease, except such rentals, royalties, and other payments as have also been paid by the lessee to the State or its grantee;

(d) Authority and rights of the United States respecting navigation, flood control and production of power

Nothing in this subchapter or subchapter I of this chapter shall affect the use, development, improvement, or control by or under the constitutional authority of the United States of said lands and waters for the purposes of navigation or flood control or the production of power, or be construed as the release or relinquishment of any rights of the United States arising under the constitutional authority of Congress to regulate or improve navigation, or to provide for flood control, or the production of power;

(e) Ground and surface waters west of the 98th meridian

Nothing in this subchapter or subchapter I of this chapter shall be construed as affecting or intended to affect or in any way interfere with or modify the laws of the States which lie wholly or in part westward of the ninety-eighth meridian, relating to the ownership and control of ground and surface waters; and the control, appropriation, use, and distribution of such waters shall continue to be in accordance with the laws of such States.

(May 22, 1953, ch. 65, title II, § 3, 67 Stat. 30.)

SEPARABILITY OF PROVISIONS

Provisions of this section as separable, see section 11 of act May 22, 1953, set out as a note under section 1301 of this title.

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in sections 1313, 1314 of this title.

§ 1312. Seaward boundaries of States

The seaward boundary of each original coastal State is approved and confirmed as a line three geographical miles distant from its coast line or, in the case of the Great Lakes, to the international boundary. Any State admitted subsequent to the formation of the Union which has not already done so may extend its seaward boundaries to a line three geographical miles distant from its coast line, or to the international boundaries of the United States in the Great Lakes or any other body of water traversed by such boundaries. Any claim heretofore or hereafter asserted either by constitutional provision, statute, or otherwise, indicating the intent of a State so to extend its boundaries is approved and confirmed, without prejudice to its claim, if any it has, that its boundaries extend beyond that line. Nothing in this section is to be construed as questioning or in any manner prejudicing the existence of any State's seaward boundary beyond three geographical miles if it was so provided by its constitution or laws prior to or at the time such State became a member of the Union, or if it has been heretofore approved by Congress.

(May 22, 1953, ch. 65, title II, § 4, 67 Stat. 31.)

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in section 1301 of this title.

§ 1313. Exceptions from confirmation and establishment of States' title, power and rights

There is excepted from the operation of section 1311 of this title—

(a) all tracts or parcels of land together with all accretions thereto, resources therein, or improvements thereon, title to which has been lawfully and expressly acquired by the United States from any State or from any person in whom title had vested under the law of the State or of the United States, and all lands which the United States lawfully holds under the law of the State; all lands expressly retained by or ceded to the United States when the State entered the Union (otherwise than by a general retention or cession of lands underlying the marginal sea); all lands acquired by the United States by eminent domain proceedings, purchase, cession, gift, or otherwise in a proprietary capacity; all lands filled in, built up, or otherwise reclaimed by the United States for its own use; and any rights the United States has in lands presently and actually occupied by the United States under claim of right;

(b) such lands beneath navigable waters held, or any interest in which is held by the United States for the benefit of any tribe, band, or group of Indians or for individual Indians; and

(c) all structures and improvements constructed by the United States in the exercise of its navigational servitude.

(May 22, 1953, ch. 65, title II, § 5, 67 Stat. 32.)

§ 1314. Rights and powers retained by the United States; purchase of natural resources; condemnation of lands

(a) The United States retains all its navigational servitude and rights in and powers of regulation and control of said lands and navigable

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waters for the constitutional purposes of commerce, navigation, national defense, and international affairs, all of which shall be paramount to, but shall not be deemed to include, proprietary rights of ownership, or the rights of management, administration, leasing, use, and development of the lands and natural resources which are specifically recognized, confirmed, established, and vested in and assigned to the respective States and others by section 1311 of this title.

(b) In time of war or when necessary for national defense, and the Congress or the President shall so prescribe, the United States shall have the right of first refusal to purchase at the prevailing market price, all or any portion of the said natural resources, or to acquire and use any portion of said lands by proceeding in accordance with due process of law and paying just compensation therefor.

(May 22, 1953, ch. 65, title II, § 6, 67 Stat. 32.)

§ 1315. Rights acquired under laws of the United States unaffected

Nothing contained in this subchapter or subchapter I of this chapter shall affect such rights, if any, as may have been acquired under any law of the United States by any person in lands subject to this subchapter or subchapter I of this chapter and such rights, if any, shall be governed by the law in effect at the time they may have been acquired: *Provided, however,* That nothing contained in this subchapter or subchapter I of this chapter is intended or shall be construed as a finding, interpretation, or construction by the Congress that the law under which such rights may be claimed in fact or in law applies to the lands subject to this subchapter or subchapter I of this chapter, or authorizes or compels the granting of such rights in such lands, and that the determination of the applicability or effect of such law shall be unaffected by anything contained in this subchapter or subchapter I of this chapter.

(May 22, 1953, ch. 65, title II, § 8, 67 Stat. 32.)

SUBCHAPTER III—OUTER CONTINENTAL SHELF LANDS

CROSS REFERENCES

Fair Labor Standards Act of 1938, applicability of, see section 213 of Title 29, Labor.

SUBCHAPTER REFERRED TO IN OTHER SECTIONS

This subchapter is referred to in sections 156, 1811, 1813, 1815, 1842, 1861, 1863, 1864, 1866 of this title; title 16 sections 460*l*-5; 470h, 471i, 1456; 1456a; title 29 sections 213, 402, 630, 653, 1002; title 30 section 1702; title 33 sections 941, 1321, 1503; title 41 section 357; title 42 sections 2000e, 9611.

§ 1331. Definitions

When used in this subchapter—

(a) The term "outer Continental Shelf" means all submerged lands lying seaward and outside of the area of lands beneath navigable waters as defined in section 1301 of this title, and of which the subsoil and seabed appertain to the United States and are subject to its jurisdiction and control;

(b) The term "Secretary" means the Secretary of the Interior, except that with respect to functions under this subchapter transferred to, or vested in, the Secretary of Energy or the Federal Energy Regulatory Commission by or pursuant to the Department of Energy Organization Act (42 U.S.C. 7101 et seq.), the term "Secretary" means the Secretary of Energy, or the Federal Energy Regulatory Commission, as the case may be;

(c) The term "lease" means any form of authorization which is issued under section 1337 of this title or maintained under section 1335 of this title and which authorizes exploration for, and development and production of, minerals;

(d) The term "person" includes, in addition to a natural person, an association, a State, a political subdivision of a State, or a private, public, or municipal corporation;

(e) The term "coastal zone" means the coastal waters (including the lands therein and thereunder) and the adjacent shorelands (including the waters therein and thereunder), strongly influenced by each other and in proximity to the shorelines of the several coastal States, and includes islands, transition and intertidal areas, salt marshes, wetlands, and beaches, which zone extends seaward to the outer limit of the United States territorial sea and extends inland from the shorelines to the extent necessary to control shorelands, the uses of which have a direct and significant impact on the coastal waters, and the inward boundaries of which may be identified by the several coastal States, pursuant to the authority of section 1454(b)(1) of title 16;

(f) The term "affected State" means, with respect to any program, plan, lease sale, or other activity, proposed, conducted, or approved pursuant to the provisions of this subchapter, any State—

(1) the laws of which are declared, pursuant to section 1333(a)(2) of this title, to be the law of the United States for the portion of the outer Continental Shelf on which such activity is, or is proposed to be, conducted;

(2) which is, or is proposed to be, directly connected by transportation facilities to any artificial island or structure referred to in section 1333(a)(1) of this title;

(3) which is receiving, or in accordnace[1] with the proposed activity will receive, oil for processing, refining, or transshipment which was extracted from the outer Continental Shelf and transported directly to such State by means of vessels or by a combination of means including vessels;

(4) which is designated by the Secretary as a State in which there is a substantial probability of significant impact on or damage to the coastal, marine, or human environment, or a State in which there will be significant changes in the social, governmental, or economic infrastructure, resulting from the exploration, development, and production of oil and gas anywhere on the outer Continental Shelf; or

(5) in which the Secretary finds that because of such activity there is, or will be, a significant risk of serious damage, due to fac-

[1] So in original. Probably should be "accordance".

Item	Reach of Shore		
	Compartment 1	Compartment 2	Total
Shore length by shore categories, feet	(2)	(2)	(2)
Benefits by shore categories, average annual $1,000	(2)	(2)	(2)
Computation of Federal share of construction cost	(3)	(3)	(3)

[1] Total cost of periodic nourishment distributed between compartments on a frontage basis.
[2] Same as example 2.
[3] The formula given in paragraph A-2a is applicable and is applied separately for each compartment. The Federal aid percentages are as in Example 2: Compartment 1—59.7 percent, Compartment 2—30.7 percent.

Federal aid for the project as a whole is computed as follows:

INITIAL MEASURES

Compartment	Construction cost, dollars	Federal share of construction cost	
		Percent	Dollars
1	545,000	59.7	325,000
2	455,000	30.7	140,000
Total	1,000,000	[1] 46.5	465,000

[1] This figure is the same as the result for Example 2 because the lengths and benefits by shore categories, and the relative compartment costs, are the same as for Example 2.

PERIODIC NOURISHMENT

Compartment	Periodic nourishment costs average annual dollars	Federal share of cost for periodic nourishment for period to be specified	
		Percent	Average annual dollars
1	75,000	59.7	44,800
2	25,000	30.7	7,700
Total	100,000	[1] 52.5	52,500

[1] Note that the Federal share of periodic nourishment costs for the project as a whole is not the same as the Federal Share of other construction costs. (Paragraph A-3.)

B-5. *Comment on Examples.* The foregoing examples have been simplified for purposes of illustration, particularly in regard to the matter of uniformity of cost. In typical project cases, shore categories may be extensively intermixed and there may be a wide range of unit costs of protection in each category. Choice of the method for computation of Federal costs must be made on the basis of the conditions encountered in individual cases. The principal alternatives available are between computation on the basis of the project as a whole as opposed to computation on a compartment-by-compartment or section-by-section basis. Reports should contain sufficient detail on costs, benefit occurrence, and alternative costs to support selection of the method of computation used.

PART 320—GENERAL REGULATORY POLICIES

Sec.
320.1 Purpose and scope.
320.2 Authorities to issue permits.
320.3 Related laws.
320.4 General policies for evaluating permit applications.

AUTHORITY: 33 U.S.C. 401 *et seq.;* 33 U.S.C. 1344; 33 U.S.C. 1413.

SOURCE: 47 FR 31800, July 22, 1982, unless otherwise noted.

§ 320.1 Purpose and scope.

(a) *Regulatory approach of the Corps of engineers.* (1) The U.S. Army Corps of Engineers has been involved in regulating certain activities in the nation's waters since 1890. Until 1968, the primary thrust of the Corps' regulatory program was the protection of navigation. As a result of several new laws and judicial decisions, the program evolved from one that protects navigation only to one that considers the full public interest by balancing the favorable impacts against the detrimental impacts. This is known as the "public interest balancing process" or the "public interest review." The program is one which reflects the national concerns for both the protection and utilization of important resources. It is a dynamic program that varies the weight given to a specific public interest factor in light of the importance of other such factors in a particular situation.

(2) The Corps is a highly decentralized organization. Most of the authority for administering the regulatory program has been given to the thirty six district engineers and eleven division engineers. If a district or division engineer makes a final decision on a permit application in accordance with the procedures and authorities contained in these regulations (33 CFR Parts 320-330), there is no administrative appeal of that decision.

(3) The Corps seeks to avoid unnecessary regulatory controls. The general permit program described in 33 CFR Parts 325 and 330 is the primary method of eliminating unnecessary Federal control over activities which do not justify individual control or which are adequately regulated by another agency.

(4) The Corps believes that applicants are not necessarily due a favorable decision but they are due a timely one. Reducing unnecessary paperwork and delays is a continuing Corps goal.

(5) The Corps believes that state and Federal regulatory programs should complement rather than duplicate one another. Use of general permits, joint processing procedures, interagency review coordination and authority transfers (where authorized by law) are encouraged to reduce duplications.

(b) *Types of activities regulated.* This regulation and the regulations that follow (33 CFR Parts 321-330) prescribe the statutory authorities, and general and special policies and procedures applicable to the review of applications for Department of the Army permits for various types of activities that occur in waters of the United States or the oceans. This part identifies the various Federal statutes that require Department of the Army permits before these activities can be lawfully undertaken; the related Federal laws applicable to the review of each activity that requires a Department of the Army permit; and the general policies that are applicable to the review of all activities that require Department of the Army permits. Parts 321-324 address the various types of activities that require Department of the Army permits, including special policies and procedures applicable to those activities, as follows:

(1) Dams or dikes in navigable waters of the United States (Part 321);

(2) Other structures or work including excavation, dredging, and/or disposal activities, in navigable waters of the United States (Part 322);

(3) Activities that alter or modify the course, condition, location, or capacity of a navigable water of the United States (Part 322);

(4) Construction of artificial islands, installations and other devices on the outer continental shelf (Part 322);

(5) Discharges of dredged or fill material into the waters of the United States (Part 323);

(6) Activities involving the transportation of dredged material for the purpose of disposal in ocean waters (Part 324); and

(7) Nationwide general permits for certain categories of these activities (Part 330).

(c) *Forms of authorization.* Department of the Army permits for the above described activities are issued under various forms of authorization. These include individual permits that are issued following a review of an individual application for a Department of the Army permit and general permits that authorize the performance of a category or categories of activities in a specific geographical region or nationwide. The term "general permit" as used in these regulations (33 CFR Parts 320-330) refers to both those regional permits issued by district or division engineers on a regional basis and to nationwide permits issued by the Chief of Engineers through publication in the FEDERAL REGISTER and applicable throughout the nation. The nationwide permits are found in 33 CFR Part 330. If an activity is covered by a general permit, an application for a Department of the Army permit does not have to be made. In such cases, a person must only comply with the conditions contained in the general permit to satisfy requirements of law for a Department of the Army Permit.

(d) *General instructions.* The procedures for processing all individual permits and regional general permits are contained in 33 CFR Part 325. However, before reviewing those procedures, a person wanting to do work that requires a Department of the Army permit should review the general and special policies that relate to the particular activity as outlined in this Part 320 and Parts 321 through 324. The terms "navigable waters of the United States" and "waters of the United States" are used frequently throughout these regulations, and it is important from the outset that the reader

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understand the difference between the two. "*Navigable waters* of the United States" are defined in 33 CFR Part 329. These are waters that are navigable in the traditional sense where permits are required for certain work or structures pursuant to Sections 9 and 10 of the River and Harbor Act of 1899. "*Waters* of the United States" are defined in 33 CFR 323.2(a). These waters include more than navigable waters of the United States and are the waters where permits are required for the discharge of dredged or fill material pursuant to Section 404 of the Clean Water Act.

§ 320.2 Authorities to issue permits.

(a) Section 9 of the River and Harbor Act approved March 3, 1899 (33 U.S.C. 401) (hereinafter referred to as Section 9) prohibits the construction of any dam or dike across any navigable water of the United States in the absence of Congressional consent and approval of the plans by the Chief of Engineers and the Secretary of the Army. Where the navigable portions of the waterbody lie wholly within the limits of a single state, the structure may be built under authority of the legislature of that State, if the location and plans or any modification thereof are approved by the Chief of Engineers and by the Secretary of the Army. The instrument of authorization is designated a permit. Section 9 also pertains to bridges and causeways by the authority of the Secretary of the Army and Chief of Engineers with respect to bridges and causeways was transferred to the Secretary of Transportation under the Department of Transportation Act of October 15, 1966 (49 U.S.C. 1155g(6)(A)). (See also 33 CFR Part 321.) A Department of the Army permit pursuant to Section 404 of the Clean Water Act is required for the discharge of dredged or fill material into waters of the United States associated with bridges and causeways. (See 33 CFR Part 323.)

(b) Section 10 of the River and Harbor Act approved March 3, 1899 (33 U.S.C. 403) (hereinafter referred to as Section 10) prohibits the unauthorized obstruction or alteration of any navigable water of the United States. The construction of any structure in or over any navigable water of the United States, the excavation from or depositing of material in such waters, or the accomplishment of any other work affecting the course, location, condition, or capacity of such waters is unlawful unless the work has been recommended by the Chief of Engineers and authorized by the Secretary of the Army. The instrument of authorization is designated a permit. The authority of the Secretary of the Army to prevent obstructions to navigation in the navigable waters of the United States was extended to artificial islands, installations, and other devices located on the outer continental shelf by Section 4(e) of the Outer Continental Shelf Lands Act of 1953 as amended (43 U.S.C. 1333(e)). (See also 33 CFR Part 322)

(c) Section 11 of the River and Harbor Act approved March 3, 1899 (33 U.S.C. 404) authorizes the Secretary of the Army to establish harbor lines channelward of which no piers, wharves, bulkheads or other works may be extended or deposits made without approval of the Secretary of the Army. Effective May 27, 1970, permits for work shoreward of those lines must be obtained in accordance with Section 10 and, if applicable Section 404 of the Clean Water Act. (See § 320.4(o) of this Part.)

(d) Section 13 of the River and Harbor Act approved March 3, 1899 (33 U.S.C. 407) provides that the Secretary of the Army, whenever the Chief of Engineers determines that anchorage and navigation will not be injured thereby, may permit the discharge of refuse into navigable waters. In the absence of a permit, such discharge of refuse is prohibited. While the prohibition of this section, known as the Refuse Act, is still in effect, the permit authority of the Secretary of the Army has been superseded by the permit authority provided the Administrator, Environmental Protection Agency (EPA), and the States under Sections 402 and 405 of the Clean Water Act, respectively (33 U.S.C. 1342 and 1345). (See 40 CFR Parts 124 and 125)

(e) Section 14 of the River and Harbor Act approved March 3, 1899 (33 U.S.C. 408) provides that the Secretary of the Army on the recommendation of the Chief of Engineers may grant permission for the temporary occupation or use of any sea wall, bulkhead, jetty, dike, levee, wharf, pier, or other work built by the United States. This permission will be granted by an appropriate real estate instrument in accordance with existing real estate regulations.

(f) Section 404 of the Clean Water Act (33 U.S.C. 1344) (hereinafter referred to as Section 404) authorizes the Secretary of the Army, acting through the Chief of Engineers, to issue permits, after notice and opportunity for public hearing, for the discharge of dredged or fill material into the waters of the United States as specified disposal sites. See 33 CFR Part 323. The selection and use of disposal sites will be in accordance with guidelines developed by the Administrator of EPA in conjunction with the Secretary of the Army and published in 40 CFR 230. If these guidelines prohibit the selection or use of a disposal site, the Chief of Engineers shall consider the economic impact on navigation of such a prohibition in reaching his decision. Furthermore, the Administrator can prohibit or restrict the use of any defined area as a disposal site whenever he determines, after notice and opportunity for public hearings and after consultation with the Secretary of the Army, that the discharge of such materials into such areas will have an unacceptable adverse effect on municipal water supplies, shellfish beds and fishery areas, wildlife, or recreational areas (See 40 CFR Part 230).

(g) Section 103 of the Marine Protection, Research and Sanctuaries Act of 1972, as amended (33 U.S.C. 1413) (hereinafter referred to as Section 103) authorizes the Secretary of the Army, acting through the Chief of Engineers, to issue permits, after notice and opportunity for public hearings, for the transportation of dredged material for the purpose of disposal in the ocean where it is determined that the disposal will not unreasonably degrade or endanger human health, welfare, or amenities, or the marine environment, ecological systems, or economic potentialities. The selection of disposal sites will be in accordance with criteria developed by the Administrator of the EPA in consultation with the Secretary of the Army and published in 40 CFR Parts 220-229. However, similar to the EPA Administrator's limiting authority cited in paragraph (f) of this section, the Administrator can prevent the issuance of a permit under this authority if he finds that the disposal of the material will result in an unacceptable adverse impact on municipal water supplies, shellfish beds, wildlife, fisheries or recreational areas. (See also 33 CFR 324.)

§ 320.3 Related laws.

(a) Section 401 of the Clean Water Act (33 U.S.C. 1341) requires any applicant for a Federal license or permit to conduct any activity that may result in a discharge of a pollutant into waters of the United States to obtain a certification from the State in which the discharge originates or would originate, or, if appropriate, from the interstate water pollution control agency having jurisdiction over the affected waters at the point where the discharge originates or would originate, that the discharge will comply with the applicable effluent limitations and water quality standards. A certification obtained for the construction of any facility must also pertain to the subsequent operation of the facility.

(b) Section 307(c) of the Coastal Zone Management Act of 1972, as amended (16 U.S.C. 1456(c)), requires Federal agencies conducting activities, including development projects, directly affecting a State's coastal zone, to comply, to the maximum extent practicable, with an approved State coastal zone management program. Indian tribes doing work on Federal lands will be treated as a Federal agency for the purpose of the Coastal Zone Management Act. The Act also requires any non-Federal applicant for a Federal license or permit to conduct an activity affecting land or water uses in the State's coastal zone to furnish a certification that the proposed activity will comply with the State's coastal zone management program. Generally, no permit will be issued until the State

has concurred with the non-Federal applicant's certification. This provision becomes effective upon approval by the Secretary of Commerce of the State's coastal zone management program. (See also 15 CFR Part 930)

(c) Section 302 of the Marine Protection, Research and Sanctuaries Act of 1972, as amended (16 U.S.C. 1432), authorizes the Secretary of Commerce, after consultation with other interested Federal agencies and with the approval of the President, to designate as marine sanctuaries those areas of the ocean waters or of the Great Lakes and their connecting waters or of other coastal waters which he determines necessary for the purpose of preserving or restoring such areas for their conservation, recreational, ecological, or aesthetic values. After designating such an area, the Secretary of Commerce shall issue regulations to control any activities within the area. Activities in the sanctuary authorized under other authorities are valid only if the Secretary of Commerce certifies that the activities are consistent with the purposes of Title III of the Act and can be carried out within the regulations for the sanctuary.

(d) The National Environmental Policy Act of 1969 (42 U.S.C. 4321-4347) declares the national policy to encourage a productive and enjoyable harmony between man and his environment. Section 102 of that Act directs that "to the fullest extent possible: (1) the policies, regulations, and public laws of the United States shall be interpreted and administered in accordance with the policies set forth in this Act, and (2) all agencies of the Federal Government shall * * * insure that presently unquantified environmental amenities and values may be given appropriate consideration in decision-making along with economic and technical considerations * * *". (See Appendix B of 33 CFR Part 230.)

(e) The Fish and Wildlife Act of 1956 (16 U.S.C. 742a, *et seq.*), the Migratory Marine Game-Fish Act (16 U.S.C. 760c-760g) and the Fish and Wildlife Coordination Act (16 U.S.C. 661-666c) and other acts express the will of Congress to protect the quality of the aquatic environment as it affects the conservation, improvement and enjoyment of fish and wildlife resources. Reorganization Plan No. 4 of 1970 transferred certain functions, including certain fish and wildlife-water resources coordination responsibilities, from the Secretary of the Interior to the Secretary of Commerce. Under the Fish and Wildlife Coordination Act and Reorganization Plan No. 4, any Federal agency that proposes to control or modify any body of water must first consult with the United States Fish and Wildlife Service, the National Marine Fisheries Service, as appropriate, and with the head of the appropriate State agency exercising administration over the wildlife resources of the affected State.

(f) The Federal Power Act of 1920 (16 U.S.C. 791a *et seq.*), as amended, authorizes the Department of Energy (DOE) to issue licenses for the construction, operation and maintenance of dams, water conduits, reservoirs, power houses, transmission lines, and other physical structures of a hydropower project. However, where such structures will affect the navigable capacity of any navigable waters of the United States (as defined in 16 U.S.C. 796), the plans for the dam or other physical structures affecting navigation must be approved by the Chief of Engineers and the Secretary of the Army. In such cases, the interests of navigation should normally be protected by a recommendation to the DOE for the inclusion of appropriate provisions in the DOE license rather than the issuance of separate Department of the Army permit under 33 U.S.C. 401 *et seq.* As to any other activities in navigable waters not constituting construction, operation and maintenance of physical structures licensed by the DOE under the Federal Power Act of 1920, as amended, the provisions of 33 U.S.C. 401 *et seq.* remain fully applicable. In all cases involving the discharge of dredged or fill material into waters of the United States or the transportation of dredged material for the purpose of disposal in ocean waters, Section 404 or Section 103 will be applicable.

(g) The National Historic Preservation Act of 1966 (16 U.S.C. 470) created the Advisory Council on Historic Preservation to advise the President and Congress on matters involving historic preservation. In performing its function the Council is authorized to review and comment upon activities licensed by the Federal Government which will have an effect upon properties listed in the National Register of Historic Places, or eligible for such listing. The concern of Congress for the preservation of significant historical sites is also expressed in the Preservation of Historical and Archeological Data Act of 1974 (16 U.S.C. 469 *et seq.*), which amends the Act of June 27, 1960. By this Act, whenever a Federal construction project or Federally licensed project, activity or program alters any terrain such that significant historical or archeological data is threatened, the Secretary of the Interior may take action necessary to recover and preserve the data prior to the commencement of the project.

(h) The Interstate Land Sales Full Disclosure Act (15 U.S.C. 1701 *et seq.*) prohibits any developer or agent from selling or leasing any lot in a subdivision (as defined in 15 U.S.C. 1701(3)) unless the purchaser is furnished in advance a printed property report containing information which the Secretary of Housing and Urban Development may, by rules or regulations, require for the protection of purchasers. In the event the lot in question is part of a project that requires Department of the Army authorization, the Property Report is required by Housing and Urban Development regulation to state whether or not a permit for the development has been applied for, issued, or denied by the Corps of Engineers under Section 10 or Section 404. The Property Report is also required to state whether or not any enforcement action has been taken as a consequence of non-application for or denial of such permit.

(i) The Endangered Species Act (16 U.S.C. 1531 *et seq.*) declares the intention of the Congress to conserve threatened and endangered species and the ecosystems on which those species depend. The Act requires that Federal agencies in consultation with the US Fish and Wildlife Service and the National Marine Fisheries Service use their authorities in furtherance of its purposes by carrying out programs for the conservation of endangered or threatened species, and by taking such action necessary to insure that any action authorized, funded or carried out by the Agency is not likely to jeopardize the continued existence of such endangered or threatened species or result in the destruction or adverse modification of habitat of such species which is determined by the Secretary of the Interior or Commerce, as appropriate, to be critical. (See also 50 CFR Parts 17 and 402)

(j) The Deepwater Port Act of 1974 (33 U.S.C. 1501 *et seq.*) prohibits the ownership, construction, or operation of a deepwater port beyond the territorial seas without a license issued by the Secretary of Transportation. The Secretary of Transportation may issue such a license to an applicant if he determines, among other things, that the construction and operation of the deepwater port is in the national interest and consistent with national security and other national policy goals and objectives. An application for a deepwater port license constitutes an application for all Federal authorizations required for the ownership, construction, and operation of a deepwater port, including applications for Section 10, Section 404 and Section 103 permits which may also be required pursuant to the authorities listed in § 320.2 and the policies specified in § 320.4 of this part.

(k) The Marine Mammal Protection Act of 1972 (16 U.S.C. 1361 *et seq.*) expresses the intent of Congress that marine mammals be protected and encouraged to develop in order to maintain the health and stability of the marine ecosystem. The Act imposes a perpetual moratorium on the harassment, hunting, capturing, or killing of marine mammals and on the importation of marine mammals and marine mammal products without a permit from either the Secretary of the Interior or the Secretary of Commerce, depending upon the species of marine mammal involved. Such permits may be issued only for purposes of scientific research and for public display if the purpose is consistent with the policies of the Act. The appropriate Secretary is also empowered in certain re-

stricted circumstances to waive the requirements of the Act.

(l) Section 7(a) of the Wild and Scenic Rivers Act (16 U.S.C. 1278 *et seq.*) provides that no department or agency of the United States shall assist by loan, grant, license, or otherwise in the construction of any water resources project that would have a direct and adverse effect on the values for which such river was established, as determined by the Secretary charged with its administration.

(m) The Ocean Thermal Energy Conversion Act of 1980, (42 U.S.C. Section 9101 *et seq.*) establishes a licensing regime administered by the Administrator of NOAA for the ownership, construction, location and operation of ocean thermal energy conversion (OTEC) facilities and plantships. An application for an OTEC license filed with the Administrator constitutes an application for all Federal authorizations required for ownership, construction, location and operation of an OTEC facility or plantship, except for certain activities within the jurisdiction of the Coast Guard. This includes applications for Section 10, Section 404 and other Department of Army authorizations which may be required.

(n) Section 402 of the Clean Water Act authorizes EPA to issue permits under procedures established to implement the National Pollutant Discharge Elimination System (NPDES) program. The administration of this program can be and, in many cases, has been delegated to individual states. Section 402(b)(6) states that no NPDES permit will be issued if the Chief of Engineers, acting for the Secretary of the Army and after consulting with the US Coast Guard, determines that navigation and anchorage in any navigable water will be substantially impaired as a result of a proposed activity.

§ 320.4 General policies for evaluating permit applications.

The following policies shall be applicable to the review of all applications for Department of the Army permits. Additional policies specifically applicable to certain types of activities are identified in Parts 321-324.

(a) *Public interest review.* (1) The decision whether to issue a permit will be based on an evaluation of the probable impact including cumulative impacts of the proposed activity and its intended use on the public interest. Evaluation of the probable impact which the proposed activity may have on the public interest requires a careful weighing of all those factors which become relevant in each particular case. The benefits which reasonably may be expected to accrue from the proposal must be balanced against its reasonably foreseeable detriments. The decision whether to authorize a proposal, and if so, the conditions under which it will be allowed to occur, are therefore determined by the outcome of the general balancing process. That decision should reflect the national concern for both protection and utilization of important resources. All factors which may be relevant to the proposal must be considered including the cumulative effects thereof: among those are conservation, economics, aesthetics, general environmental concerns, wetlands, cultural values, 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 and, in general, the needs and welfare of the people. No permit will be granted unless its issuance is found to be in the public interest.

(2) The following general criteria will be considered in the evaluation of every application:

(i) The relative extent of the public and private need for the proposed structure or work:

(ii) Where there are unresolved conflicts as to resource use, the practicability of using reasonable alternative locations and methods to accomplish the objective of the proposed structure or work; and

(iii) The extent and permanence of the beneficial and/or detrimental effects which the proposed structure or work may have on the public and private uses to which the area is suited.

(b) *Effect on wetlands.* (1) Some wetlands are vital areas that constitute a productive and valuable public resource, the unnecessary alteration or destruction of which should be discouraged as contrary to the public interest. For projects to be undertaken by Federal, state, or local agencies, additional guidance on wetlands considerations is stated in Executive Order 11990, dated 24 May 1977.

(2) Wetlands considered to perform functions important to the public interest include:

(i) Wetlands which serve significant natural biological functions, including food chain production, general habitat, and nesting, spawning, rearing and resting sites for aquatic or land species;

(ii) Wetlands set aside for study of the aquatic environment or as sanctuaries or refuges;

(iii) Wetlands the destruction or alteration of which would affect detrimentally natural drainage characteristics, sedimentation patterns, salinity distribution, flushing characteristics, current patterns, or other environmental characteristics;

(iv) Wetlands 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 bars;

(v) Wetlands which serve as valuable storage areas for storm and flood waters;

(vi) Wetlands which are prime natural recharge areas. Prime recharge areas are locations where surface and ground water are directly interconnected; and

(vii) Wetlands which through natural water filtration processes serve significant and necessary water purification functions.

(3) Although a particular alteration of wetlands may constitute a minor change, the cumulative effect of numerous such piecemeal changes often results in a major impairment of the wetland resources. Thus, the particular wetland site for which an application is made will be evaluated with the recognition that it may be part of a complete and interrelated wetland area. In addition, the District Engineer may undertake reviews of particular wetland areas in consultation with the appropriate Regional Director of the Fish and Wildlife Service, the Regional Director of the National Marine Fisheries Service of the National Oceanic and Atmospheric Administration, the Regional Administrator of the Environmental Protection Agency, the local representative of the Soil Conservation Service of the Department of Agriculture, and the head of the appropriate state agency to assess the cumulative effect of activities in such areas.

(4) No permit will be granted which involves the alteration of wetlands identified as important by paragraph (b) (2) or of this section because of provisions of paragraph (b)(3), of this section, unless the district engineer concludes, on the basis of the analysis required in paragraph (a), of this section, that the benefits of the proposed alteration outweigh the damage to the wetlands resource. In evaluating whether a particular alteration is necessary, the district engineer shall consider whether the proposed activity is dependent on being located in, or in close proximity to the aquatic environment and whether practicable alternative sites are available. The applicant must provide sufficient information on the need to locate the proposed activity in the wetland and the availability of practicable alternative sites.

(5) In addition to the policies expressed in this subpart, the Congressional policy expressed in the Estuary Protection Act, Pub. L. 90-454, and state regulatory laws or programs for classification and protection of wetlands will be given great weight.

(c) *Fish and wildlife.* In accordance with the Fish and Wildlife Coordination Act (paragraph 320.3(e) of this part) Corps of Engineers officials will consult with the Regional Director U.S. Fish and Wildlife Service, the Regional Director, National Marine Fisheries Service, and the head of the agency responsible for fish and wildlife for the state in which work is to be performed, with a view to the conservation of wildlife resources by prevention of their direct and indirect loss and damage due to the activity proposed in a permit application. The will give great weight to these views on fish and wildlife considerations in evaluating the application.

(d) *Water quality.* Applications for permits for activities which may adversely affect the quality of waters of the United States will be evaluated for compliance with applicable effluent limitations and, water quality standards, during the construction, and subsequent operation of the proposed activity. Certification of compliance with applicable effluent limitations and water quality standards required under provisions of Section 401 of the Clean Water Act will be considered conclusive with respect to water quality considerations unless the Regional Administrator, Environmental Protection Agency (EPA), advises of other water quality aspects to be taken into consideration.

(e) *Historic, cultural, scenic, and recreational values.* Applications for permits covered by this regulation may involve areas which possess recognized historic, cultural, scenic, conservation, recreational or similar values. Full evaluation of the general public interest requires that due consideration be given to the effect which the proposed structure or activity may have on values such as those associated with wild and scenic rivers, registered historic places and natural landmarks, National Rivers, National Wilderness Areas, National Seashores, National Recreation Areas, National Lakeshores, National Parks, National Monuments, estuarine and marine sanctuaries, archeological resources, including Indian religious or cultural sites, and such other areas as may be established under Federal or state law for similar and related purposes. Recognition of those values is often reflected by state, regional, or local land use classifications, or by similar Federal controls or policies. Action on permit applications should, insofar as possible, be consistent with and avoid significant adverse effects on the values or purposes for which those classifications, controls, or policies were established.

(f) *Effect on limits of the territorial sea.* Structures or work affecting coastal waters may modify the coast line or base line from which the territorial sea is measured for purposes of the Submerged Lands Act and international law. Generally, the coast line or base line is the line of ordinary low water on the mainland; however, there are exceptions where there are islands or lowtide elevations offshore (the Submerged Lands Act, 43 U.S.C. 1301(a) and United States v. California, 381 U.S.C. 139 (1965), 382 U.S. 448 (1966)). Applications for structures or work affecting coastal waters will therefore be reviewed specifically to determine whether the coast line or base line might be altered. If it is determined that such a change might occur, coordination with the Attorney General and the Solicitor of the Department of the Interior is required before final action is taken. The district engineer will submit a description of the proposed work and a copy of the plans to the Solicitor, Department of the Interior, Washington, D.C. 20240, and request his comments concerning the effects of the proposed work on the outer continental rights of the United States. These comments will be included in the administrative record of the application. After completion of standard processing procedures, the record will be forwarded to the Chief of Engineers. The decision on the application will be made by the Secretary of the Army after coordination with the Attorney General.

(g) *Interference with adjacent properties or water resource projects.* Authorization of work or structures by the Department of the Army does not convey a property right, nor authorize any injury to property or invasion of other rights.

(1) Because a landowner has the general right to protect his property from erosion, applications to erect protective structures will usually receive favorable consideration. However, if the protective structure may cause damage to the property of others, adversely affect public health and safety, adversely impact floodplain or wetland values, or otherwise appear not to be in the public interest, the district engineer will so advise the applicant and inform him of possible alternative methods of protecting his property. Such advice will be given in terms of general guidance only so as not to compete with private engineering firms nor require undue use of government resources.

(2) A riparian landowner's general right of access to navigable waters of the United States is subject to the similar rights of access held by nearby riparian landowners and to the general public's right of navigation on the water surface. In the case of proposals which create undue interference with access to, or use of, navigable waters, the authorization will generally be denied.

(3) Where it is found that the work for which a permit is desired is in navigable waters of the United States (see 33 CFR Part 329) and may interfere with an authorized Federal project, the applicant should be apprised in writing of the fact and of the possibility that a Federal project which may be constructed in the vicinity of the proposed work might necessitate its removal or reconstruction. The applicant should also be informed that the United States will in no case be liable for any damage or injury to the structures or work authorized by Sections 9 or 10 of the River and Harbor Act of 1899 or by Section 404 of the Clean Water Act which may be caused by or result from future operations undertaken by the Government for the conservation or improvement of navigation, or for other purposes, and no claims or right to compensation will accrue from any such damage.

(4) Proposed activities which are in the area of a Federal project which exists or is under construction will be evaluated to insure that they are compatible with the purpose of the project.

(h) *Activities affecting coastal zones.* Applications for Department of the Army permits for activities affecting the coastal zones of those states having a coastal zone management program approved by the Secretary of Commerce will be evaluated with respect to compliance with that program. No permit will 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 the certification or has waived its right to do so. However, a permit may be issued to a non-Federal applicant if the Secretary of Commerce, on his own initiative or upon appeal by the applicant, finds that the proposed activity is consistent with the objectives of the Coastal Zone Management Act of 1972 or is otherwise necessary in the interests of national security. Federal agency and Indian tribe applicants for Department of the Army permits are responsible for complying with the Coastal Zone Management Act's directives for assuring that their activities directly affecting the coastal zone are consistent, to the maximum extent practicable, with approved State coastal zone management programs.

(i) *Activities in marine sanctuaries.* Applications for Department of the Army authorization for activities in a marine sanctuary established by the Secretary of Commerce under authority of Section 302 of the Marine Protection, Research and Sanctuaries Act of 1972, as amended, will be evaluated for impact on the marine sanctuary. No permit will be issued until the applicant provides a certification from the Secretary of Commerce that the proposed activity is consistent with the purposes of Title III of the Marine Protection, Research and Sanctuaries Act of 1972, as amended, and can be carried out within the regulations promulgated by the Secretary of Commerce to control activities within the marine sanctuary.

(j) *Other Federal, State, or local requirements.* (1) Processing of an application for a Department of the Army permit normally will proceed concurrently with the processing of other required Federal, state, and/or local authorizations or certifications. Final action on the Department of the Army permit will normally not be delayed pending action by another Federal, state or local agency (see 33 CFR 325.2(d)(4)). However, where the required Federal, state and/or local certification and/or authorization has been denied for activities which also require a Department of Army permit before final action has been taken on the Army permit, the Army permit will be denied without prejudice to the right of the applicant to reinstate processing of the application if subsequent approval is received from the appropriate Federal, state and/or local

agency. Even if official certification and/or authorization is not required by state or Federal law, but a state, regional, or local agency having jurisdiction or interest over the particular activity comments on the application, due consideration shall be given to those official views as a reflection of local factors of the public interest.

(2) Where officially adopted Federal, State, regional, local or tribal land-use classifications, determinations, or policies are applicable to the land or water areas under consideration, they shall be presumed to reflect local factors of the public interest and shall be considered in addition to the other national factors of the public interest identified in § 320.4(a) of this part.

(3) A proposed activity may result in conflicting comments from several agencies within the same state. Where a state has not designated a single responsible coordinating agency, district engineers will ask the Governor to express his views or to designate one state agency to represent the official state position in the particular case.

(4) In the absence of overriding national factors of the public interest that may be revealed during the evaluation of the permit application, a permit will generally be issued following receipt of a favorable state determination provided the concerns, policies, goals, and requirements as expressed in 33 CFR Part 320-324, and the applicable statutes have been followed and considered: e.g., the National Environmental Policy Act; the Fish and Wildlife Coordination Act; the Historical and Archeological Preservation Act; the National Historic Preservation Act; the Endangered Species Act; the Coastal Zone Management Act; the Marine Protection, Research and Sanctuaries Act of 1972, as amended; the Clean Water Act, the Archeological Resources Act, and the American Indian Religious Freedom Act. Similarily, a permit will generally be issued for Federal and federally-authorized activities; another Federal agency's determination to proceed is entitled to substantial consideration in the Corps' public interest review.

(5) The district engineers are encouraged to develop joint procedures with those States and other Federal agencies with ongoing permit programs for activities also regulated by the Department of the Army. In such cases, applications for Department of the Army permits may be processed jointly with the State or other Federal applications to an independent conclusion and decision by the district engineer and appropriate Federal or State agency. (See 33 CFR 325.2(e).)

(6) The district engineer shall develop operating procedures for establishing official communications with Indian Tribes within the district. The procedures shall provide for appointment of a tribal representative who will receive all pertinent public notices, and respond to such notices with the official tribal position on the proposed activity. This procedure shall apply only to those Tribes which accept this option. Any adopted operating procedures shall be distributed by public notice to inform the Tribes of the option.

(k) *Safety of impoundment structures.* To insure that all impoundment structures are designed for safety, non-Federal applicants may be required to demonstrate that the structure complies with established state dam safety criteria or has been designed by qualified persons and, in appropriate cases, that the design has been independently reviewed (and modified as the review would indicate) by similarly qualified persons.

(l) *Floodplain management.* (1) Floodplains possess significant natural values and carry out numerous functions important to the public interest. These include:

(i) Water resources values (natural moderation of floods, water quality maintenance, and groundwater recharge);

(ii) Living resource value (fish, wildlife, and plant resources);

(iii) Cultural resource values (open space, natural beauty, scientific study, outdoor education, and recreation); and

(iv) Cultivated resource values (agriculture, aquaculture, and forestry).

(2) Although a particular alteration to a floodplain may constitute a minor change, the cumulative impact of such changes may result in a significant degradation of floodplain values and

functions and in increased potential for harm to upstream and downstream activities. In accordance with the requirements of Executive Order 11988, district engineers, as part of their public interest review, should avoid to the extent practicable long and short term significant adverse impacts associated with the occupancy and modification of floodplains as well as the direct and indirect support of floodplain development whenever there is a practicable alternative. For those activities, which in the public interest, must occur in or impact upon floodplains, the district engineer shall ensure to the maximum extent practicable that the impacts of potential flooding on human health, safety and welfare are minimized, the risks of flood losses are minimized, and, whenever practicable the natural and beneficial values served by floodplains and restored and preserved.

(3) In accordance with Executive Order 11988, the district engineer should avoid authorizing floodplain developments whenever practicable alternatives exist outside the floodplain. If there are no practicable alternatives, the district engineer may consider, as a means of mitigation, alternatives within the floodplain which will lessen any significant adverse impact to the floodplain.

(m) *Water supply and conservation.* Water is an essential resource, basic to human survival, economic growth, and the natural environment. Water conservation requires the efficient use of water resources in all actions which involve the significant use of water or that significantly affect the availability of water for alternative uses. Full consideration will be given to water conservation as a factor in the public interest review including opportunities to reduce demand and improve efficiency in order to minimize new supply requirements. This policy is subject to Congressional policy stated in Sec. 101(g) of the Clean Water Act that the authority of states to allocate water quantities shall not be superseded, abrogated, or otherwise impaired.

(n) *Energy conservation and development.* Energy conservation and development is a major national objective. District engineers will give great weight to energy needs as a factor in the public interest review and will give high priority to permit actions involving energy projects.

(o) *Navigation.* (1) Section 11 of the River and Harbor Act of 1899 authorized establishment of harbor lines shoreward of which no individual permits were required. Because harbor lines were established on the basis of navigation impacts only, the Corps of Engineers published a regulation on May 27, 1970 (33 CFR 209.150)[1] which declared that permits would thereafter be required for activities shoreward of the harbor lines. Review of applications would be based on a full public interest evaluation and harbor lines would serve as guidance for assessing navigation impacts. Accordingly, activities constructed shoreward of harbor lines prior to May 27, 1970 do not require specific authorization.

(2) The policy of considering harbor lines as guidance for assessing impacts on navigation continues.

(3) Navigation in all navigable waters of the United States continues to be a primary concern of the Federal government and will be given great weight in the public interest balancing process.

(4) District engineers should protect navigational and anchorage interests in connection with the NPDES program by recommending to EPA or to the state, if the program has been delegated, that a permit be denied unless appropriate conditions can be included to avoid any substantial impairment of navigation and anchorage.

PART 321—PERMITS FOR DAMS AND DIKES IN NAVIGABLE WATERS OF THE UNITED STATES

Sec.

AUTHORITY: 33 U.S.C. 401.

SOURCE: 47 FR 31806, July 22, 1982, unless otherwise noted.

[1] 33 CFR 209.150 was removed at 42 FR 37133, July 19, 1977.

§ 321.1 General.

This regulation prescribes, in addition to the general policies of 33 CFR Part 320 and procedures of 33 CFR Part 325, those special policies, practices, and procedures to be followed by the Corps of Engineers in connection with the review of applications for Department of Army permits to authorize the construction of a dike or dam in a navigable water of the United States pursuant to Section 9 of the River and Harbor Act of 1899 (33 U.S.C. 401). See 33 CFR 320.2(a). Dams and dikes in navigable waters of the United States also require Department of the Army permits under Section 404 of the Clean Water Act, as amended (33 U.S.C. 1344). Applicants for Department of the Army permits under this Part should also refer to 33 CFR Part 323 to satisfy the requirements of Section 404.

§ 321.2 Definitions.

For the purpose of this regulation, the following terms are defined:

(a) The term "navigable waters of the United States" means those waters of the United States that are subject to the ebb and flow of the tide shoreward to the mean high water mark and/or are presently used, or have been used in the past, or may be susceptible to use to transport interstate or foreign commerce. See 33 CFR Part 329 for a more complete definition of this term.

(b) The term "dike or dam" means an impoundment structure that completely spans a navigable water of the United States and that may obstruct interstate waterborne commerce. The term does not include a weir which is regulated pursuant to Section 10 of the River and Harbor Act of 1899 (see 33 CFR Part 322).

§ 321.3 Special policies and procedures.

The following additional special policies and procedures shall be applicable to the evaluation of pemit applications under this regulation:

(a) The Secretary of the Army will decide whether Department of the Army authorization for a dam or dike in a navigable water of the United States will be issued, since this authority has not been delegated to the Chief of Engineers. The conditions to be imposed in any instrument of authorization will be recommended by the district engineer when forwarding the report to the Secretary of the Army, through the Chief of Engineers.

(b) Processing a Department of the Army application under Section 9 will not be completed until the approval of the United States Congress has been obtained if the navigable water of the United States is an interstate waterbody, or until the approval of the appropriate state legislature has been obtained if the navigable water of the United States is solely within the boundaries of one state. The district engineer, upon receipt of such an application, will notify the applicant that the consent of Congress or the state legislature must be obtained before a permit can be issued.

PART 322—PERMITS FOR STRUCTURES OR WORK IN OR AFFECTING NAVIGABLE WATERS OF THE UNITED STATES

Sec.

AUTHORITY: 33 U.S.C. 403.

SOURCE: 47 FR 31807, July 22, 1982, unless otherwise noted.

§ 322.1 General.

This regulation prescribes, in addition to the general policies of 33 CFR Part 320 and procedures of 33 CFR Part 325 those special policies, practices and procedures to be followed by the Corps of Engineers in connection with the review of applications for Department of Army permits to authorize certain structures or work in or affecting navigable waters of the United States pursuant to Section 10 of the River and Harbor Act of 1899 (33 U.S.C. 403) (hereinafter referred to as Section 10). See 33 CFR 320.2(b). Certain stuctures or work in or affecting navigable waters of the United States are also regulated under other authorities of the Department of the Army. These include discharges of dredged or fill material into waters of the United States, including the territorial seas, pursuant to Section 404 of the Clean Water Act (33 U.S.C. 1344; see 33 CFR Part 323) and the transportation of dredged material by vessel for purposes of dumping in ocean waters, including the territorial seas, pursuant to Section 103 of the Marine Protection, Research and Sanctuaries Act of 1972, as amended (33 U.S.C. 1413; see 33 CFR Part 324). A Department of the Army permit will also be required under these additional authorities if they are applicable to structures or work in or affecting navigable waters of the United States. Applicants for Department of the Army permits under this part should refer to the other cited authorities and implementing regulations for these additional permit requirements to determine whether they also are applicable to their proposed activities.

§ 322.2 Definitions.

For the purpose of this regulation, the following terms are defined:

(a) The term "navigable waters of the United States" means those waters of the United States that are subject to the ebb and flow of the tide shoreward to the mean high water mark, and/or are presently used, or have been used in the past, or may be susceptible to use to transport interstate or foreign commerce. See 33 CFR Part 329 for a more complete definition of this term.

(b) The term "structure" shall include, without limitation, any pier, wharf, dolphin, weir, boom, breakwater, bulkhead, revetment, riprap, jetty, permanent mooring structure, power transmission line, permanently moored floating vessel, piling, aid to navigation, or any other obstacle or obstruction.

(c) The term "work" shall include, without limitation, any dredging or disposal of dredged material, excavation, filling, or other modification of a navigable water of the United States.

(d) The term "letter of permission" means a type of individual permit issued in accordance with the abbreviated procedures of 33 CFR 325.2(e).

(e) The term "individual permit" means a Department of the Army authorization that is issued following a case-by-case evaluation of a specific structure or work in accordance with the procedures of this regulation and 33 CFR 325 and a determination that the proposed structure or work is in the public interest pursuant to 33 CFR 320.

(f) The term "general permit" means a Department of the Army authorization that is issued on a nationwide ("nationwide permits") or regional ("regional permits") basis for a category or categories of activities when:

(1) those activities are substantially similar in nature and cause only minimal individual and cumulative environmental impacts; or

(2) the general permit would result in avoiding unnecessary duplication of the regulatory control exercised by another Federal, state, or local agency provided it has been determined that the environmental consequences of the action are individually and cumulatively minimal. (See 33 CFR 325.2(e) and 33 CFR Part 330).

§ 322.3 Activities requiring permits.

(a) *General.* Department of the Army permits are required under Section 10 for structures and/or work in or affecting navigable waters of the United States except as otherwise provided in these regulations. Activities that were commenced or completed shoreward of established Federal habor lines before May 27, 1970 (see 33 CFR 320.4(o)) also do not require Section 10 permits; however, if those activities involve the discharge of dredged or fill material into waters of the United States after October 18, 1972, a Section 404 permit is required (see 33 CFR Part 323).

(1) Structures or work are in the navigable waters of the United States if they are within limits defined in 33 CFR Part 329. Structures or work outside these limits are subject to the provisions of law cited in paragraph (a) of this section, if these structures or work affect the course, location, or condition of the waterbody in such a manner as to impact on the navigable capacity of the waterbody. For purposes of a Section 10 permit, a tunnel or other structure or work under or over a navigable water of the United

States is considered to have an impact on the navigable capacity of the waterbody.

(2) Pursuant to Section 154 of the Water Resource Development Act of 1976 (Pub. L. 94-587), Department of the Army permits will not be required under Section 10 to construct wharves and piers in any waterbody, located entirely within one State, that is a navigable water of the United States solely on the basis of its historical use to transport interstate commerce. Section 154 applies only to the construction of a single pier or wharf and not to marinas. Furthermore, Section 154 is not applicable to any pier or wharf that would cause an unacceptable impact on navigation.

(b) *Outer continental shelf.* Department of the Army permits will also be required for the construction of artificial islands, installations, and other devices on the outer continental shelf pursuant to Section 4(e) of the Outer Continental Shelf Lands Act as amended (see 33 CFR 320.2(b)).

(c) *Activities of Federal agencies.* (1) Except as specifically provided in this subparagraph, activities of the type described in paragraphs (a) and (b), of this section, done by or on behalf of any Federal agency, other than any work or structures in or affecting navigable waters of the United States that are part of the civil works activities of the Corps of Engineers, are subject to the authorization procedures of these regulations. Agreement for construction or engineering services performed for other agencies by the Corps of Engineers does not constitute authorization under this regulation. Division and district engineers will therefore advise Federal agencies accordingly, and cooperate to the fullest extent in expediting the processing of their applications.

(2) Congress has delegated to the Secretary of the Army and the Chief of Engineers in Section 10 the duty to authorize or prohibit certain work or structures in navigable waters of the United States. The general legislation by which Federal agencies are empowered to act generally is not considered to be sufficient authorization by Congress to satisfy the purposes of Section 10. If an agency asserts that it has Congressional authorization meeting the test of Section 10 or would otherwise be exempt from the provisions of Section 10, the legislative history and/or provisions of the Act should clearly demonstrate that Congress was approving the exact location and plans from which Congress could have considered the effect on navigable waters of the United States or that Congress intended to exempt that agency from the requirements of Section 10. Very often such legislation reserves final approval of plans or construction for the Chief of Engineers. In such cases evaluation and authorization under this regulation are limited by the intent of the statutory language involved.

(3) The policy provisions set out in 33 CFR 320.4(j) relating to state or local certifications and/or authorizations, do not apply to work or structures undertaken by Federal agencies, except where compliance with non-Federal authorization is required by Federal law or Executive policy, e.g., Section 313 and Section 401 of the Clean Water Act.

§ 322.4 [Reserved]

§ 322.5 Special policies.

The Secretary of the Army has delegated to the Chief of Engineers the authority to issue or deny Section 10 permits. The following additional special policies and procedures shall also be applicable to the evaluation of permit applications under this regulation.

(a) *General.* Department of the Army permits are required for structures or work in or affecting navigable waters of the United States. However, certain structures or work specified in 33 CFR Part 330 are permitted by that regulation. If a structure or work is not permitted by that regulation, an individual or regional Section 10 permit will be required.

(b) [Reserved]

(c) *Non-Federal dredging for navigation.* (1) The benefits which an authorized Federal navigation project are intended to produce will often require similar and related operations by non-Federal agencies (e.g., dredging access channels to docks and berthing

facilities or deepening such channels to correspond to the Federal project depth). These non-Federal activities will be considered by Corps of Engineers officials in planning the construction and maintenance of Federal navigation projects and, to the maximum practical extent, will be coordinated with interested Federal, state, regional and local agencies and the general public simultaneously with the associated Federal projects. Non-Federal activities which are not so coordinated will be individually evaluated in accordance with these regulations. In evaluating the public interest in connection with applications for permits for such coordinated operations, equal treatment will, therefore, be accorded to the fullest extent possible to both Federal and non-Federal operations. Furthermore, permits for non-Federal dredging operations will normally contain conditions requiring the permittee to comply with the same practices or requirements utilized in connection with related Federal dredging operations with respect to such matters as turbidity, water quality, containment of material, nature and location of approved spoil disposal areas (non-Federal use of Federal contained disposal areas will be in accordance with laws authorizing such areas and regulations governing their use), extent and period of dredging, and other factors relating to protection of environmental and ecological values.

(2) A permit for the dredging of a channel, slip, or other such project for navigation may also authorize the periodic maintenance dredging of the project. Authorization procedures and limitations for maintenance dredging shall be as prescribed in 33 CFR 325.6(e). The permit will require the permittee to give advance notice to the district engineer each time maintenance dredging is to be performed. Where the maintenance dredging involves the discharge of dredged material into waters of the United States or the transportation of dredged material for the purpose of dumping in the ocean waters, the procedures in 33 CFR Parts 323 and 324 respectively shall also be followed.

(d) *Structures for small boats.* (1) As a matter of policy, in the absence of overriding public interest, favorable consideration will generally be given to applications from riparian owners for permits for piers, boat docks, moorings, platforms and similar structures for small boats. Particular attention will be given to the location and general design of such structures to prevent possible obstructions to navigation with respect to both the public's use of the waterway and the neighboring proprietors' access to the waterway. Obstructions can result from both the existence of the structure, particularly in conjunction with other similar facilities in the immediate vicinity, and from its inability to withstand wave action or other forces which can be expected. District engineers will inform applicants of the hazards involved and encourage safety in location, design and operation. Corps of Engineers officials will also encourage cooperative or group use facilities in lieu of individual proprietor use facilities.

(2) Floating structures for small recreational boats or other recreational purposes in lakes controlled by the Corps of Engineers under a resource manager are normally subject to permit authorities cited in § 322.3, above, when those waters are regarded as navigable waters of the United States. However, such structures will not be authorized under this regulation but will be regulated under applicable regulations of the Chief of Engineers published in 36 CFR 327.19 if the land surrounding those lakes is under complete Federal ownership. District engineers will delineate those portions of the navigable waters of the United States where this provision is applicable and post notices of this designation in the vicinity of the lake resource manager's office.

(e) *Aids to navigation.* The placing of fixed and floating aids to navigation in a navigable water of the United States is within the purview of Section 10 of the River and Harbor Act of 1899. Furthermore, these aids are of particular interest to the U.S. Coast Guard because of their control of marking, lighting and standardization of such navigation aids. A Section 10 nationwide permit has been issued for such aids provided they are approved

by and installed in accordance with the requirements of the U.S. Coast Guard (33 CFR Part 330). Electrical service cables to such aids are not included in the nationwide permit (an individual or regional Section 10 permit will be required).

(f) *Outer continental shelf.* Artificial islands, installations, and other devices located on the outer continental shelf are subject to the standard permit procedures of this regulation. Where the islands, installations and other devices are to be constructed on lands which are under mineral lease from the Bureau of Land Management, Department of the Interior, that agency, in cooperation with other Federal agencies, fully evaluates the potential effect of the leasing program on the total environment. Accordingly, the decision whether to issue a permit on lands which are under mineral lease from the Department of the Interior will be limited to an evaluation of the impact of the proposed work on navigation and national security. The public notice will so identify the criteria.

(g) *Canals and other artificial waterways connected to navigable waters of the United States.* (1) A canal or similar artificial waterway is subject to the regulatory authorities discussed in § 322.3, of this part, if it constitutes a navigable water of the United States, or if it is connected to navigable waters of the United States in a manner which affects their course, location, condition, or capacity or if at some point in its construction or operation it results in an effect on the course, location, condition, or capacity of navigable waters of the United States. In all cases the connection to navigable waters of the United States requires a permit. Where the canal itself constitutes a navigable water of the United States, evaluation of the permit application and further exercise of regulatory authority will be in accordance with the standard procedures of these regulations. For all other canals, the exercise of regulatory authority is restricted to those activities which affect the course, location, condition, or capacity of the navigable waters of the United States.

(2) The proponent of canal work should submit the application for a permit, including a proposed plan of the entire development, and the location and description of anticipated docks, piers and other similar structures which will be placed in the canal, to the district engineer before commencing any form of work. If construction of the canal in such a manner as to result in an effect on the course, location, condition, or capacity of the navigable waters of the United States has already taken place without a permit, the district engineer will proceed in accordance with 33 CFR Part 326. Where the construction of the canal would result in an effect on the course, location, condition, or capacity of navigable waters of the United States, an application for a Section 10 permit should be made at the earliest stage of planning. Where the district engineer becomes aware that the canal construction has already begun, he will advise the proponent in writing of the need for a permit to the extent that the construction will result in an effect on the course, location, condition, or capacity of navigable waters of the United States. He will also ask the proponent if he intends to undertake such work and will request the immediate submission of the plans and permit application if it is so intended. The district engineer will also advise the proponent that any work is done at the risk that, if a permit is required, it may not be issued, and that the existence of partially completed excavation work will not be allowed to weigh favorably in evaluation of the permit application.

(h) *Facilities at the borders of the United States.* (1) The construction, operation, maintenance, or connection of facilities at the borders of the United States are subject to Executive control and must be authorized by the President, Secretary of State, or other delegated official.

(2) Applications for permits for the construction, operation, maintenance, or connection at the borders of the United States of facilities for the transmission of electric energy between the United States and a foreign country, or for the exportation or importation of natural gas to or from a

foreign country, must be made to the Secretary of Energy. (Executive Order 10485, September 3, 1953, 16 U.S.C. 824(a)(e), 15 U.S.C. 717(b), as amended by Executive Order 12038, February 3, 1978, and 18 CFR Parts 32 and 153).

(3) Applications for the landing or operation of submarine cables must be made to the Federal Communications Commission. (Executive Order 10530, May 10, 1954, 47 U.S.C. 34 to 39, and 47 CFR 1.766).

(4) The Secretary of State is to receive applications for permits for the construction, connection, operation, or maintenance, at the borders of the United States, of pipelines, conveyor belts, and similar facilities for the exportation or importation of petroleum products, coals, minerals, or other products to or from a foreign country; facilities for the exportation or importation of water or sewage to or from a foreign country; and monorails, aerial cable cars, aerial tramways and similar facilities for the transportation of persons or things, or both, to or from a foreign country. (Executive Order 11423, August 16, 1968).

(5) A Department of the Army permit under Section 10 of the River and Harbor Act of 1899 is also required for all of the above facilities which affect the navigable waters of the United States, but in each case in which a permit has been issued as provided above, the district engineer, in evaluating the general public interest, may consider the basic existence and operation of the facility to have been primarily examined and permitted as provided by the Executive Orders. Furthermore, in those cases where the construction, maintenance, or operation at the above facilities involves the discharge of dredged or fill material in waters of the United States or the transportation of dredged material for the purpose of dumping it into ocean waters, appropriate Department of the Army authorizations under Section 404 of the Clean Water Act or under Section 103 of the Marine Protection, Research and Sanctuaries Act of 1972, as amended, are also required (see 33 CFR Parts 323, 324).

(i) *Power transmission lines.* (1) Permits under Section 10 of the River and Harbor Act of 1899 are required for power transmission lines crossing navigable waters of the United States unless those lines are part of a water power project subject to the regulatory authorities of the Department of Energy under the Federal Power Act of 1920. If an application is received for a permit for lines which are part of such a water project, the applicant will be instructed to permit the application to the Department of Energy. If the lines are not part of such a water power project, the application will be processed in accordance with the procedures of these regulations.

(2) The following minimum clearances are required for aerial electric power transmission lines crossing navigable waters of the United States. These clearances are related to the clearances over the navigable channel provided by existing fixed bridges, or the clearances which would be required by the U.S. Coast Guard for new fixed bridges, in the vicinity of the proposed power line crossing. The clearances are based on the low point of the line under conditions which produce the greatest sag, taking into consideration temperature, load, wind, length of span, and type of supports as outlined in the National Electrical Safety Code.

Nominal system voltage, kV	Minimum additional clearance (feet) above clearance required for bridges
115 and below	20
138	22
161	24
230	26
350	30
500	35
700	42
750 to 765	45

(3) Clearances for communication lines, stream gaging cables, ferry cables, and other aerial crossings are usually required to be a minimum of ten feet above clearances required for bridges. Greater clearances will be required if the public interest so indicates.

(j) *Seaplane operations.* (1) Structures in navigable waters of the United States associated with seaplane operations require Department of the Army permits, but close coordination with the Federal Aviation Administration (FAA), Department of Transportation, is required on such applications.

(2) The FAA must be notified by an applicant whenever he proposes to establish or operate a seaplane base. The FAA will study the proposal and advise the applicant, district engineer, and other interested parties as to the effects of the proposal on the use of airspace. The district engineer will therefore refer any objections regarding the effect of the proposal on the use of airspace to the FAA, and give due consideration to its recommendations when evaluating the general public interest.

(3) If the seaplane base would serve air carriers licensed by the Civil Aeronautics Board, the applicant must receive an airport operating certificate from the FAA. That certificate reflects a determination and conditions relating to the installation, operation, and maintenance of adequate air navigation facilities and safety equipment. Accordingly, the district engineer may, in evaluating the general public interest, consider such matters to have been primarily evaluated by the FAA.

(4) For regulations pertaining to seaplane landings at Corps of Engineers projects, see § 327.4 of this part.

(k) *Foreign trade zones.* The Foreign Trade Zones Act (48 Stat. 998-1003, 19 U.S.C. 81a to 81u, as amended) authorizes the establishment of foreign-trade zones in or adjacent to United States ports of entry under terms of a grant and regulations prescribed by the Foreign-Trade Zones Board. Pertinent regulations are published at Title 15 of the Code of Federal Regulations, Part 400. The Secretary of the Army is a member of the Board, and construction of a zone is under the supervision of the district engineer. Laws governing the navigable waters of the United States remain applicable to foreign-trade zones, including the general requirements of these regulations. Evaluation by a district engineer of a permit application may give recognition to the consideration by the Board of the general economic effects of the zone on local and foreign commerce, general location of wharves and facilities, and other factors pertinent to construction, operation, and maintenance of the zone.

PART 323—PERMITS FOR DISCHARGES OF DREDGED OR FILL MATERIAL INTO WATERS OF THE UNITED STATES

Sec.

AUTHORITY: 33 U.S.C. 1344.

SOURCE: 47 FR 31810, July 22, 1982, unless otherwise noted.

§ 323.1 General.

This regulation prescribes, in addition to the general policies of 33 CFR Part 320 and procedures of 33 CFR Part 325, those special policies, practices, and procedures to be followed by the Corps of Engineers in connection with the review of applications for Department of the Army permits to authorize the discharge of dredged or fill material into waters of the United States pursuant to Section 404 of the Clean Water Act (33 U.S.C. 1344) (hereinafter referred to as Section 404). See 38 CFR 320.2(g). Certain discharges of dredged or fill material into waters of the United States are also regulated under other authorities of the Department of the Army. These include dams and dikes in navigable waters of the United States pursuant to Section 9 of the River and Harbor Act of 1899 (33 U.S.C. 401; see 33 CFR Part 321) and certain structures or work in or affecting navigable waters of the United States pursuant to Section 10 of the River and Harbor Act of 1899 (33 U.S.C. 403; see 33 CFR Part 322). A Department of the Army permit will also be required under these additional authorities if they are applicable to activities involving discharges of dredged or fill material into waters of the United States. Applicants for Department of the Army permits under this part should refer to the other cited authorities and implementing regulations for these additional permit requirements to determine whether they also are applicable to their proposed activities.

§ 323.2 Definitions.

For the purpose of this regulation, the following terms are defined:

(a) The term "waters of the United States" means: [1]

(1) All waters which are currently used, or were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide;

(2) All interstate waters including interstate wetlands;

(3) All other waters such as intrastate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds, the use, degradation or destruction of which could affect interstate or foreign commerce including any such waters:

(i) Which are or could be used by interstate or foreign travels for recreational or other purposes; or

(ii) From which fish or shellfish are or could be taken and sold in interstate or foreign commerce; or

(iii) Which are used or could be used for industrial purposes by industries in interstate commerce;

(4) All impoundments of waters otherwise defined as waters of the United States under this definition.

(5) Tributaries of waters identified in paragraphs (a)(1) through (a)(4) of this section;

(6) The territorial sea;

(7) Wetlands adjacent to waters (other than waters that are themselves wetlands) identified in paragraphs (a)(1) through (a)(6) of this section. Waste treatment systems, including treatment ponds or lagoons designed to meet the requirements of CWA (other than cooling ponds as defined in 40 CFR 123.11(m) which also meet the criteria of this definition) are not waters of the United States.

(b) The term "navigable waters of the United States" means those waters of the United States that are subject to the ebb and flow of the tide shoreward to the mean high water mark and/or are presently used, or have been used in the past, or may be susceptible to use to transport interstate or foreign commerce. (See 33 CFR Part 329 for a more complete definition of this term.)

(c) The term "wetlands" means those areas that are inundated or saturated by surface or ground water at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs and similar areas.

(d) The term "adjacent" means bordering, contiguous, or neighboring. Wetlands separated from other waters of the United States by man-made dikes or barriers, natural river berms, beach dunes and the like are "adjacent wetlands."

(e) The term "lake" means a standing body of open water that occurs in a natural depression fed by one or more streams from which a stream may flow, that occurs due to the widening or natural blockage or cutoff of a river or stream, or that occurs in an isolated natural depression that is not a part of a surface river or stream. The term also includes a standing body of open water created by artificially blocking or restricting the flow of a river, stream, or tidal area. As used in this regulation, the term does not include artificial lakes or ponds created by excavating and/or diking dry land to collect and retain water for such purposes as stock watering, irrigation, settling basins, cooling, or rice growing.

(f) The term "ordinary high water mark" means that the line on the shore established by the fluctuation of water and indicated by physical characteristics such as a clear, natural line impressed on the bank; shelving

[1] The terminology used by the CWA is "navigable waters" which is defined in Section 502(7) of the Act as "waters of the United States including the territorial seas." For purposes of clarity, and to avoid confusion with other Corps of Engineers regulatory programs, the term "waters of the United States" is used throughout this regulation.

changes in the character of soil; destruction of terrestrial vegetation; the presence of litter and debris; or other appropriate means that consider the charactertics of the surrounding areas.

(g) The term "high tide line" is the line used in Sec. 404 determinations and means a line or mark left upon tide flats, beaches, or along shore objects that indicates the intersection of the land with the water's surface at the maximum height reached by a rising tide. The mark may be determined by a line of oil or scum along shore objects, a more or less continuous deposit of fine shell or debris on the foreshore or berm, other physical markings or characteristics, vegetation lines, tidal gages, or other suitabie means that delineate the general height reached by a rising tide. The term includes spring high tides and other high tides that occur with periodic frequency, but does not include storm surges in which there is a departure from the normal or predicted reach of the tide due to the piling up of water against a coast by strong winds such as those accompanying a hurricane or other intense storm.

(h) The term "headwaters" means the point on a non-tidal stream above which the average annual flow is less than five cubic feet per second.[2] The District engineer may estimate this point from available data by using the mean annual area precipitation, area drainage basin maps, and the average runoff coefficient, or by similar means.

(i) The term "dredged material" means material that is excavated or dredged from waters of the United States.

(j) The term "discharge of dredged material" means any addition of dredged material into the waters of the United States. The term includes, without limitation, the addition of dredged material to a specified discharge site located in waters of the United States and the runoff or overflow from a contained land or water disposal area. Discharges of pollutants into waters of the United States resulting from the onshore subsequent processing of dredged material that is extracted for any commercial use (other than fill) are not included within this term and are subject to Section 402 of the Clean Water Act even though the extraction and deposit of such material may require a permit from the Corps of Engineers. The term does not include plowing, cultivating, seeding and harvesting for the production of food, fiber, and forest products.

(k) The term "fill material" means any material used for the primary purpose of replacing an aquatic area with dry land or of changing the bottom elevation of an waterbody. The term does not include any pollutant discharged into the water primarily to dispose of waste, as that activity is regulated under Section 402 of the Clean Water Act.

(l) The term "discharge of fill material" means the addition of fill material into waters of the United States. The term generally includes, without limitation, the following activities: Placement of fill that is necessary to the construction of any structure in a water of the United States; the building of any structure or impoundment requiring rock, sand, dirt, or other material for its construction; site-development fills for recreational, industrial, commercial, residential, and other uses; causeways or road fills; dams and dikes; artificial islands; property protection and/or reclamation devices such as riprap, groins, seawalls, breakwaters, revetments; beach nourishment; levees; fill for structures such as sewage treatment facilities, intake and outfall pipes associated with power plants and subaqueous utility lines; and artificial reefs. The terms does not include plowing, cultivating, seeding and harvesting for the production of food, fiber, and forest products.

(m) The term "individual permit" means a Department of the Army authorization that is issued following a case-by-case evaluation of a specific project involving the proposed discharge(s) in accordance with the procedures of this regulation and 33 CFR Part 325 and a determination that the proposed discharge is in the public interest pursuant to 33 CFR Part 320.

(n) The term "general permit" means a Department of the Army authorization that is issued on a nationwide ("nationwide permits") or regional ("regional permits") basis for a category or categories of activities when:

(1) those activities are substantially similar in nature and cause only minimal individual and cumulative environmental impacts; or

(2) the general permit would result in avoiding unnecessary duplication of regulatory control exercised by another Federal, state, or local agency provided it has been determined that the environmental consequences of the action are individually and cumulatively minimal. (See 33 CFR 325.2(e) and 33 CFR Part 330).

[2] For streams that are dry during long periods of the year, district engineers may establish the headwater point as that point on the stream where a flow of five cubic feet per second is equaled or exceeded 50 percent of the time.

§ 323.3 Discharges requiring permits.

(a) *General.* Except as provided in § 323.4 below, Department of the Army permits will be required for the discharge of dredged or fill material into waters of the United States. Certain discharges specified in 33 CFR Part 330 are permitted by that regulation ("nationwide permits"). Other discharges may be authorized by district or division engineers on a regional basis ("regional permits"). If a discharge of dredged or fill material is not exempted by § 323.4 of this part or permitted by 33 CFR Part 330, an individual or regional Section 404 permit will be required for the discharge of dredged or fill material into waters of the United States.

(b) *Activities of Federal agencies.* Discharges of dredged or fill material into waters of the United States done by or on behalf of any Federal agency, other than the Corps of Engineers (see 33 CFR 209.145), are subject to the authorization procedures of these regulations. Agreement for construction or engineering services performed for other agencies by the Corps of Engineers does not constitute authorization under the regulations. Division and district engineers will therefore advise Federal agencies and instrumentalities accordingly and cooperate to the fullest extent in expediting the processing of their applications.

§ 323.4 Discharges not requiring permits.

(a) *General.* Except as specified in paragraphs (b) and (c) of this section, any discharge of dredged or fill material that may result from any of the following activities is not prohibited by or otherwise subject to regulation under Section 404:

(1)(i) Normal farming, silviculture and ranching activities such as plowing, seeding, cultivating, minor drainage, and harvesting for the production of food, fiber, and forest products, or upland soil and water conservation practices, as defined in paragraph (a)(1)(iii) of this section.

(ii) To fall under this exemption, the activities specified in paragraph (a)(1)(i) of this section must be part of an established (i.e., on-going) farming, silviculture, or ranching operation. Activities on areas lying fallow as part of a conventional rotational cycle are part of an established operation. Activities which bring an area into farming, silviculture, or ranching use are not part of an established operation. An operation ceases to be established when the area on which it was conducted has been converted to another use or has lain idle so long that modifications to the hydrological regime are necessary to resume operations. If an activity takes place outside the waters of the United States, or if it does not involve a discharge, it does not need a section 404 permit, whether or not it is part of an established farming, silviculture, or ranching operation.

(iii)(A) Cultivating means physical methods of soil treatment employed within established farming, ranching and silviculture lands on farm, ranch, or forest crops to aid and improve their growth, quality or yield.

(B) Harvesting means physical measures employed directly upon farm, forest, or ranch crops within established agricultural and silvicultural lands to bring about their removal from farm, forest, or ranch land, but does not include the construction of farm, forest, or ranch roads.

(C)(*1*) Minor Drainage means:

(*i*) The discharge of dredged or fill material incidental to connecting upland drainage facilities to waters of

the United States, adequate to effect the removal of excess soil moisture from upland croplands. (Construction and maintenance of upland (dryland) facilities, such as ditching and tiling, incidental to the planting, cultivating, protecting, or harvesting of crops, involve no discharge of dredged or fill material into waters of the United States, and as such never require a Section 404 permit.);

(*ii*) The discharge of dredged or fill material for the purpose of installing ditching or other such water control facilities incidental to planting, cultivating, protecting, or harvesting of rice, cranberries or other wetland crop species, where these activities and the discharge occur in waters of the United States which are in established use for such agricultural and silvicultural wetland crop production;

(*iii*) the discharge of dredged or fill material for the purpose of manipulating the water levels of, or regulating the flow or distribution of water within, existing impoundments which have been constructed in accordance with applicable requirements of CWA, and which are in established use for the production of rice, cranberries, or other wetland crop species.[3]

(*iv*) The discharge of dredged or fill material incidental to the emergency removal of sandbars, gravel bars, or other similar blockages which are formed during flood flows or other events, where such blockages close or constrict previously existing drainageways and, if not promptly removed, would result in damage to or loss of existing crops or would impair or prevent the plowing, seeding, harvesting or cultivating crops on land in established use for crop production. Such removal does not include enlarging or extending the dimensions of, or changing the bottom elevations of, the affected drainageway as it existed prior to the formation of the blockage. Removal must be accomplished within one year of discovery of such blockages in order to be eligible for exemption.

(*2*) Minor drainage in waters of the U.S. is limited to drainage within areas that are part of an established farming or silviculture operation. It does not include drainage associated with the immediate or gradual conversion of a wetland to a non-wetland (e.g., wetland species to upland species not typically adapted to life in saturated soil conditions), or conversion from one wetland use to another (for example, silviculture to farming). In addition, minor drainage does not include the construction of any canal, ditch, dike or other waterway or structure which drains or otherwise significantly modifies a stream, lake, swamp, bog or any other wetland or aquatic area constituting waters of the United States. Any discharge of dredged or fill material into the waters of the United States incidental to the construction of any such structure or waterway requires a permit.

(D) Plowing means all forms of primary tillage, including moldboard, chisel, or wide-blade plowing, discing, harrowing and similar physical means utilized on farm, forest or ranch land for the breaking up, cutting, turning over, or stirring of soil to prepare it for the planting of crops. The term does not include the redistribution of soil, rock, sand, or other surficial materials in a manner which changes any of area of the waters of the United States to dry land. For example, the redistribution of surface materials by blading, grading, or other means to fill in wetland areas is not plowing. Rock crushing activities which result in the loss of natural drainage characteristics, the reduction of water storage and recharge capabilities, or the overburden of natural water filtration capacities do not constitute plowing. Plowing will never involve a discharge of dredged or fill material.

(E) Seeding means the sowing of seed and placement of seedlings to produce farm, ranch, or forest crops and includes the placement of soil beds for seeds or seedlings on established farm and forest lands.

[3]The provisions of paragraphs (a)(1)(iii)(C)(*1*)(*ii*) and (*iii*) of this section apply to areas that are in established use exclusively for wetland crop production as well as areas in established use for conventional wetland/non-wetland crop rotation (e.g., the rotations of rice and soybeans) where such rotation results in the cyclical or intermittent temporary dewatering of such areas.

(2) Maintenance, including emergency reconstruction of recently damaged parts, of currently serviceable structures such as dikes, dams, levees, groins, riprap, breakwaters, causeways, bridge abutments or approaches, and transportation structures. Maintenance does not include any modification that changes the character, scope, or size of the original fill design. Emergency reconstruction must occur within a reasonable period of time after damage occurs in order to qualify for this exemption.

(3) Construction or maintenance of farm or stock ponds or irrigation ditches, or the maintenance (but not construction) of drainage ditches. Discharges associated with irrigation facilities in the waters of the U.S. are included within the exemption unless the discharges have the effect of bringing these waters into a use to which they were not previously subject and the flow or circulation may be impaired or reach reduced of such waters.

(4) Construction of temporary sedimentation basins on a construction site which does not include placement of fill material into waters of the U.S. The term "construction site" refers to any site involving the erection of buildings, roads, and other discrete structures and the installation of support facilities necessary for construction and utilization of such structures. The term also includes any other land areas which involve land-disturbing excavation activities, including quarrying or other mining activities, where an increase in the runoff of sediment is controlled through the use of temporary sedimentation basins.

(5) Any activity with respect to which a state has an approved program under section 208(b)(4) of CWA which meets the requirements of sections 208(b)(4)(B) and (C).

(6) Construction or maintenance of farm roads, forest roads, or temporary roads for moving mining equipment, where such roads are constructed and maintained in accordance with best management practices (BMPs) to assure that flow and circulation patterns and chemical and biological characteristics of waters of the United States are not impaired, that the reach of the waters of the United States is not reduced, and that any adverse effect on the aquatic environment will be otherwise minimized. These BMPs which must be applied to satisfy this provision shall include those detailed BMPs described in the state's approved program description pursuant to the requirements of 40 CFR 123.4(h)(4), and shall also include the following baseline provisions:

(i) Permanent roads (for farming or forestry activities), temporary access roads (for mining, forestry, or farm purposes) and skid trails (for logging) in waters of the U.S. shall be held to the minimum feasible number, width, and total length consistent with the purpose of specific farming, silvicultural or mining operations, and local topographic and climatic conditions;

(ii) All roads, temporary or permanent, shall be located sufficiently far from streams or other water bodies (except for portions of such roads which must cross water bodies) to minimize discharges of dredged or fill material into waters of the U.S.;

(iii) The road fill shall be bridged, culverted, or otherwise designed to prevent the restriction of expected flood flows;

(iv) The fill shall be properly stabilized and maintained during and following construction to prevent erosion;

(v) Discharges of dredged or fill material into waters of the United States to construct a road fill shall be made in a manner that minimizes the encroachment of trucks, tractors, bulldozers, or other heavy equipment within waters of the United States (including adjacent wetlands) that lie outside the lateral boundaries of the fill itself;

(vi) In designing, constructing, and maintaining roads, vegetative disturbance in the waters of the U.S. shall be kept to a minimum;

(vii) The design, construction and maintenance of the road crossing shall not disrupt the migration or other movement of those species of aquatic life inhabiting the water body;

(viii) Borrow material shall be taken from upland sources whenever feasible;

(ix) The discharge shall not take, or jeopardize the continued existence of, a threatened or endangered species as defined under the Endangered Species Act, or adversely modify or destroy the critical habitat of such species;

(x) Discharges into breeding and nesting areas for migratory waterfowl, spawning areas, and wetlands shall be avoided if practical alternatives exist;

(xi) The discharge shall not be located in the proximity of a public water supply intake;

(xii) The discharge shall not occur in areas of concentrated shellfish production;

(xiii) The discharge shall not occur in a component of the National Wild and Scenic River System;

(xiv) The discharge of material shall consist of suitable material free from toxic pollutants in toxic amounts; and

(xv) All temporary fills shall be removed in their entirety and the area restored to its original elevation.

(b) If any discharge of dredged or fill material resulting from the activities listed in paragraphs (a)(1)-(6) of this section contains any toxic pollutant listed under section 307 of CWA such discharge shall be subject to any applicable toxic effluent standard or prohibition, and shall require a permit.

(c) Any discharge of dredged or fill material into waters of the United States incidental to any of the activities identified in paragraphs (a)(1)-(6) of this section must have a permit if it is part of an activity whose purpose is to convert an area of the waters of the United States into a use to which it was not previously subject and the flow for circulation of waters of the United States may be impaired or the reach of such waters reduced. Where the proposed discharge will result in significant discernible alterations to flow or circulation, the presumption is that flow or circulation may be impaired by such alteration.[4]

[4]For example, a permit will be required for the conversion of a cypress swamp to some other use or the conversion of a wetland from silvicultural to agricultural use when there is a discharge of dredged or fill material into waters of the United States in conjunction with construction of dikes, drainage ditches or other works or structures used to effect such conversion. A discharge which elevates the bottom of waters of the United States without converting it to dry land does not thereby reduce the reach of, but may alter the flow or circulation of, waters of the United States.

(d) Federal projects which qualify under the criteria contained in Section 404(r) of CWA (Federal projects authorized by Congress where an EIS has been submitted to Congress prior to authorization or an appropriation) are exempt from Section 404 permit requirements, but may be subject to other state or Federal requirements.

§ 323.5 Program transfer to states.

Section 404(h) of the Clean Water Act allows the Administrator of the Environmental Protection Agency to transfer administration of the Section 404 permit program for discharges into certain waters of the United States to qualified states. (The program cannot be transferred for those waters which are presently used, or are susceptible to use in their natural condition or by reasonable improvement as a means to transport interstate or foreign commerce shoreward to their ordinary high water mark, including all waters which are subject to the ebb and flow of the tide shoreward to the high tide line, including wetlands adjacent thereto). See 40 CFR Part 123 for procedural regulations for transferring Section 404 programs to states. Once a state's 404 program is approved, the Corps of Engineers will suspend processing of Section 404 applications in the applicable waters and will transfer pending applications to the state agency responsible for administering the program. District engineers will assist EPA and the states in any way practicable to effect transfer and will develop appropriate procedures to ensure orderly and expeditious transfer.

§ 323.6 Special policies and procedures.

(a) The Secretary of the Army has delegated to the Chief of Engineers the authority to issue or deny Section 404 permits. Applications for permits for the discharge of dredged or fill material into waters of the United States will be reviewed in accordance with

guidelines promulgated by the Administrator, EPA, under authority of Section 404(b) of the Clean Water Act. (See 40 CFR Part 230.) If the EPA guidelines alone prohibit the designation of a proposed disposal site, the economic impact on navigation and anchorage of the failure to authorize the use of the proposed disposal site will also be considered in evaluating whether or not the proposed discharge is in the public interest.

(b) The Corps will not issue a permit where the regional administrator of EPA has notified the district engineer and applicant in writing pursuant to 40 CFR 231.3(a)(1) that he intends to issue a public notice of a proposed determination to prohibit or withdraw the specification, or to deny, restrict or withdraw the use for specification, of any defined area as a disposal site in accordance with Section 404(c) of the Clean Water Act. However the Corps will continue to complete the administrative processing of the application while the Section 404(c) procedures are underway including completion of final coordination with EPA under 33 CFR Part 325.

PART 324—PERMITS FOR OCEAN DUMPING OF DREDGED MATERIAL

Sec.

AUTHORITY: 33 U.S.C. 1413.

SOURCE: 47 FR 31814, July 22, 1982, unless otherwise noted.

§ 324.1 General.

This regulation prescribes in addition to the general policies of 33 CFR Part 320 and procedures of 33 CFR Part 325, those special policies, practices and procedures to be followed by the Corps of Engineers in connection with the review of applications for Department of the Army permits to authorize the transportation of dredged material by vessel or other vehicle for the purpose of dumping it in ocean waters at dumping sites designated under 40 CFR Part 228 pursuant to Section 103 of the Marine Protection, Research and Sanctuaries Act of 1972, as amended (33 U.S.C. 1413) (hereinafter referred to as Section 103). See 33 CFR 320.2(h). Activities involving the transportation of dredged material for the purpose of dumping in the ocean waters also require Department of the Army permits under Section 10 of the River and Harbor Act of 1899 (33 USC 403) for the dredging in navigable waters of the United States. Applicants for Department of the Army permits under this Part should also refer to 33 CFR Part 322 to satisfy the requirements of Section 10.

§ 324.2 Definitions.

For the purpose of this regulation, the following terms are defined:

(a) The term "ocean waters" means those waters of the open seas lying seaward of the base line from which the territorial sea is measured, as provided for in the Convention on the Territorial Sea and the Contiguous Zone (15 UST 1606: TIAS 5639).

(b) The term "dredged material" means any material excavated or dredged from navigable waters of the United States.

(c) The term "transport" or "transportation" refers to the carriage and related handling of dredged material by a vessel or other vehicle.

§ 324.3 Activities requiring permits.

(a) *General.* Department of the Army permits are required for the transportation of dredged material for the purpose of dumping it in ocean waters.

(b) *Activities of Federal agencies.* (1) The transportation of dredged material for the purpose of disposal in ocean waters done by or on behalf of any Federal agency other than the activities of the Corps of Engineers are subject to the procedures of this regulation. Agreement for construction or engineering services performed for other agencies by the Corps of Engineers does not constitute authorization under these regulations. Division and district engineers will therefore advise Federal agencies accordingly and cooperate to the fullest extent in the expeditious processing of their applications. The activities of the Corps of Engineers that involve the trans-

portation of dredged material for disposal in ocean waters are regulated by 33 CFR 209.145.

(2) The policy provisions set out in 33 CFR 320.4(j) relating to state or local authorizations do not apply to work or structures undertaken by Federal agencies, except where compliance with non-Federal authorization is required by Federal law or Executive policy. Federal agencies are required to comply with the substantive and procedural state, interstate, and local water quality standards and effluent limitations as are applicable by law that are adopted in accordance with or effective under the provisions of the Clean Water Act and the Marine Protection, Research and Sanctuaries Act of 1972, as amended, and related laws in the design, construction, management, operation, and maintenance of their respective facilities. (See Executive Order No. 12088, dated October 18, 1978.) They are not required, however, to obtain and provide certification of compliance with effluent limitations and water quality standards from state or interstate water pollution control agencies in connection with activities involving the transport of dredged material for dumping into ocean waters beyond the territorial sea.

§ 324.4 Special procedures.

The Secretary of the Army has delegated to the Chief of Engineers the authority to issue or deny section 103 permits. The following additional procedures shall also be applicable under this regulation.

(a) *Public notice.* For all applications for section 103 permits, the district engineer will issue a public notice which shall contain the information specified in 33 CFR 325.3.

(b) *Evaluation.* Applications for permits for the transportation of dredged material for the purpose of dumping it in ocean waters will be evaluated to determine whether the proposed dumping will unreasonably degrade or endanger human health, welfare, or amenities, or the marine environment, ecological systems or economic potentialities. In making this evaluation, criteria established by the Administrator, EPA, pursuant to section 102 of the Marine Protection, Research and Sanctuaries Act of 1972, as amended, shall be applied including an evaluation of the need for the ocean dumping and including the availability of alternatives to ocean dumping. Where ocean dumping is determined to be necessary, the district engineer will, to the extent feasible, specify disposal sites using the recommendations of the Administrator pursuant to section 102(c) of the Act. See 40 CFR Parts 220 to 229.

(c) *EPA review.* If the Regional Administrator, EPA, advises the district engineer that the proposed dumping will comply with the criteria, the district engineer shall complete his evaluation of the section 103 application under this regulation and 33 CFR Parts 320 and 325. If, however, the Regional Administrator advises the district engineer that the proposed dumping will not comply with the criteria, the district engineer will proceed as follows.

(1) The district engineer shall determine whether there is an economically feasible alternative method or site available other than the proposed ocean disposal site. If there are other feasible alternative methods or sites available, the district engineer shall evaluate them in accordance with 33 CFR Parts 320, 322, 323, 325 and this regulation, as appropriate.

(2) If the district engineer makes a determination that there is no economically feasible alternative method or site available, and the proposed project is otherwise found to be in the public interest, he shall so advise the Regional Administrator of his intent to issue the permit setting forth his reasons for such determination.

(d) *EPA objection.* If the Regional Administrator advises, within 15 days of the notice of the intent to issue, that he will commence procedures specified by section 103(c) of the Marine Protection, Research, and Sanctuaries Act of 1972 to prohibit designation of the disposal site, the case will be forwarded to the Chief of Engineers for further coordination with the Administrator, EPA, and decision. The report forwarding the case will contain, in addition to the analysis required by 33 CFR 325.11, an analysis

of whether there are other economically feasible methods or sites available to dispose of the dredged material.

(e) *Chief of Engineers review.* The Chief of Engineers shall evaluate the permit application and make a decision to deny the permit or recommend its issuance. If the decision of the Chief of Engineers is that ocean dumping at the proposed disposal site is required because of the unavailability of economically feasible alternatives, he shall so certify and request that the Secretary of the Army seek a waiver from the Administrator, EPA, of the criteria or of the critical site designation in accordance with 40 CFR 225.4.

PART 325—PROCESSING OF DEPARTMENT OF THE ARMY PERMITS

Sec.

AUTHORITY: 33 U.S.C. 401 et seq.; 33 USC 1344; 33 USC 1413.

SOURCE: 47 FR 31815, July 22, 1982, unless otherwise noted.

§ 325.1 Applications for permits.

(a) *General.* The processing procedures of this regulation (Part 325) apply to any Department of the Army permit. Special procedures and additional information are contained in 33 CFR Parts 320 through 324 and Part 330. This Part is arranged in the basic timing sequence used by the Corps of Engineers in processing applications for Department of the Army permits.

(b) *Pre-application consultation for major applications.* The district staff element having responsibility for administering, processing, and enforcing Federal laws and regulations relating to the Corps of Engineers regulatory program shall be available to advise potential applicants of studies or other information forseeably required for later Federal action. The district engineer will establish local procedures and policies including appropriate publicity programs which will allow potential permit applicants to contact the district engineer or the staff element to request pre-application consultation. Upon receipt of such request, the district engineer will assure the conduct of an orderly process which may involve other staff elements and affected agencies (Federal, state, or local) and the public. This early process should be brief but thorough so that the applicant may begin to assess the viability of some of the more obvious alternatives in the permit application. The district engineer will endeavor at this stage, to provide the applicant with all helpful information necessary in pursuing the application, including factors which the Corps must consider in its permit decision making process. Whenever the district engineer becomes aware of planning for work which may require a Department of the Army permit and which would involve the preparation of an environmental document, he shall contact the principals involved to advise them of the requirement for the permit(s) and the attendant public interest review including the development of an environmental document. Whenever a potential permit applicant indicates the intent to submit an application for work which may require the preparation of an environmental document, a single point of contact shall be designated within the district's regulatory staff to effectively coordinate the regulatory process, including the National Environmental Policy Act (NEPA) procedures and attendant reviews, meetings, hearings and other actions, including the scoping process if appropriate, leading to decision by the district engineer. Effort devoted to this process should be commensurate with the likelihood of a permit application actually being submitted to the Corps. The regulatory staff coordinator shall maintain an open relationship with each applicant or his consultants so as to assure that the applicant is fully aware of the substance (both quantitative and qualitative) of the data required by the d

trict engineer for use in preparing an environmental assessment or an environmental impact statement (EIS). The actual development of the scope of data required in cases requiring an EIS should be the product of the formal "scoping" process discussed in 33 CFR Part 230.

(c) *Application form.* Any person proposing to undertake any activity requiring Department of the Army authorization as specified in 33 CFR Parts 321 through 324 (except activities already authorized by general permit) must apply for a permit to the district engineer in charge of the district where the proposed activity is to be performed. Applications for permits must be prepared utilizing the prescribed application form (ENG Form 4345, OMB Approval No. OMB 49-R0120). The form may be obtained from the district engineer having jurisdiction over the waters in which the proposed activity will be located. Local variations of the application form for purposes of facilitating coordination with state and local agencies may be used.

(d) *Content of application.* (1) Generally, the application must include a complete description of the proposed activity including necessary drawings, sketches or plans sufficient for public notice (the applicant is not expected to submit detailed engineering plans and specifications); the location, purpose and intended use of the proposed activity; scheduling of the activity; the names and addresses of adjoining property owners; the location and dimensions of adjacent structures; and a list of authorizations required by other Federal, interstate, state or local agencies for the work, including all approvals received or denials already made. See also section 325.3 for information required to be in public notices. District and division engineers are not authorized to develop additional information forms and will limit requests for additional information to those cases where the specific information is essential to complete an evaluation of the proposal's impact on the public interest.

(2) All activities which the applicant plans to undertake which are reasonably related to the same project and for which a Department of the Army permit would be required should be included in the same permit application. District engineers should reject, as incomplete, any permit application which fails to comply with this requirement. For example, a permit application for a marina will include dredging required for access as well as any fill associated with construction of the marina.

(3) If the activity would involve dredging in navigable waters of the United States, the application must include a description of the type, composition and quantity of the material to be dredged, the method of dredging, and the site and plans for disposal of the dredged material.

(4) If the activity would include the discharge of dredged or fill material in the waters of the United States or the transportation of dredged material for the purpose of disposing of it in ocean waters, the application must include the source of the material; the purpose of the discharge, a description of the type, composition and quantity of the material; the method of transportation and disposal of the material; and the location of the disposal site. Certification under Section 401 of the Clean Water Act is required for such discharges into waters of the United States.

(5) If the activity would include the construction of a filled area or pile or float-supported platform, the project description must include the use of and specific structures to be erected on the fill or platform.

(6) If the activity would involve the construction of an impoundment structure, the applicant may be required to demonstrate that the structure complies with established state dam safety criteria or that the structure has been designed by qualified persons and, in appropriate cases, independently reviewed (and modified as the review would indicate) by similarly qualified persons. No specific design criteria are to be prescribed nor is an independent detailed engineering review to be made by the district engineer.

(7) *Signatures on application.* The application must be signed by the person who desires to undertake the proposed activity or by a duly authorized agent if accompanied by a statement by that person designating the agent. In either case, the signature of the applicant or the agent will be understood to be an affirmation that he possesses the requisite property interest to undertake the activity proposed in the application, except where the lands are under the control of the Corps of Engineers, in which cases the district engineer will coordinate the transfer of the real estate and the permit action. An application may include the activity of more than one owner provided the character of the activity of each owner is similar and in the same general area and each owner submits a statement designating the same agent.

(e) *Additional information.* In addition to the information indicated in paragraph (d) of this section the applicant will be required to furnish only such additional information as the district engineer deems essential to assist in the evaluation of the application. Such additional information may include environmental data and information on alternate methods and sites as may be necessary for the preparation of the required environmental documentation.

(f) *Fees.* Fees are required for permits under Section 404 of the Clean Water Act, Section 103 of the Marine Protection, Research and Sanctuaries Act of 1972, as amended, and Sections 9 and 10 of the River and Harbor Act of 1899. A fee of $100.00 will be charged when the planned or ultimate purpose of the project is commercial or industrial in nature and is in support of operations that charge for the production, distribution or sale of goods or services. A $10.00 fee will be charged for permit applications when the proposed work is non-commercial in nature and would provide personal benefits that have no connection with a commercial enterprise. The final decision as to the basis for a fee (commercial vs. non-commercial) shall be solely the responsibility of the district engineer. No fee will be charged if the applicant withdraws the application at any time prior to issuance of the permit or if the permit is denied. Collection of the fee will be deferred until the proposed activity has been determined to be in the public interest. At that time, the district engineer will furnish the applicant two copies of the unsigned permit for his signature. He will also notify the applicant of the required fee and will request that any check or money order be made payable to the Treasurer of the United States. The permit will then be issued upon receipt of the application fee and the two signed permit copies. Multiple fees are not to be charged if more than one law is applicable. Any modification significant enough to require publication of a public notice will also require a fee. No fee will be assessed when a permit is transferred from one property owner to another. No fees will be charged for time extensions, general permits or letters of permission. Agencies or instrumentalities of Federal, state or local governments will not be required to pay any fee in connection with permits.

§ 325.2 Processing of applications.

(a) *Standard procedures.* (1) When an application for a permit is received, the district engineer shall immediately assign it a number for identification, acknowledge receipt thereof, and advise the applicant of the number assigned to it. He shall review the application for completeness, and if the application is incomplete, request from the applicant within 15 days of receipt of the application any additional information necessary for further processing.

(2) Within 15 days of receipt of all information required in accordance with Sec. 325.1(d) of this part, the district engineer will issue a public notice as described in Sec. 325.3 of this part unless specifically exempted by other provisions of this regulation. The district engineer will issue a supplemental, revised, or corrected public notice if in his view there is a change in the application data that would affect the public's review of the proposal.

(3) The district engineer will consider all comments received in response to the public notice in his subsequent actions on the permit application. Receipt of the comments will be acknowledged and they will be made a part of

the administrative record of the application. Comments received as form letters or petitions may be acknowledged as a group to the person or organization responsible for the form letter or petition. If comments relate to matters within the special expertise of another Federal agency, the district engineer may seek the advise of that agency. At the earliest practicable time, the applicant must be given the opportunity to furnish the district engineer his proposed resolution or rebuttal to all objections from other Government agencies and other substantive adverse comments before final decision will be made on the application. The applicant may voluntarily elect to contact objectors in an attempt to resolve objections but will not be required to do so.

(4) The district engineer will follow Appendix B of 33 CFR Part 230 for environmental procedures and documentation required by the National Environmental Policy Act of 1969. A permit application will require either an environmental assessment or an environmental impact statement unless it is included within a categorical exclusion.

(5) The district engineer will also evaluate the application to determine the need for a public hearing pursuant to 33 CFR Part 327.

(6) After all above actions have been completed, the district engineer will determine in accordance with the record and applicable regulations whether or not the permit should be issued. He shall prepare a Statement of Findings (SOF) or, where an EIS has been prepared, a Record of Decision (ROD), on all permit decisions. The SOF or ROD shall include the district engineer's views on the probable effect of the proposed work on the public interest including conformity with the guidelines published for the discharge of dredged or fill material in waters of the United States (40 CFR Part 230) or with the criteria for dumping of dredged material in ocean waters (40 CFR Parts 220 to 229), if applicable, and the conclusions of the district engineer. The SOF or ROD shall be dated, signed, and included in the record prior to final action on the application. Where the district engineer has delegated authority to sign permits for and in his behalf, he may similarly delegate the signing of the SOF or ROD. If a permit is warranted, the district engineer will determine the special conditions, if any, and duration which should be incorporated into the permit. In accordance with the authorities specified in § 325.8 of this Part, the district engineer will take final action or forward the application with all pertinent comments, records, and studies, including the final EIS or environmental assessment, through channels to the official authorized to make the final decision. The report forwarding the application for decision will be in the format prescribed by the Chief of Engineers. District and division engineers will notify the applicant and interested Federal and state agencies that the application has been forwarded to higher headquarters. The district or division engineer may, at his option, disclose his recommendation to the news media and other interested parties, with the caution that it is only a recommendation and not a final decision. Such disclosure is encouraged in permit cases which have become controversial and have been the subject of stories in the media or have generated strong public interest. In those cases where the application is forwarded for decision in the format prescribed by the Chief of Engineers, the report will serve as the SOF or ROD.

(7) If the final decision is to deny the permit, the applicant will be advised in writing of the reason(s) for denial. If the final decision is to issue the permit and a standard individual permit form will be used, the issuing official will forward two copies of the draft permit to the applicant for signature accepting the conditions of the permit. The applicant will return both signed copies to the issuing official who then will sign and date the permit and return one copy to the permittee. The permit is not valid until signed by the issuing official. Letters of permission will be issued in letter form (signed by the issuing official only). Final action on the permit application is the signature on the letter notifying the applicant of the denial of the

permit or signature of the issuing official on the authorizing document.

(8) The district engineer will publish monthly a list of permits issued or denied during the previous month. The list will identify each action by public notice number, name of applicant, and brief description of activity involved. It will also note that relevant environmental documents and the SOF's or ROD's are available upon written request and, where applicable, upon the payment of administrative fees. This list will be distributed to all persons who may have an interest in any of the public notices listed.

(9) Copies of permits will be furnished to other agencies in appropriate cases as follows:

(i) If the activity involves the construction of artificial islands, installations or other devices on the outer continental shelf, to the Director, Defense Mapping Agency, Hydrographic Center, Washington, D.C. 20390 Attention, Code NS12 and to the Director, National Ocean Survey, NOAA, Department of Commerce, Rockville, Maryland 20852.

(ii) If the activity involves the construction of structures to enhance fish propagation (e.g., fishing reefs) along the coasts of the United States, to Defense Mapping Agency, Hydrographic Center and National Ocean Survey as in paragraph (a)(9)(i) of this section and to the Director, Office of Marine Recreational Fisheries, National Marine Fisheries Service, Washington, D.C. 20235.

(iii) If the activity involves the erection of an aerial transmission line across a navigable water of the United States, to the Director, National Ocean Survey, NOAA, Department of Commerce, Rockville, Maryland 20852, reference C322.

(iv) If the activity is listed in paragraphs (a)(9)(i), (ii), or (iii) of this section or involves the transportation of dredged material for the purpose of dumping it in ocean waters, to the appropriate District Commander, U.S. Coast Guard.

(b) *Procedures for particular types of permit situations.* (1) If the district engineer determines that water quality certification for the proposed activity is necessary under the provisions of Section 401 of the Clean Water Act, he shall so notify the applicant and obtain from him or the certifying agency a copy of such certification.

(i) The public notice for such activity, which will contain a statement on certification requirements (see Sec. 325.3(a)(8)), will serve as the notification to the Administrator of the Environmental Protection Agency (EPA) pursuant to Section 401(a)(2) of the Clean Water Act. If EPA determines that the proposed discharge may affect the quality of the waters of any state other than the state in which the discharge will originate, it will so notify such other state, the district engineer, and the applicant. If such notice or a request for supplemental information is not received within 30 days of issuance of the public notice, the district engineer will assume EPA has made a negative determination with respect to Section 401(a)(2). If EPA does determine another state's waters may be affected, such state has 60 days from receipt of EPA's notice to determine if the proposed discharge will affect the quality of its waters so as to violate any water quality requirement in such state, to notify EPA and the district engineer in writing of its objection to permit issuance, and to request a public hearing. If such occurs, the district engineer will hold a public hearing in the objecting state. Except as stated below, the hearing will be conducted in accordance with 33 CFR 327. The issues to be considered at the public hearing will be limited to water quality impacts. EPA will submit its evaluation and recommendations at the hearing with respect to the state's objection to permit issuance. Based upon the recommendations of the objecting state, EPA, and any additional evidence presented at the hearing, the district engineer will condition the permit, if issued, in such a manner as may be necessary to insure compliance with applicable water quality requirements. If the imposition of conditions cannot, in the district engineer's opinion, insure such compliance, he will deny the permit.

(ii) No permit will be granted until required certification has been obtained or has been waived. Waiver may be explicit, or will be deemed to occu

if the certifying agency fails or refuses to act on a request for certification within sixty days after receipt of such a request unless the district engineer determines a shorter or longer period is reasonable for the state to act. The request for certification must be made in accordance with the regulations of the certifying agency. In determining whether or not a waiver period has commenced or waiver has occurred, the district engineer will verify that the certifying agency has received a valid request for certification. If, however, special circumstances identified by the district engineer require that action on an application be taken within a more limited period of time, the district engineer shall determine a reasonable lesser period of time, advise the certifying agency of the need for action by a particular date and that, if certification is not received by that date, it will be considered that the requirement for certification has been waived. Similarly if it appears that circumstances may reasonably require a period of time longer than sixty days, the district engineer, based on information provided by the certifying agency, will determine a longer reasonable period of time, not to exceed one year, at which time a waiver will be deemed to occur.

(2) If the proposed activity is to be undertaken in a State operating under a coastal zone management program approved by the Secretary of Commerce pursuant to the Coastal Zone Management Act (see 33 CFR 320.3(b)), the district engineer shall proceed as follows:

(i) If the applicant is a Federal agency, and the application involves a Federal activity in or affecting the coastal zone, the district engineer shall forward a copy of the public notice to the agency of the state responsible for reviewing the consistency of Federal activities. The Federal agency applicant shall be responsible for complying with the Coastal Zone Management Act's directive for ensuring that Federal agency activities are undertaken in a manner which is consistent, to the maximum extent practicable, with approved Coastal Zone Management Programs. (See 15 CFR Part 930.) If the State coastal zone agency objects to the proposed Federal activity on the basis of its inconsistency with the State's approved Coastal Zone Management Program, the district engineer shall not make a final decision on the application until the disagreeing parties have had an opportunity to utilize the procedures specified by the Coastal Zone Management Act for resolving such disagreements.

(ii) If the applicant is not a Federal agency and the application involves an activity affecting the coastal zone, the district engineer shall obtain from the applicant a certification that his proposed activity complies with and will be conducted in a manner that is consistent with the approved State Coastal Zone Management Program. Upon receipt of the certification, the district engineer will forward a copy of the public notice (which will include the applicant's certification statement) to the state coastal zone agency and request its concurrence or objection. If the state agency objects to the certification or issues a decision indicating that the proposed activity requires further review, the district engineer shall not issue the permit until the state concurs with the certification statement or the Secretary of Commerce determines that the proposed activity is consistent with the purposes of the Coastal Zone Management Act or is necessary in the interest of national security. If the state agency fails to concur or object to a certification statement within six months of the state agency's receipt of the certification statement, state agency concurrence with the certification statement shall be conclusively presumed. District engineers shall check with the certifying agency at the end of the allotted period of time before determining that a waiver has occurred.

(iii) If the applicant is requesting a permit for work on Indian reservation lands which are in the coastal zone, the district engineer shall treat the application in the same manner as prescribed for a Federal applicant in paragraph (b)(2)(i) of this section. However, if the applicant is requesting a permit on non-trust Indian lands and the state CZM agency has decided to assert jurisdiction over such lands, the district engineer shall treat the application in the same manner as prescribed for a non-Federal applicant in paragraph (b)(2)(ii) of this section.

(3) If the proposed activity would involve any property listed or eligible for listing in the National Register of Historic Places, the district engineer will proceed in accordance with Corps National Historical Preservation Act counterpart implementing regulations.

(4) If the proposed activity would consist of dredging of an access channel and/or berthing facility associated with an authorized Federal navigation project, the activity will be included in the planning and coordination of the construction or maintenance of the Federal project to the maximum extent feasible. Separate notice, hearing, and environmental documentation will not be required for activities so included and coordinated; and the public notice issued by the district engineer for these Federal and associated non-Federal activities will be the notice of intent to issue permits for those included non-Federal dredging activities. The decision whether to issue or deny such a permit will be consistent with the decision on the Federal project unless special considerations applicable to the proposed activity are identified. (See Sec. 322.5(C)).

(5) Applications will be reviewed for the potential impact on threatened or endangered species pursuant to Section 7 of the Endangered Species Act as amended. If the district engineer determines that the proposed activity would not affect listed species or their critical habitat, he will include a statement to this effect in the public notice. If he finds that proposed activity may jeopardize the continued existence of listed species or destroy or adversely modify their critical habitat, he will initiate formal consultation procedures with the U.S. Fish and Wildlife Service or National Marine Fisheries Service by including a statement to this effect in the public notice (or will amend any previous notice as appropriate). Public notices forwarded to the U.S. Fish and Wildlife Service or National Marine Fisheries Service will serve as the request for information on whether any listed or proposed to be listed endangered or threatened species may be present in the area which would be affected by the proposed activity, pursuant to Section 7(c) of the Act. References, definitions, and consultation procedures are found in 33 CFR Part 306 and 50 CFR Part 402.

(c) [Reserved]

(d) *Timing of processing of applications.* The district engineer will be guided by the following time limits for the indicated steps in the evaluation process:

(1) The public notice will be issued within 15 days of receipt of all information required to be submitted by the applicant in accordance with §325.1.(d) of this part.

(2) The comment period of the public notice should not extend beyond 30 days from the date of the notice. However, if circumstances warrant, the district engineer may extend the comment period up to an additional 30 days.

(3) District engineers will decide on all applications not later than 60 days after receipt of a complete application, unless (i) precluded as a matter of law or procedures required by law (see below), (ii) the case must be referred to higher authority (see § 325.8 of this part), (iii) the comment period is extended, (iv) a timely rebuttal or resolution of objections is not received from the applicant, (v) the processing is suspended at the request of the applicant, or (vi) information needed by the district engineer for a decision on the application cannot reasonably be obtained within the 60-day period. Once the cause for preventing the decision from being made within the normal 60-day period has been satisfied or eliminated, the 60-day clock will start running again from where it was suspended. For example, if the comment period is extended by 30 days, the district engineer will, absent other restraints, decide on the application within 90 days of receipt of a complete application. Certain laws (e.g., the Clean Water Act, the Coastal Zone Management Act, the National Environmental Policy Act, the National Historic Preservation Act, the Preservation of Historical and Archeological Data Act, the Endangered Species Act, the Wild and Scenic Rivers Act, and the Marine Protection, Research and

Sanctuaries Act) require procedures such as state or other Federal agency certifications, public hearings, environmental impact statements, consultation, special studies and testing which may prevent district engineers from being able to decide certain applications within 60 days.

(4) Once the public comment period has closed (or, at the latest, on the ninetieth day following the public notice) and the district engineer has sufficient information to make his public interest determination, he should decide the permit application even though other agencies which may have regulatory jurisdiction have not yet granted their authorizations, except where such authorizations are, by Federal law, a prerequisite to making a decision on the Army permit application. Permits granted prior to other (non-prerequisite) authorizations by other agencies should, where appropriate, be conditioned in such manner as to give those other authorities an opportunity to undertake their review without the applicant biasing such review by making substantial resource commitments on the basis of the Army permit. In an unusual case, the district engineer may decide that due to the nature or scope of a specific proposal, it would be prudent to defer taking final action until another agency has acted on its authorization. In such cases, he may advise the other agency of his position on the Army permit while deferring his final decision.

(5) If the applicant fails to respond within 45 days to any request or inquiry of the district engineer, the district engineer may advise the applicant by certified letter that his application will be considered as having been withdrawn unless the applicant responds thereto within thirty days of the date of the letter.

(e) *Alternative procedures.* Division and district engineers are authorized to use alternative procedures as follows:

(1) *Letters of permission.* In those cases subject to Section 10 of the River and Harbor Act of 1899 in which, in the opinion of the district engineer, the proposed work would be minor, would not have significant individual or cumulative impact on environmental values, and should encounter no appreciable opposition, the district engineer may omit the publishing of a public notice and authorize the work by a letter of permission. However, he will coordinate the proposal with all concerned fish and wildlife agencies, Federal and state, as required by the Fish and Wildlife Coordination Act. The letter of permission will not used to authorize the discharge of dredged or fill material into waters of the United States nor the transportation of dredged material for purposes of dumping it in ocean waters. The letter of permission form is specified in § 325.5 of this part.

(2) *Regional permits.* Regional permits are a type of general permit as defined in 33 CFR 322.2(f) and 33 CFR 323.2(n). They may be issued by a division or district engineer after compliance with the other procedures of this regulation. After a regional permit has been issued, individual activities falling within those categories that are authorized by such regional permits do not have to be further authorized by the procedures of this regulation. The issuing authority will determine and add appropriate conditions to protect the public interest. When the issuing authority determines on a case-by-case basis that the concerns for the aquatic environment so indicate, he may exercise discretionary authority to override the regional permit and require an individual application and review. A regional permit may be revoked by the issuing authority if it is determined that it is no longer in the public interest provided the procedures of Sec. 325.7 of this part are followed. Following revocation, applications for future activities in areas covered by the regional permit shall be processed as applications for individual permits. No regional permit shall be issued for a period of more than five years.

(3) *Joint procedures.* Division and district engineers are authorized and encouraged to develop joint procedures with states and other Federal agencies with ongoing permit programs for activities also regulated by the Department of the Army. Such procedures may be substituted for the

procedures in paragraphs (a)(1) through (5) of this section provided that the substantive requirements of those sections are maintained. Division and district engineers are also encouraged to develop management techniques such as joint agency review meetings to expedite the decision-making process. However, in doing so, the applicant's rights to a full public interest review and independent decision by the district or division engineer must be strictly observed.

(4) *Emergency procedures.* Division engineers are authorized to approve special processing procedures in emergency situations. An "emergency" is a situation which would result in an unacceptable hazard to life, a significant loss of property, or an immediate, unforeseen, and significant economic hardship if corrective action requiring a permit is not undertaken within a time period less than the normal time needed to process the application under standard procedures. In emergency situations, the district engineer will explain the circumstances and recommend special procedures to the division engineer who will instruct the district engineer as to further processing of the application. Even in an emergency situation, reasonable efforts will be made to receive comments from interested Federal, state, and local agencies and the affected public. Also, notice of any special procedures authorized and their rationale is to be appropriately published as soon as practicable.

§ 325.3 Public notice.

(a) *General.* The public is the primary method of advising all interested parties of the proposed activity for which a permit is sought and of soliciting comments and information necessary to evaluate the probable impact on the public interest. The notice must, therefore, include sufficient information to give a clear understanding of the nature and magnitude of the activity to generate meaningful comment. The notice should include the following items of information:

(1) Applicable statutory authority or authorities;

(2) The name and address of the applicant;

(3) The name or title, address and telephone number of the Corps employee from whom additional information concerning the application may be obtained;

(4) The location of the proposed activity;

(5) A brief description of the proposed activity, its purpose and intended use so as to provide sufficient information concerning the nature of the activity to generate meaningful comments, including a description of the type of structures, if any, to be erected on fills, or pile or float-supported platforms, and a description of the type, composition and quantity of materials to be discharged or disposed of in the ocean;

(6) A plan and elevation drawing showing the general and specific site location and character of all proposed activities, including the size relationship of the proposed structures to the size of the impacted waterway and depth of water in the area;

(7) If the proposed activity would occur in the territorial seas or ocean waters, a description of the activity's relationship to the baseline from which the territorial sea is measured;

(8) A list of other government authorizations obtained or requested by the applicant, including required certifications relative to water quality, coastal zone management, or marine sanctuaries;

(9) If appropriate, a statement that the activity is a categorical exclusion for purposes of the National Environmental Policy Act (see paragraph 7 of Appendix B to 33 CFR Part 230);

(10) A statement on endangered species (see Sec. 325.2(b)(5);

(11) A statement(s) on evaluation factors (see Sec. 325.3(b));

(12) Any other available information which may assist interested parties in evaluating the likely impact of the proposed activity, if any, on factors affecting the public interest;

(13) A reasonable period of time, normally thirty days but not less than fifteen days from date of mailing, within which interested parties may express their views concerning the permit application;

(14) A statement that any person may request, in writing, within the

comment period specified in the notice, that a public hearing be held to consider the application. Requests for public hearings shall state, with particularity, the reasons for holding a public hearing;

(15) For non-Federal applications in states with an approved Coastal Zone Management Plan, a statement on compliance with the approved Plan; and

(16) In addition, for Section 103 (ocean dumping) activities:

(i) The specific location of the proposed disposal site and its physical boundaries;

(ii) A statement as to whether the proposed disposal site has been designated for use by the Administrator, EPA, pursuant to Section 102(c) of the Act;

(iii) If the proposed disposal site has not been designated by the Administrator, EPA, a description of the characteristics of the proposed disposal site and an explanation as to why no previously designated disposal site is feasible;

(iv) A brief description of known dredged material dischages at the proposed disposal site;

(v) Existence and documented effects of other authorized disposals that have been made in the disposal area (e.g., heavy metal background reading and organic carbon content);

(vi) An estimate of the length of time during which disposal would continue at the proposed site; and

(vii) Information on the characteristics and composition of the dredged material.

(b) *Evaluation factors.* A paragraph describing the various evaluation factors on which decisions are based shall be included in every public notice.

(1) Except as provided in paragraph (b)(3) of this section, the following will be included:

> The decision whether to issue a permit will be based on an evaluation of the probable impact including cumulative impacts of the proposed activity on the public interest. That decision will reflect the national concern for both protection and utilization of important resources. The benefit which reasonably may be expected to accrue from the proposals must be balanced against its reasonably foreseeable detriments. All factors which may be relevant to the proposal will be considered including the cumulative effects thereof; among those are conservation, economics, aesthetics, general environmental concerns, wetlands, cultural values, fish and wildlife values, flood hazards, flood plain values, land use, navigation, shoreline erosion and accretion, recreation, water supply and conservation, water quality, energy needs, safety production and, in general, the needs and welfare of the people.

(2) If the activity would involve the discharge of dredged or fill material into the waters of the United States or the transportation of dredged material for the purpose of disposing of it in ocean waters, the public notice shall also indicate that the evaluation of the impact on the activity of the public interest will include application of the guidelines promulgated by the Administrator, EPA under authority of Section 404(b) of the Clean Water Act (40 CFR Part 230) or of the criteria established under authority of Section 102(a) of the Marine Protection, Research and Sanctuaries Act of 1972, as amended (40 CFR Parts 220 to 229), as appropriate. (See also 33 CFR Parts 323 and 324).

(3) In cases involving construction of artificial islands, installations and other devices on outer continental shelf lands which are under mineral lease from the Department of the Interior, the notice will contain the following statement: "The decision as to whether a permit will be issued will be based on an evaluation of the impact of the proposed work on navigation and national security."

(c) *Distribution of public notices.* (1) Public notices will be distributed for posting in post offices or other appropriate public places in the vicinity of the site of the proposed work and will be sent to the applicant, to appropriate city and county officials, to adjoining property owners, to appropriate state agencies, to appropriate Indian Tribes or tribal represenatives, to concerned Federal agencies, to local, regional and national shipping and other concerned business and conservation organizations, to appropriate River Basin Commissions, to appropriate state and areawide clearing houses as prescribed by OMB Circular A-95, to local news media and to any other interested party. Copies of public notices will be sent to all parties who have specifically requested copies of public notices, to the U.S. Senators and Representatives for the area where the work is to be performed, the field representative of the Secretary of the Interior, the Regional Director of the Fish and Wildlife Service, the Regional Director of the National Park Service, the Regional Administrator of the Environmental Protection Agency (EPA), the Regional Director of the National Marine Fisheries Service of the National Oceanic and Atmospheric Administration (NOAA), the head of the state agency responsible for fish and wildlife resources, the State Historic Preservation Officer, and the District Commander, U.S. Coast Guard.

(2) In addition to the general distribution of public notices cited above, notices will be sent to other addressees in appropriate cases as follows:

(i) If the activity would involve structures or dredging along the shores of the seas or Great Lakes, to the Coastal Engineering Research Center, Washington, D.C. 20016.

(ii) If the activity would involve construction of fixed structures or artificial islands on the outer continental shelf or in the territorial seas, to the Assistant Secretary of Defense (Manpower, Reserve Affairs and Logistics (ASD(MRA&L)), Washington, D.C. 20310; the Director, Defense Mapping Agency (Hydrographic Center) Washington, D.C. 20390, Attention, Code NS12; and the Director, National Ocean Survey, NOAA, Department of Commerce, Rockville, Maryland 20852, and to affected military installations and activities.

(iii) If the activity involves the construction of structures to enhance fish propagation (e.g., fishing reefs) along the coasts of the United States, to the Director, Office of Marine Recreational Fisheries, National Marine Fisheries Service, Washington, D.C. 20235.

(iv) If the activity involves the construction of structures which may affect aircraft operations or for purposes associated with seaplane operations, to the Regional Director of the Federal Aviation Administration.

(v) If the activity would be in connection with a foreign-trade zone, to the Executive Secretary, Foreign-Trade Zones Board, Department of Commerce, Washington, D.C. 20230 and to the appropriate District Director of Customs as Resident Representative, Foreign-Trade Zones Board.

(3) It is presumed that all interested parties and agencies will wish to respond to public notices; therefore, a lack of response will be interpreted as meaning that there is no objection to the proposed project. A copy of the public notice with the list of the addresses to whom the notice was sent will be included in the record. If a question develops with respect to an activity for which another agency has responsibility and that other agency has not responded to the public notice, the district engineer may request its comments. Whenever a response to a public notice has been received from a member of Congress, either in behalf of a constitutent or himself, the district engineer will inform the member of Congress of the final decision.

§ 325.4 Conditioning of permits.

(a) *General.* The decision of whether to issue a permit is based on the public interest review described in 33 CFR 320.4. In order to protect the public interest, projects may require modifications or conditions different from what the applicant proposes.

(b) Division and district engineers are authorized to modify or add conditions to proposals when:

(1) They are necessary to meet legal requirement,

(2) They serve to meet a public interest objective, or

(3) They will avoid or mitigate adverse impacts on fish and wildlife resources.

(c) Division and district engineers may modify or condition proposals to meet one of the objectives of § 325.4(b) of this part when:

(1) There are no local, state or other Federal programs or policies to achieve the objective of the desired condition, and

(2) An agreement, enforceable at law, between the applicant and the party(ies) concerned with the resource use is not practicable.

(d) Division and district engineers will ensure that any modifications or conditions imposed on an applicant's proposal are:

(1) Directly related to the impacts of the proposal; and

(2) Commensurate in scope and degree with the impacts of concern; and

(3) Reasonably enforceable.

(e) *Bonds.* If the District Engineer has reason to consider that the permittee might be prevented from completing work which is necessary to protect the public interest, he may require the permittee to post a bond of sufficient amount to indemnify the government against any loss as a result of corrective action it might take.

§ 325.5 Forms of permits.

(a) *General discussion.* (1) Department of the Army permits under this regulation will be in the form of individual permits or general permits. The basic format shall be ENG Form 1721, Department of the Army Permit (Appendix A).

(2) The general conditions included in ENG Form 1721 are normally applicable to all permits; however, some conditions may not apply to certain permits and may be deleted by the issuing officer. Special conditions applicable to the specific activity will be included in the permit as necessary to protect the public interest in accordance with § 325.4 of this part.

(b) *Individual permits.* (1) *Standard permits.* A standard permit is one which has been processed through the public interest review procedures, including public notice and receipt of comments, described throughout this Part. The standard individual permit shall be issued using ENG Form 1721.

(2) *Letters of permission.* A letter of permission will be issued where procedures of § 325.2(e)(1) have been followed. It will be in letter form and will identify the permittee, the authorized work and location of the work, the statutory authority, any limitations on the work, a construction time limit and a requirement for a report of completed work. A copy of the general conditions form ENG Form 1721 will be attached and will be incorporated by reference into the letter of permission.

(c) *General permits.* (1) *Regional permits.* Regional permits are a type of general permit as defined in 33 CFR 322.2(f) and 33 CFR 323.2(n). They may be issued by a division or district engineer after compliance with the other procedures of this regulation. If the public interest so requires, the issuing authority may condition the regional permit to require a case-by-case reporting and acknowledgement system. However, no separate applications or other authorization documents will be required.

(2) *Nationwide permits.* Nationwide permits are a type of general permit and represent Department of the Army authorizations that have been issued by the regulation (33 CFR Part 330) for certain specified activities nationwide. If certain conditions are met, the specified activities can take place without the need for an individual or regional permit.

(d) *Section 9 permits.* Permits for structures under Section 9 of the River and Harbor Act of 1899 will be drafted at Department of the Army level.

§ 325.6 Duration of permits.

(a) *General.* Department of the Army permits may authorize both the work and the resulting use. Permits continue in effect until they automatically expire or are modified, suspended, or revoked.

(b) *Structures.* Permits for the existence of a structure or other activity of a permanent nature are usually for an indefinite duration with no expiration date cited. However, where a temporary structure is authorized, or where restoration of a waterway is contemplated, the permit will be of limited duration with a definite expiration date.

(c) *Works.* Permits for construction work, discharge of dredged or fill material, or other activity and any construction period for a structure with a permit of indefinite duration under paragraph (b) of this section will specify time limits for completing the work or activity. The time limits may specify a date by which the work must

be started, normally one year from the date of issuance, and will specify a date by which the work must be completed. The dates will be established by the issuing official and will provide reasonable times based on the scope and nature of the work involved. Permits issued for the transport of dredged material for the purpose of disposing of it in ocean waters will specify a completion date for the disposal not to exceed three years from the date of permit issuance.

(d) *Extensions of time.* An authorization or construction period will automatically expire if the permittee fails to request and receive an extension of time. Extensions of time may be granted by the district engineer. The permittee must request the extension and explain the basis of the request, which will be granted only if the district engineer determines that an extension would be in the public interest. Requests for extensions will be processed in accordance with the regular procedures of § 325.2 of this part, including issuance of a public notice, except that such processing is not required where the district engineer determines that there have been no significant changes in the attendant circumstances since the authorization was issued and that the work is proceeding essentially in accordance with the approved plans and conditions.

(e) *Maintenance dredging.* If the authorized work includes periodic maintenance dredging, an expiration date for the authorization of that maintenance dredging will be included in the permit. The expiration date, which in no event is to exceed ten years from the date of issuance of the permit, will be established by the issuing official after evaluation of the proposed method of dredging and disposal of the dredged material in accordance with the requirements of 33 CFR Parts 320 through 325. In such cases, this district engineer shall require notification of the maintenance dredging prior to actual performance to insure continued compliance with the requirements of this regulation and 33 CFR Parts 320 through 324. If the permittee desires to continue maintenance dredging beyond the expiration date, he must request a new permit. The permittee should be advised to apply for the new permit six months prior to the time he wishes to do the maintenance work.

§ 325.7 Modification, suspension or revocation of authorizations.

(a) *General.* The district engineer may reevaluate the circumstances and conditions of any permit, including regional permits either on his own motion, at the request of the permittee, or a third party, or as the result of periodic progress inspections, and initiate action to modify, suspend, or revoke a permit as may be made necessary by considerations of the public interest. In the case of regional permits, this reevaluation may cover individual activities, categories of activities, or geographic areas. Among the factors to be considered are the extent of the permittee's compliance with the terms and conditions of the permit; whether or not circumstances relating to the authorized activity have changed since the permit was issued or extended, and the continuing adequacy of the permit conditions; any significant objections to the authorized activity which were not earlier considered; revisions to applicable statutory and/or regulatory authorities; and the extent to which modification, suspension, or other action would adversely affect plans, investments and actions the permittee has reasonably made or taken in reliance on the permit. Significant increases in scope of a permitted activity will be processed as new applications for permits in accordance with § 325.2 of this part, and not as modifications under this paragraph.

(b) *Modification.* Upon request by the permittee or, as a result of reevaluation of the circumstances and conditions of a permit, the district engineer may determine that the public interest requires a modification of the terms or conditions of the permit. In such cases, the district engineer will hold informal consultations with the permittee to ascertain whether the terms and conditions can be modified by mutual agreement. If a mutual agreement is reached on modification of the terms and conditions of the permit, the district engineer will give

the permittee written notice of the modification, which will then become effective on such date as the district engineer may establish. In the event a mutual agreement cannot be reached by the district engineer and the permittee, the district engineer will proceed in accordance with paragraph (c) of this section if immediate suspension is warranted. In cases where immediate suspension is not warranted by the district engineer determines that the permit should be modified, he will notify the permittee of the proposed modification and reasons therefor, and that he may request a meeting with the district engineer and/or a public hearing. The modification will become effective on the date set by the district engineer which shall be at least ten days after receipt of the notice by the permittee unless a hearing or meeting is requested within that period. If the permittee fails or refuses to comply with the modification, the district engineer will proceed in accordance with 33 CFR Part 326.

(c) *Suspension.* The district engineer may suspend a permit after preparing a written determination and finding that immediate suspension would be in the public interest. The district engineer will notify the permittee in writing by the most expeditious means available that the permit has been suspended with the reasons therefor, and order the permittee to stop those activities previously authorized by the suspended permit. The permittee will also be advised that following this suspension a decision will be made to either reinstate, modify, or revoke the permit, and that he may within 10 days of receipt of notice of the suspension, request a meeting with the district engineer and/or a public hearing to present information in this matter. If a hearing is requested, the procedures prescribed in 33 CFR Part 327 will be followed. After the completion of the meeting or hearing (or within a reasonable period of time after issuance of the notice to the permittee that the permit has been suspended if no hearing or meeting is requested), the district engineer will take action to reinstate, modify or revoke the permit.

(d) *Revocation.* Following completion of the suspension procedures in paragraph (c) of this section if revocation of the permit is found to be in the public interest, the authority who made the decision on the original permit may revoke it. The permittee will be advised in writing of the final decision.

(e) *Regional permits.* The district engineer may, by following the procedures of this section, revoke regional permits for individual activities, categories of activities, or geographic areas. Where groups of permittees are involved, such as for categories of activities or geographic areas, the informal discussions provided in paragraph (b) of this section may be waived and any written notification may be made through the general public notice procedures of this regulation. If a regional permit is revoked, any permittee may then apply for an individual permit which shall be processed in accordance with these regulations.

§ 325.8 Authority to issue or deny permits.

(a) *General.* Except as otherwise provided in this regulation, the Secretary of the Army, subject to such conditions as he or his authorized representative may from time to time impose, has authorized the Chief of Engineers and his authorized representatives to issue or deny permits for construction or other work in or affecting navigable waters of the United States pursuant to Section 10 of the River and Harbor Act of 1899. He also has authorized the Chief of Engineers and his authorized representatives to issue or deny permits for the discharge of dredged or fill material in waters of the United States pursuant to Section 404 of the Clean Water Act or for the transportation of dredged material for the purpose of disposing of it into ocean waters pursuant to Section 103 of the Marine Protection, Research and Sanctuaries Act of 1972, as amended. The authority to issue or deny permits pursuant to Section 9 of the River and Harbor Act of March 3, 1899 has not been delegated to the Chief of Engineers or his authorized representatives.

(b) *District Engineers' authority.* District engineers are authorized to issue or deny permits in accordance

with these regulations permits pursuant to Section 10 of the River and Harbor Act of 1899; Section 404 of the Clean Water Act; and Section 103 of the Marine Protection, Research and Sanctuaries Act of 1972, as amended, in all cases not required to be referred to higher authority (see below). It is essential to the legality of a permit that it contain the name of the district engineer as the issuing officer. However, the permit need not be signed by the district engineer in person but may be signed for and in behalf of him by whomever he designates. In cases where permits are denied for reasons other than navigation or failure to obtain required local, State, or other Federal approvals or certifications, the Statement of Findings must conclusively justify a denial decision, District engineers are authorized to deny permits without issuing a public notice or taking other procedural steps where required local, state or other Federal permits for the proposed activity have been denied or where he determines that the activity will clearly interfere with navigation except in all cases required to be referred to higher authority (see below). District engineers are also authorized to add, modify, or delete special conditions in permits in accordance with § 325.4 of this part, except for those conditions which may have been imposed by higher authority, and to modify, suspend and revoke permits according to the procedures of § 325.7 of this part. District engineers will refer the following applications to the division engineer for resolution:

(1) When a referral is required by a written agreement between the head of a Federal agency and the Secretary of the Army;

(2) When the recommended decision is contrary to the written position of the Governor of the State in which the work would be performed;

(3) When there is substantial doubt as to authority, law, regulations, or policies applicable to the proposed activity;

(4) When higher authority requests the application be forwarded for decision; or

(5) When the district engineer is precluded by law or procedures required by law from taking final action on the application (e.g., Section 404(c) of the Clean Water Act, Section 9 of the River and Harbor Act of 1899, or territorial sea baseline changes).

(c) *Division Engineers' authority.* Division engineers will review and evaluate all permit applications referred by district engineers. Division engineers may authorize the issuance or denial of permits pursuant to Section 10 of the River and Harbor Act of 1899; Section 404 of the Clean Water Act; and Section 103 of the Marine Protection, Research and Sanctuaries Act of 1972, as amended; and the inclusion of conditions in accordance with § 325.4 of this part in all cases not required to be referred to the Chief of Engineers. Division Engineers will refer the following applications to the Chief of Engineers for resolution:

(1) When a referral is required by a written agreement between the head of a Federal agency and the Secretary of the Army;

(2) When there is substantial doubt as to authority, law, regulations, or policies applicable to the proposed activity;

(3) When higher authority requests the application be forwarded for decision; or

(4) When the division engineer is precluded by law or procedures required by law from taking final action on the application.

§ 325.9 [Reserved]

§ 325.10 Publicity.

The district engineer will establish and maintain a program to assure that potential applicants for permits are informed of the requirements of this regulation and of the steps required to obtain permits for activities in waters of the United States or ocean waters. Whenever the district engineer becomes aware of plans being developed by either private or public entities which might require permits for implementation, he should advise the potential applicant in writing of the statutory requirements and the provisions of this regulation. Whenever the district engineer is aware of changes in Corps of Engineers regulatory jurisdiction, he will issue appropriate public notices.

APPENDIX A—PERMIT FORM

Application No. ————————————
Name of Applicant ————————————
Effective Date ————————————
Expiration Date (If applicable) ————————————

DEPARTMENT OF THE ARMY

Permit

Referring to written request dated ———— for a permit to:

( ) Perform work in or affecting navigable waters of the United States, upon the recommendation of the Chief of Engineers, pursuant to Section 10 of the Rivers and Harbors Act of March 3, 1899 (33 U.S.C. 403);

( ) Discharge dredged or fill material into waters of the United States upon the issuance of a permit from the Secretary of the Army acting through the Chief of Engineers pursuant to Section 404 of the Clean Water Act (86 Stat. 816, Pub. L. 92-500);

( ) Transport dredged material for the purpose of disposal in ocean waters upon the issuance of a permit from the Secretary of the Army acting through the Chief of Engineers pursuant to Section 103 of the Marine Protection, Research and Sanctuaries Act of 1972 (86 Stat. 1052; Pub. L. 92-532);

————————————

————————————

(Here insert the full name and address of the permittee.)

is hereby authorized by the Secretary of the Army:
to ————————————

————————————

(Here describe the proposed structure or activity, and its intended use. In the case of an application for a fill permit, describe the structures, if any proposed to be erected on the fill. In the case of an application for the discharge of dredged or fill material into waters of the United States or the transportation for discharge in ocean waters of dredged material, describe the type and quantity of material to be discharged.)
in ————————————

————————————

(Here to be named the ocean, river, harbor, or waterway concerned.)

at ————————————
(Here to be named the nearest well-known locality-preferably a town or city and the distance in miles and tenths from some definite point in the same, stating whether above or below or giving direction by points of compass.)

in accordance with the plans and drawings attached hereto which are incorporated in and made a part of this permit (on drawings, give file number or other definite identification marks). Subject to the following conditions:

I. General conditions: (a) That all activities identified and authorized herein shall be consistent with the terms and conditions of this permit; and that any activities not specifically identified and authorized herein shall constitute a violation of the terms and conditions of this permit which may result in the modification, suspension or revocation of this permit, in whole or in part, as set forth more specifically in General Conditions j or k hereto, and in the institution of such legal proceedings as the United States Government may consider appropriate, whether or not this permit has been previously modified, suspended or revoked in whole or in part.

(b) That all activities authorized herein shall, if they involve, during their construction or operation, any discharge of pollutants into waters of the United States or ocean waters, be at all times consistent with applicable water quality standards, effluent limitations and standards of performance, prohibitions, pretreatment standards and management practices established pursuant to the Clean Water Act of 1972 (Pub. L. 92-500; 86 Stat. 816), the Marine Protection, Research and Sanctuaries Act of 1972 (Pub. L. 92-532, 86 Stat. 1052), or pursuant to applicable State and local law.

(c) That when the activity authorized herein involves a discharge during its construction or operation, of any pollutant (including dredged or fill material), into waters of the United States, the authorized activity shall, if applicable water quality standards are revised or modified during the term of this permit, be modified, if necessary, to conform with such revised or modified water quality standards within 6 months of the effective date of any revision or modification of water quality standards, or as directed by an implementation plan contained in such revised or modified standards, or within such longer period of time as the district engineer, in consultation with the Regional Administrator of the Environmental Protection Agency, may determine to be reasonable under the circumstances.

(d) That the discharge will not destroy a threatened or endangered species as identified under the Endangered Species Act, or endanger the critical habitat of such species.

(e) That the permittee agrees to make every reasonable effort to prosecute the construction or operation of the work authorized herein in a manner so as to minimize any adverse impact on fish, wildlife, and natural environmental values.

(f) That the permittee agrees that it will prosecute the construction or work authorized herein in a manner so as to minimize any degradation of water quality.

(g) That the permittee shall allow the District Engineer or his authorized representative(s) or designee(s) to make periodic inspections at any time deemed necessary in order to assure that the activity being performed under authority of this permit is in accordance with the terms and conditions prescribed herein.

(h) That the permittee shall maintain the structure or work authorized herein in good condition and in reasonable accordance with the plans and drawings attached hereto.

(i) That this permit does not convey any property rights, either in real estate or material, or any exclusive privileges; and that it does not authorize any injury to property or invasion of rights or any infringement of Federal, state, or local laws or regulations.

(j) That this permit does not obviate the requirement to obtain state or local assent required by law for the activity authorized herein.

(k) That this permit may be either modified, suspended or revoked in whole or in part pursuant to the policies and procedures of 33 CFR 325.7.

(l) That in issuing this permit, the Government has relied on the information and data which the permittee has provided in connection with his permit application. If, subsequent to the issuance of this permit, such information and data prove to be materially false, materially incomplete or inaccurate, this permit may be modified, suspended or revoked, in whole or in part, and or the Government may, in addition, institute appropriate legal proceedings.

(m) That any modification, suspension, or revocation of this permit shall not be the basis for any claim for damages against the United States.

(n) That the permittee shall notify the District Engineer of the time the activity authorized herein will be commenced, as far in advance of the time of commencement as the District Engineer may specify, and of any suspension of work, if for a period of more than one week, resumption of work and its completion.

(o) That if the activity authorized herein is not completed on or before ——— day of ———, 19—, (three years from the date of issuance of this permit unless otherwise specified) this permit, if not previously revoked or specifically extended, shall automatically expire.

(p) That this permit does not authorize or approve the construction of particular structures, the authorization or approval of which may require authorization by the Congress or other agencies of the Federal Government.

(q) That if and when the permittee desires to abandon the activity authorized herein, unless such abandonment is part of a transfer procedure by which the permittee is transferring his interests herein to a third party pursuant to General Condition (t) hereof, he must restore the area to a condition satisfactory to the District Engineer.

(r) That if the recording of this permit is possible under applicable state or local law, the permittee shall take such action as may be necessary to record this permit with the Register of Deeds or other appropriate official charged with the responsibility for maintaining records of title to and interests in real property.

(s) That there shall be no unreasonable interference with navigation by the existence or use of the activity authorized herein.

(t) That this permit may not be transferred to a third party without prior written notice to the District Engineer, either by the transferee's written agreement to comply with all terms and conditions of this permit or by the transferee subscribing to this permit in the space provided below and thereby agreeing to comply with all terms and conditions of this permit. In addition, if the permittee transfers the interests authorized herein by conveyance of realty, the deed shall reference this permit and the terms and conditions specified herein and this permit shall be recorded along with the deed with the Register of Deeds or other appropriate official.

(u) That if the permittee during prosecution of the work authorized herein, encounters a previously unidentified archeological or other cultural resource that might be eligible for listing in the National Register of Historic Places, he shall immediately notify the district engineer.

II. Special Conditions: Here list conditions relating specifically to the proposed structure or work authorized by this permit. The following Special Conditions will be applicable when appropriate:

Structures In or Affecting Navigable Waters of the United States

(a) That this permit does not authorize the interference with any existing or proposed Federal project and that the permittee shall not be entitled to compensation for damage or injury to the structures or work authorized herein which may be caused by or result from existing or future operations undertaken by the United States in the public interest.

(b) That no attempt shall be made by the permittee to prevent the full and free use by the public of all navigable waters at or

adjacent to the activity authorized by this permit.

(c) That if the display of lights and signals on any structure or work authorized herein is not otherwise provided for by law, such lights and signals as may be prescribed by the United States Coast Guard shall be installed and maintained by and at the expense of the permittee.

(d) That the permittee, upon receipt of a notice of revocation of this permit or upon its expiration before completion of the authorized structure or work, shall, without expense to the United States and in such time and manner as the Secretary of the Army or his authorized representative may direct, restore the waterway to its former conditions. If the permittee fails to comply with the direction of the Secretary of the Army or his authorized representative, the Secretary or his designee may restore the waterway to its former condition, by contract or otherwise, and recover the cost thereof from the permittee.

(e) Structures for Small Boats: That the permittee hereby recognizes the possibility that the structure permitted herein may be subject to damage by wave wash from passing vessels. The issuance of this permit does not relieve the permittee from taking all proper steps to insure the integrity of the structure permitted herein and the safety of boats moored thereto from damage by wave wash and the permittee shall not hold the United States liable for any such damage.

Maintenance Dredging

(a) That when the work authorized herein includes periodic maintenance dredging, it may be performed under this permit for —— years from the date of issuance of this permit (ten years unless otherwise indicated);

(b) That the permittee will advise the District Engineer in writing at least two weeks before he intends to undertake any maintenance dredging.

Discharges of Dredged or Fill Material Into Waters of the United States

(a) That the discharge will be carried out in conformity with the goals and objectives of the EPA Guidelines established pursuant to Section 404(b) of the Clean Water Act and published in 40 CFR Part 230;

(b) That the discharge will consist of suitable material free from toxic pollutants in toxic amounts.

(c) That the fill created by the discharge will be properly maintained to prevent erosion and other non-point sources of pollution; and

Disposal of Dredged Material Into Ocean Waters

(a) That the disposal will be carried out in conformity with the goals, objectives, and requirements of the EPA criteria established pursuant to Section 102 of the Marine Protection, Research and Sanctuaries Act of 1972, published in 40 CFR Parts 220-228.

(b) That the permittee shall place a copy of this permit in a conspicuous place in the vessel to be used for the transportation and/or disposal of the dredged material as authorized herein.

This permit shall become effective on the date of the District Engineer's signature.

Permittee hereby accepts and agrees to comply with the terms and conditions of this permit.

(Permittee) ——————————

(Date) ——————————

By authority of the Secretary of the Army:

(District Engineer) ——————————

(Date) ——————————

Transferee hereby agrees to comply with the terms and conditions of this permit.

(Transferee) ——————————

(Date) ——————————

PART 326—ENFORCEMENT, SUPERVISION AND INSPECTION

Sec.

AUTHORITY: 33 U.S.C. 401 et seq.; 33 U.S.C. 1344; 33 U.S.C. 1413.

SOURCE: 47 FR 31825, July 22, 1982, unless otherwise noted.

§ 326.1 Purpose.

This regulation prescribes the policy, practice, and procedures to be followed by the Corps of Engineers in connection with activities requiring Department of the Army permits that are performed without prior authorization; and supervision and inspection of authorized activities.

§ 326.2 Discovery of unauthorized activity.

(a) When the district engineer becomes aware of any unauthorized activity still in progress, including a violation of the terms and conditions of an authorized activity, he shall immediately issue an order prohibiting further work to all persons responsible for and/or involved in the performance of the activity and may order interim protective work. If the unauthorized activity has been completed, he will advise the responsible party of his discovery.

(b) Where the unauthorized activity involves an American Indian (including Alaskan natives, Eskimos, and Aleuts) or takes place on reservation land, district engineers will coordinate proposed cease and desist order with the Assistant Chief Counsel for Indian Affairs (DAEN-CCI).

§ 326.3 Administrative action.

(a) *Initial investigation.* Immediately upon discovery of an unauthorized activity, the district engineer shall commence an investigation to ascertain the facts surrounding the activity. In making this investigation, the district engineer should, in appropriate cases, depending upon the potential impacts of the completed work solicit the views of the Regional Administrator of the Environmental Protection Agency, the Regional Director of the U.S. Fish and Wildlife Service, and the Regional Director of the National Marine Fisheries Service, and other Federal, state, and/or local agencies. He shall also request the persons involved in the unauthorized activity to provide appropriate information on the activity to assist him in his evaluation and in determining the course of action to be taken.

(b) *Remedial work.* (1) The district engineer shall determine whether as a result of the unauthorized activity, life, property or important public resources are in serious jeopardy and would require expeditious measures for protection. Such measures may range from minor modification of the existing work to complete restoration of the area involved. Important public resources are identified in 33 CFR 320.4. If the district engineer determines that immediate remedial work is required, he shall issue an appropriate order describing the work, conditions and time limits required to provide satisfactory protection of the resource.

(2) Voluntary restoration by the responsible party on the party's own initiative shall be allowed if legal action is not otherwise necessary. However, district engineers will advise the responsible party of the option of an after-the-fact application for a permit to retain the unauthorized work. No permit will be required when complete and satisfactory restoration is accomplished.

(c) *Acceptance of an after-the-fact application.* Upon completion of appropriate remedial work, if any, the district engineer shall accept an application for an after-the-fact permit for all unauthorized activities unless:

(1) Civil action to enforce an order issued pursuant to § 326.2 or § 326.3(b) of this part is required;

(2) Criminal action is appropriate (see § 326.4a(1) of this part);

(3) State local, or other federal authorization or certification has been denied,[1] or a state or local enforcement action is pending. In the above situations, the District Engineer may accept an after-the-fact permit application provided he believes it would be in the public interest and he obtains approval of the next higher authority.

(4) In some cases, a violation of the Clean Water Act may be of such a nature that it is appropriate to seek a civil penalty as provided for in the act. These cases include knowing, flagrant, repeated or substantial impact violations.[2]

(d) If the responsible party fails to submit an application as noted in paragraph (c) of this section within a reasonable time period, the district engineer may proceed on his own initiative with a determination of whether the activity is in the public interest.

[1] This section refers to state or local authorizations required as a matter of Federal law before a Sec. 404 permit may be issued. Examples are Sec. 401 Water Quality Certification and Sec. 307 Coastal Zone Management Consistency Determinations.

[2] In such cases, the District Engineer may, in his discretion, recommend to the United States Attorney that a complaint be filed. An after-the-fact application should not be accepted until the enforcement action is completely resolved. This exception to the general rule of accepting after-the-fact applications should be used on a limited basis, only for those cases which merit special treatment.

The determination will be made in accordance with appropriate procedures described in 33 CFR Parts 320 through 325.

§ 326.4 Legal action.

(a) *Criminal or civil action.* District engineers shall be guided by the following policies in recommending appropriate legal action:

(1) *Criminal action.* Criminal action is considered appropriate when the facts surrounding an unauthorized activity reveal the necessity for punitive action and/or when deterrence of future unauthorized activities in the area is considered essential to the establishment or maintenance of a viable regulatory program.

(2) *Civil action.* Civil action is considered appropriate when the evalution of the unauthorized activity reveals that (i) enforcement of an order issued pursuant to § 326.2 or § 326.3 (b) of this part is required; (ii) after the procedures in § 326.3 (c) of this part have been completed, the unauthorized activity would be in the public interest if altered or modified but attempts to secure voluntary alteration or modification have failed such that a judicial order is necessary, or (iii) after the procedures in § 326.3 (c) of this part have been completed, a civil penalty under Section 309 of the Clean Water Act is warranted.

(b) *Preparation of case.* If the district engineer determines to recommend legal action he shall prepare a litigation report which shall contain an analysis of the data and information obtained during the investigation and a recommendation of appropriate civil and/or criminal action. In those cases where the analysis of the facts developed during the investigation and/or the after-the-fact application evaluation leads to the preliminary conclusion to recommend that removal of the unauthorized activity is in the public interest, the district engineer shall also recommend restoration of the area to its original or comparable condition.

(c) *Referral to local U.S. Attorney.* Except as provided in paragraph (d) of this section, district engineers are authorized to refer the following cases to the Department of Justice (DOJ) in accordance with procedures established by DOJ. Information copies of all letters of referral which go directly to a U.S. Attorney shall be forwarded to the Chief of Engineers, ATTN: DAEN-CCK, for transmittal to the Chief, Pollution Control Section, Land and Natural Resources Division, Department of Justice, Washington, D.C. 20530.

(1) Unauthorized structures or work in or affecting navigable waters of the United States that fall exclusively within the purview of Section 10 of the River and Harbor Act of 1899 (see 33 CFR Part 322) for which a criminal fine or penalty under Section 12 of that Act (33 U.S.C. 406) is recommended.

(2) Civil action involving small unauthorized structures, such as piers, which the district engineer determines are either (i) not in the public interest and recommends that they be removed, or (ii) would be in the public interest if altered or modified but attempts to secure voluntary alteration or modification have failed such that the district engineer recommends that a judicial order is necessary.

(3) Violations of Section 301 of the Clean Water Act involving the unauthorized discharge of dredged or fill material into the waters of the United States where the district engineer recommends, with the concurrence of the Regional Administrator, civil and/or criminal action pursuant to Section 309 of the Clean Water Act.

(4) Cases for which a temporary restraining order and/or preliminary injunction is appropriate following noncompliance with a cease and desist order.

(d) *Referral to Office, Chief of Engineers.* District engineers shall prepare and forward a litigation report to the Office, Chief of Engineers, ATTN: DAEN-CCK, for cases not identified in paragraph (c) of this section which civil and/or criminal action is considered appropriate, including cases involving:

(1) Significant questions of law or fact;

(2) Discharges of dredged or fill material into waters of the United States that are not interstate waters or navigable waters of the United States, or part of a surface tributary system to these waters;

(3) Recommendations for substantial or complete restoration;

(4) Violations of Section 9 of the River and Harbor Act of 1899; and

(5) Violations of the Marine Protection, Research and Sanctuaries Act of 1972.

(6) All cases involving American Indians, including unauthorized activities on reservation lands.

§ 326.5 Supervision and enforcement of authorized activities.

(a) *Inspection and monitoring.* District engineers will assure that authorized activities are conducted and executed in conformance with approved plans and other conditions of the permits. Appropriate inspections should be made on timely occasions during performance of the activity and appropriate notices and instructions given permittees to insure that they do not depart from the approved plans. Reevaluation of a permit to assure compliance with its purposes and conditions will be carried out as provided in 33 CFR Part 325.7. If there are approved material departures from the authorized plans, the district engineer will require the permittee to furnish corrected plans showing the activity as actually performed.

(b) *Non-compliance.* Where the district engineer determines that there has been non-compliance with the terms or conditions of a permit, he should first contact the permittee and attempt to resolve the problem. If a mutually agreeable resolution cannot be reached, a written demand for compliance will be made. If the permittee has not agreed to comply within 5 days of receipt of the demand, the district engineer will issue an immediately effective notice of suspension in accordance with 33 CFR Part 325.7(c) and consider initiation of appropriate legal action (§ 326.4 of this part).

(c) *Surveillance.* For purposes of inspection of permitted activities and for surveillance of the waters of the United States for enforcement of the permit authorities the district engineer will use all means at his disposal. All Corps of Engineers employees will be instructed to observe and report all unauthorized activities in waters of the United States. The assistance of members of the public and personnel of other interested Federal, state and local agencies to observe and report such activities will be encouraged. To facilitate this surveillance, the district engineer will, in appropriate cases, require a copy of ENG Form 4336 to be posted conspicuously at the site of authorized activities and will make available to all interested persons information on the scope of authorized activities and the conditions prescribed in the authorizations. Surveillance in ocean waters will be accomplished primarily by the Coast Guard pursuant to Section 107(c) of the Marine Protection, Research and Sanctuaries Act of 1972, as amended.

(d) *Inspection expenses.* The expenses incurred in connection with the inspection of permitted activity in waters of the United States normally will be paid by the Federal Government in accordance with the provisions of Section 6 of the River and Harbor Act of 3 March 1905 (33 U.S.C. 417) unless daily supervision or other unusual expenses are involved. In such unusual cases, the district engineer may require the permittee to bear the expense of inspections in accordance with the conditions of his permit; however, the permittee will not be required or permitted to pay the United States inspector either directly or through the district engineer. The inspector will be paid on regular payrolls or service vouchers. The district engineer will collect the cost from the permittee in accordance with the following:

(1) At the end of each month the amount chargeable for the cost of inspection pertaining to the permit will be collected from the permittee and will be taken up on the statement of accountability and deposited in a designated depository to the credit of the Treasurer of the United States, on account of reimbursement of the appropriation from which the expenses of the inspection were paid.

(2) If the district engineer considers such a procedure necessary to insure the United States against loss through possible failure of the permittee to supply the necessary funds in accor

ance with paragraph (d)(1) of this section he may require the permittee to keep on deposit with the district engineer at all times an amount equal to the estimated cost of inspection and supervision for the ensuing month, such deposit preferably being in the form of a certified check, payable to the order of Treasurer of the United States. Certified checks so deposited will be carried in a special deposit account (guaranty for inspection expenses) and upon completion of the work under the permit the funds will be returned to the permittee provided he has paid the actual cost of inspection.

(3) On completion of work under a permit, and the payment of expenses by the permittee without protest, the account will be closed, and outstanding deposits returned to the permittee. If the account is protested by the permittee, it will be referred to the division engineer for approval before it is closed and before any deposits are returned to the permittee.

(e) Where the unauthorized activity is determined not to be in the public interest, the notification of the denial of the permit will prescribe any corrective actions to be taken in connection with the work already accomplished, including restoration of those areas subject to denial, and establish a reasonable period of time for the applicant to complete such actions. The district engineer, after denial of the permit, will again consider whether to recommend civil and/or criminal action in accordance with § 326.4 of this part.

(f) If the applicant declines to accept the proposed permit conditions, or fails to take corrective action prescribed in the notification of denial, or if the district engineer recommends legal action after denying the permit, the matter will be referred to the Chief of Engineers, Attn.: DAEN-CCK, with recommendations for appropriate action.

(g) Division and District Engineers are authorized and encouraged to develop joint surveillance and inspection procedures with other Federal, state, and local agencies with similar regulatory responsibilities and with other Federal, state and local agencies having special interest or expertise in the Corps regulatory program. However, any decision to initiate legal action or to require any restoration or other remedial work under Corps of Engineers authority remains the independent responsibility of the Division or district engineer.

PART 327—PUBLIC HEARINGS

Sec.

AUTHORITY: 33 U.S.C. 1344; 33 U.S.C. 1413.

SOURCE: 47 FR 31827, July 22, 1982, unless otherwise noted.

§ 327.1 Purpose.

This regulation prescribes the policy, practice and procedures to be followed by the U.S. Army Corps of Engineers in the conduct of public hearings conducted in the evaluation of a proposed Department of the Army permit action or Federal project as defined in § 327.3 of this part below including those held pursuant to Section 404 of the Clean Water Act (33 U.S.C. 1344) and Section 103 of the Marine Protection, Research and Sanctuaries Act (MPRSA), as amended (33 U.S.C. 1413).

§ 327.2 Applicability.

This regulation is applicable to all divisions and districts responsible for the conduct of public hearings.

§ 327.3 Definitions.

(a) Public hearing means a public proceeding conducted for the purpose of acquiring information or evidence which will be considered in evaluating a proposed Department of the Army permit action, or Federal project, and which affords to the public the opportunity to present their views, opinions, and information on such permit actions or Federal projects.

(b) Permit action, as used herein means the evaluation of and decision on an application for a permit pursuant to Section 9 or 10 of the River and Harbor Act of 1899, Section 404 of the Clean Water Act, or Section 103 of the MPRSA, as amended, or the modification or revocation of any Department of the Army permit (see 33 CFR 325.7).

(c) Federal project means a Corps of Engineers project (work or activity of any nature for any purpose which is to be performed by the Chief of Engineers pursuant to Congressional authorizations) involving the discharge of dredged or fill material into waters of the United States or the transportation of dredged material for the purpose of dumping it in ocean waters subject to Section 404 of the Clean Water Act, or Section 103 of the MPRSA. See 33 CFR 209.145. (This regulation supersedes all references to public meetings in 33 CFR 209.145).

§ 327.4 General policies.

(a) A public hearing will be held in connection with the consideration of a Department of the Army permit application, or a Federal project whenever a public hearing is needed for making a decision on such permit application or Federal project. In addition, a public hearing may be held when it is proposed to modify or revoke a permit. (See 33 CFR 325.7).

(b) Unless the public notice specifies that a public hearing will be held, any person may request, in writing, within the comment period specified in the public notice on a Department of the Army permit application or on a Federal project, that a public hearing be held to consider the material matters in issue in the permit application or Federal project. Upon receipt of any such request, stating with particularity the reasons for holding a public hearing, the district engineer may expeditiously attempt to resolve the issues informally. Otherwise, he shall promptly set a time and place for the public hearing and give due notice thereof, as prescribed in § 327.11 of this part. Requests for a public hearing under this paragraph shall be granted, unless the district engineer determines that the issues raised are insubstantial or there is otherwise no valid interest to be served by a hearing. The district engineer will make such a determination in writing, and communicate his reasons therefor to all requesting parties.

(c) In case of doubt, a public hearing shall be held. HQDA has the discretionary power to require hearings in any case.

(d) In fixing the time and place for a hearing, the convenience and necessity of the interested public will be duly considered.

§ 327.5 Presiding officer.

(a) The district engineer, in whose district a matter arises, shall normally serve as the presiding officer. When the district engineer is unable to serve, he may designate the deputy district engineer or other qualified person as such presiding officer. In cases of unusual interest, the Chief of Engineers or the Division Engineer may appoint such person as he deems appropriate to serve as the presiding officer.

(b) The presiding officer shall include in the administrative record of the permit action the request or requests for the hearing and any data or material submitted in justification thereof, materials submitted in opposition to or in support of the proposed action, the hearing transcript, and such other material as may be relevant or pertinent to the subject matter of the hearing. The administrative record shall be available for public inspection with the exception of material exempt from disclosure under the Freedom of Information Act.

§ 327.6 Legal adviser.

At each public hearing, the district counsel or his designee may serve as legal advisor to the presiding officer. In appropriate circumstances, the district engineer may waive the requirement for a legal advisor to be present.

§ 327.7 Representation.

At the public hearing, any person may appear on his own behalf, or may

be represented by counsel, or by other representatives.

§ 327.8 Conduct of hearings.

(a) The presiding officer shall make an opening statement outlining the purpose of the hearing and prescribing the general procedures to be followed.

(b) Hearings shall be conducted by the presiding officer in an orderly but expeditious manner. Any person shall be permitted to submit oral or written statements concerning the subject matter of the hearing, to call witnesses who may present oral or written statements, and to present recommendations as to an appropriate decision. Any person may present written statements for the hearing record prior to the time the hearing record is closed to public submissions, and may present proposed findings and recommendations. The presiding officer shall afford participants a reasonable opportunity for rebuttal.

(c) The presiding officer shall have discretion to establish reasonable limits upon the time allowed for statements of witnesses, for arguments of parties or their counsel or representatives, and upon the number of rebuttals.

(d) Cross-examination of witnesses shall not be permitted.

(e) All public hearings shall be reported verbatim. Copies of the transcripts of prceedings may be purchased by any person from the Corps of Engineers or the reporter of such hearing. A copy will be available for public inspection at the office of the appropriate district engineer.

(f) All written statements, charts, tabulations, and similar data offered in evidence at the hearing shall, subject to exclusion by the presiding officer for reasons of redundancy, be received in evidence and shall constitute a part of the record.

(g) The presiding officer shall allow a period of not less than 10 days after the close of the public hearing for submission of written comments.

(h) In appropriate cases, the district engineer may participate in joint public hearings with other Federal or state agencies, provided the procedures of those hearings meet the requirements of this regulation. In those cases in which the other Federal or state agency allows a cross-examination in its public hearing, the district engineer may still participate in the joint public hearing but shall not require cross-examination as a part of his participation.

§ 327.9 Filing of transcript of the public hearing.

Where the presiding officer is the initial action authority, the transcript of the public hearing, together with all evidence introduced at the public hearing, shall be made a part of the administrative record of the permit action or Federal project. The initial action authority shall fully consider the matters discussed at the public hearing in arriving at his initial decision or recommendation and shall address, in his decision or recommendation, all substantial and valid issues presented at the hearing. Where a person other than the initial action authority serves as presiding officer, such person shall forward the transcript of the public hearing and all evidence received in connection therewith to the initial action authority together with a report summarizing the issues covered at the hearing. The report of the presiding officer and the transcript of the public hearing and evidence submitted thereat shall in such cases be fully considered by the initial action authority in his decision or recommendation to higher authority as to such permit action or Federal project.

§ 327.10 Authority of the presiding officer.

Presiding officers shall have the following authority:

(a) To regulate the course of the hearing including the order of all sessions and the scheduling thereof, after any initial session, and the recessing, reconvening, and adjournment thereof; and

(b) To take any other action necessary or appropriate to the discharge of the duties vested in them, consistent with the statutory or other authority under which the Chief of Engineers functions, and with the policies and directives of the Chief of Engineers and the Secretary of the Army.

§ 327.11 Public notice.

(a) Public notice shall be given of any public hearing to be held pursuant to this regulation. Such notice should normally provide for a period of not less than 30 days following the date of public notice during which time interested parties may prepare themselves for the hearing. Notice shall also be given to all Federal agencies affected by the proposed action, and to state and local agencies and other parties having an interest in the subject matter of the hearing. Notice shall be sent to all persons requesting a hearing and shall be posted in appropriate government buildings and published in newspapers of general circulation.

(b) The notice shall contain time, place, and nature of hearing; the legal authority and jurisdiction under which the hearing is held; and location of and availability of the draft environmental impact statement or environmental assessment.

PART 329—DEFINITION OF NAVIGATION WATERS OF THE UNITED STATES

Sec.

AUTHORITY: 33 U.S.C. 401 et seq.

SOURCE: 47 FR 31828, July 22, 1982, unless otherwise noted.

§ 329.1 Purpose.

This regulation defines the term "navigable waters of the United States" as it is used to define authorities of the Corps of Engineers. It also prescribes the policy, practice and procedure to be used in determining the extent of the jurisdiction of the Corps of Engineers and in answering inquiries concerning "navigible waters of the United States." This definition does not apply to authorities under the Clean Water Act which definitions are described under 33 CFR Part 323.

§ 329.2 Applicability.

This regulation is applicable to all Corps of Engineers districts and divisions having civil works responsibilities.

§ 329.3 General policies.

Precise definitions of "navigable waters of the United States"; or "navigability" are ultimately dependent on judicial interpretation, and cannot be made conclusively by administrative agencies. However, the policies and criteria contained in this regulation are in close conformance with the tests used by the Federal courts and determinations made under this regulation are considered binding in regard to the activities of the Corps of Engineers.

§ 329.4 General definition.

Navigable waters of the United States are those waters that are subject to the ebb and flow of the tide and/or are presently used, or have been used in the past, or may be susceptible for use to transport interstate or foreign commerce. A determination of navigability, once made, applies laterally over the entire surface of the waterbody, and is not extinguished by later actions or events which impede or destroy navigable capacity.

§ 329.5 General scope of determination.

The several factors which must be examined when making a determination whether a waterbody is a navigable water of the United States are discussed in detail below. Generally, the following conditions must be satisfied:

(a) Past, present, or potential presence of interstate or foreign commerce;
(b) Physical capabilities for use by commerce as in paragraph (a) of this section; and
(c) Defined geographic limits of the waterbody.

§ 329.6 Interstate or foreign commerce.

(a) *Nature of commerce: Type, means, and extent of use.* The types of commercial use of a waterway are extremely varied and will depend on the character of the region, its products, and the difficulties or dangers of navigation. It is the waterbody's capability of use by the public for purposes of transportation of commerce which is the determinative factor, and not the time, extent or manner of that use. As discussed in § 329.9 of this part, it is sufficient to establish the potential for commercial use at any past, present, or future time. Thus, sufficient commerce may be shown by historical use of canoes, bateaux, or other frontier craft, as long as that type of boat was common or well-suited to the place and period. Similarly, the particular items of commerce may vary widely, depending again on the region and period. The goods involved might be grain, furs, or other commerce of the time. Logs are a common example; transportation of logs has been a substantial and well-recognized commercial use of many navigable waters of the United States. Note, however, that the mere presence of floating logs will not of itself make the river "navigable"; the logs must have been related to a commercial venture. Similarly, the presence of recreational craft may indicate that a waterbody is capable of bearing some forms of commerce, either presently, in the future, or at a past point in time.

(b) *Nature of commerce: Interstate and intrastate.* Interstate commerce may of course be existent on an intrastate voyage which occurs only between places within the same state. It is only necessary that goods may be brought from, or eventually be destined to go to, another state. (For purposes of this regulation, the term "interstate commerce" hereinafter includes "foreign commerce" as well.)

§ 329.7 Intrastate or interstate nature of waterway.

A waterbody may be entirely within a state, yet still be capable of carrying interstate commerce. This is especially clear when it physically connects with a generally acknowledged avenue of interstate commerce, such as the ocean or one of the Great Lakes, and is yet wholly within one state. Nor is it necessary that there be a physically navigable connection across a state boundary. Where a waterbody extends through one or more states, but substantial portions, which are capable of bearing interstate commerce, are located in only one of the states, the entirety of the waterway up to the head (upper limit) of navigation is subject to Federal jurisdiction.

§ 329.8 Improved or natural conditions of the waterbody.

Determinations are not limited to the natural or original condition of the waterbody. Navigability may also be found where artificial aids have been or may be used to make the waterbody suitable for use in navigation.

(a) *Existing improvements: artificial waterbodies.* (1) An artificial channel may often constitute a navigable water of the United States, even though it has been privately developed and maintained, or passes through private property. The test is generally as developed above, that is, whether the waterbody is capable of use to transport interstate commerce. Canals which connect two navigable waters of the United States and which are used for commerce clearly fall within the test, and themselves become navigable. A canal open to navigable waters of the United States on only one end is itself navigable where it in fact supports interstate commerce. A canal or other artificial waterbody that is subject to ebb and flow of the tide is also a navigable water of the United States.

(2) The artificial waterbody may be a major portion of a river or harbor area or merely a minor backwash, slip, or turning areas. (See § 329.12(b) of this part.)

(3) Private ownership of the lands underlying the waterbody, or of the lands through which it runs, does not

preclude a finding of navigability. Ownership does become a controlling factor if a privately constructed and operated canal is not used to tranport interstate commerce nor used by the public; it is then not considered to be a navigable water of the United States. However, a private waterbody, even though not itself navigable, may so affect the navigable capacity of nearby waters as to nevertheless be subject to certain regulatory authorities.

(b) *Non-existing improvements, past or potential.* A waterbody may also be considered navigable depending on the feasibility of use to transport interstate commerce after the construction of whatever "reasonable" improvements may potentially be made. The improvements need not exist, be planned, nor even authorized; it is enough that potentially they could be made. What is a "reasonable" improvement is always a matter of degree; there must be a balance between cost and need at a time when the improvement would be (or would have been) useful. Thus, if an improvement were "reasonable" at a time of past use, the water was therefore navigable in law from that time forward. The changes in engineering practices or the coming of new industries with varying classes of freight may affect the type of the improvement; those which may be entirely reasonable in a thickly populated, highly developed industrial region may have been entirely too costly for the same region in the days of the pioneers. The determination of reasonable improvement is often similar to the cost analyses presently made in Corps of Engineers studies.

§ 329.9 Time at which commerce exists or determination is made.

(a) *Past use.* A waterbody which was navigable in its natural or improved state, or which was susceptible of reasonable improvement (as discussed in § 329.8(b) of this part retains its character as "navigable in law" even though it is not presently used for commerce, or is presently incapable of such use because of changed conditions or the presence of obstructions. Nor does absence of use because of changed economic conditions affect the legal character of the waterbody. Once having attained the character of "navigable in law," the Federal authority remains in existence, and connot be abandoned by administrative officers or court action. Nor is mere inattention or ambiguous action by Congress an abandonment of Federal control. However, express statutory declarations by Congress that described portions of a waterbody are non-navigable, or have been abandoned, are binding upon the Department of the Army. Each statute must be carefully examined, since Congress often reserves the power to amend the Act, or assigns special duties of supervision and control to the Secretary of the Army or Chief of Engineers.

(b) *Future or potential use.* Navigability may also be found in a waterbody's susceptibility for use in its ordinary condition or by reasonable improvement to transport interstate commerce. This may be either in its natural or improved condition, and may thus be existent although there has been no actual use to date. Nonuse in the past therefore does not prevent recognition of the potential for future use.

§ 329.10 Existence of obstructions.

A stream may be navigable despite the existence of falls, rapids, sand bars, bridges portages, shifting currents, or similar obstructions. Thus, a waterway in its original condition might have had substantial obstructions which were overcome by frontier boats and/or portages, and nevertheless be a "channel" or commerce, even though boats had to be removed from the water in some stretches, or logs be brought around an obstruction by means of artificial chutes. However, the question is ultimately a matter of degree, and it must be recognized that there is some point beyond which navigability could not be established.

§ 329.11 Geographic and jurisdictional limits of rivers and lakes.

(a) *Jurisdiction over entire bed.* Federal regulatory jurisdiction, and powers of improvement for navigation, extend laterally to the entire water

surface and bed of a navigable waterbody, which includes all the land and waters below the ordinary high water mark.

(1) The "ordinary high water mark" on non-tidal rivers is the line on the shore established by the fluctuations of water and indicated by physical characteristics such as a clear, natural line impressed on the bank; shelving; changes in the character of soil; destruction of terrestrial vegetation;' the presence of litter and debris; or other appropriate means that consider the characteristics of the surrounding areas.

(2) Ownership of a river or lake bed or of the lands between high and low water marks will vary according to state law; however, private ownership of the underlying lands has no bearing on the existence or extent of the dominant Federal jurisdiction over a navigable waterbody.

(b) *Upper limit of navigability.* The character of a river will, at some point along its length, change from navigable to non-navigable. Very often that point will be at a major fall or rapids, or other place where there is a marked decrease in the navigable capacity of the river. The upper limit will therefore often be the same point traditionally recognized as the head of navigation, but may, under some of the tests described above, be at some point yet farther upstream.

§ 329.12 Geographic and jurisdictional limits of oceanic and tidal waters.

(a) *Ocean and coastal waters.* The navigable waters of the United States over which Corps of Engineers regulatory jurisdiction extends include all ocean and coastal waters within a zone three geographic (nautical) miles seaward from the coast line. Wider zones of three leagues (nine nautical miles) are recognized off the coast of Texas and the Gulf coast of Florida and for other special regulatory powers such as those exercised over the outer continental shelf.

(1) *Coast line defined.* Generally, where the shore directly contacts the open sea, the line on the shore reached by the ordinary low tides comprises the coast line from which the distance of three geographic miles is measured. The line has significance for both domestic and international law (in which it is termed the "baseline"), and is subject to precise definitions. Special problems arise when offshore rocks, islands, or other bodies exist, and the line may have to be drawn to seaward of such bodies.

(2) *Shoreward limit of jurisdiction.* Regulatory jurisdiction in coastal areas extends to the line on the shore reached by the plane of the mean (average) high water. Where precise determination of the actual location of the line becomes necessary, it must be established by survey with reference to the available tidal datum, preferably averaged over a period of 18.6 years. Less precise methods, such as observation of the "apparent shoreline" which is determined by reference to physical markings, lines of vegetation, or changes in type of vegetation, may be used only where an estimate is needed of the line reached by the mean high water.

(b) *Bays and estuaries.* Regulatory jurisdiction extends to the entire surface and bed of all waterbodies subject to tidal action. Jurisdiction thus extends to the edge (as determined by paragraph (a)(2) of this section of all such waterbodies, even though portions of the waterbody may be extremely shallow, or obstructed by shoals, vegetation, or other barriers. Marshlands and similar areas are thus considered "navigable in law," but only so far as the area is subject to inundation by the mean high waters. The relevant test is therefore the presence of the mean high tidal waters, and not the general test described above, which generally applies to inland rivers and lakes.

§ 329.13 Geographic limits: Shifting boundaries.

Permanent changes of the shoreline configuration result in similar alterations of the boundaries of the navigable waters of the United States. Thus, gradual changes which are due to natural causes and are perceptible only over some period of time constitute changes in the bed of a waterbody which also change the shoreline boundaries of the navigable waters of

the United States. However, an area will remain "navigable in law," even though no longer covered with water, whenever the change has occurred suddenly, or was caused by artificial forces intended to produce that change. For example, shifting sand bars within a river or estuary remain part of the navigable water of the United States, regardless that they may be dry at a particular point in time.

§ 329.14 Determination of navigability.

(a) *Effect on determinations.* Although conclusive determinations of navigability can be made only by Federal Courts, those made by Federal agencies are nevertheless accorded substantial weight by the courts. It is therefore necessary that when jurisdictional questions arise, District personnel carefully investigate those waters which may be subject to Federal regulatory jurisdiction under guidelines set out above, as the resulting determination may have substantial impact upon a judicial body. Official determinations by an agency made in the past can be revised or reversed as necessary to reflect changed rules or interpretations of the law.

(b) *Procedures of determination.* A determination whether a waterbody is a navigable water of the United States will be made by the Division Engineer, and will be based on a report of findings prepared at the District level in accordance with the criteria set out in this regulation. Each report of findings will be prepared by the District Engineer, accompanied by an opinion of the District Counsel, and forwarded to the Division Engineer for final determination. Each report of findings will be based substantially on applicable portions of the format in paragraph (c) of this section.

(c) *Suggested format of report of findings.* (1) Name of waterbody:

(2) Tributary to:

(3) Physical characteristics:

(i) Type: (river, bay, slough, estuary, etc.)

(ii) Length:

(iii) Approximate discharge volumes: Maximum, Minimum, Mean.

(iv) Fall per mile:

(v) Extent of tidal influence:

(vi) Range between ordinary high and ordinary low water:

(vii) Description of improvements to navigation not listed in paragraph (c)(5) of this section:

(4) Nature and location of significant obstructions to navigation in portions of the waterbody used or potentially capable of use in interestate commerce:

(5) Authorized projects:

(i) Nature, condition and location of any improvements made under projects authorized by Congress:

(ii) Description of projects authorized but not constructed:

(iii) List of known survey documents or reports describing the waterbody:

(6) Past or present interstate commerce:

(i) General types, extent, and period in time:

(ii) Documentation if necessary:

(7) Potential use for interstate commerce, if applicable:

(i) If in natural condition:

(ii) If improved:

(8) Nature of jurisdiction known to have been exercised by Federal agencies if any:

(9) State or Federal court decisions relating to navigability of the waterbody, if any:

(10) Remarks:

(11) Finding of navigability (with date) and recommendation for determination:

§ 329.15 Inquiries regarding determinations.

(a) Findings and determination should be made whenever a question arises regarding the navigability of a waterbody. Where no determination has been made, a report of finding will be prepared and forwarded to the Division Engineer, as described above. Inquiries may be answered by an interim reply which indicates that a final agency determination must be made by the Division Engineer. If a need develops for an emergency determination, District Engineers may act in reliance on a finding prepared as in § 329.14 of this part. The report of findings should then be forwarded to the Division Engineer on an expedited basis.

(b) Where determinations have been made by the Division Engineer, inquiries regarding the *navigability* of specific portions of waterbodies covered by these determinations may be answered as follows:

This Department, in the administration of the laws enacted by Congress for the protection and preservation of the navigable waters of the United States, has determined that ———— (River) (Bay) (Lake, etc.) is a navigable water of the United States from ———— to ————. Actions which modify or otherwise affect those waters are subject to the jurisdiction of this Department, whether such actions occur within or outside the navigable areas.

(c) Specific inquiries regarding the *jurisdiction* of the Corps of Engineers can be answered only after a determination whether (1) the waters are navigable waters of the United States or (2) if not navigable, whether the proposed type of activity may nevertheless so affect the navigable waters of the United States that the assertion of regulatory jurisdiction is deemed necessary.

§ 329.16 Use and maintenance of lists of determinations.

(a) Tabulated lists of final determinations of navigability are to be maintained in each District office, and be updated as necessitated by court decisions, jurisdictional inquiries, or other changed conditions.

(b) It should be noted that the lists represent only those waterbodies for which determinations have been made; absence from that list should not be taken as an indication that the waterbody is not navigable.

(c) Deletions from the list are not authorized. If a change in status of a waterbody from navigable to non-navigable is deemed necessary, an updated finding should be forwarded to the Division Engineer; changes are not considered final until a determination has been made by the Division Engineer.

PART 330—NATIONWIDE PERMITS

Sec.

AUTHORITY: 33 U.S.C. 403; 33 U.S.C. 1344.

SOURCE: 47 FR 31831, July 22, 1982, unless otherwise noted.

§ 330.1 General.

The purpose of this regulation is to describe the Department of the Army's nationwide permit program and to list all current nationwide permits which have been issued by publication herein. The two types of general permits are referred to as "nationwide permits" and "regional permits." A nationwide permit is a form of general permit which authorizes a category of activities throughout the nation. The authority for general permits to be issued by district engineers on a regional basis is contained in 33 CFR Part 325. Copies of regional permits can be obtained from the appropriate district engineer. Nationwide permits are designed to allow the work to occur with little, if any, delay or paperwork. However, the nationwide permits are valid only if the conditions applicable to the nationwide permits are met. Just because a condition cannot be met does not necessarily mean the activity cannot be authorized but rather that the activity will have to be authorized by an individual or regional permit. Additionally, division engineers have the discretion, under situations and procedures described herein, to override the nationwide permit coverage and require an individual or regional permit. The nationwide permits are issued to satisfy the requirements of both Section 10 of the River and Harbor Act of 1899 and Section 404 of the Clean Water Act unless otherwise stated. These nationwide permits apply only to Department of the Army regulatory programs (other Federal agency, state and local authorizations may be required for the activity).

§ 330.2 Definitions.

(a) The definitions of 33 CFR Parts 321 through 329 are applicable to the terms used in this part.

(b) Discretionary authority means the authority delegated to division engineers in § 330.7 of this part to override provisions of nationwide permits to add regional conditions or to require individual permit applications.

§ 330.3 Nationwide permits for activities occurring before certain dates.

The following activities are permitted by a nationwide permit which was issued on 19 July 1977 and need not be further permitted:

(a) Discharges of dredged or fill material in waters of the United States outside the limits of navigable waters of the United States that occurred before the phase-in dates which began July 25, 1975, and extended Section 404 jurisdiction to *all* waters of the United States. These phase-in dates are: after July 25, 1975, discharges into navigable waters of the United States and adjacent wetlands; after September 1, 1976, discharges into navigable waters of the United States and their primary tributaries, including adjacent wetlands, and into natural lakes, greater than 5 acres in surface area; and after July 1, 1977, discharges into all waters of the United States.

(b) Structures or work completed before 18 December 1968 or in waterbodies over which the District Engineer was not asserting jurisdiction at the time the activity occurred provided, in both instances, there is no interference with navigation.

§ 330.4 Nationwide permits for discharges into certain waters.

(a) *Authorized discharges.* Discharges of dredge or fill material into the following waters of the United States are hereby permitted provided the conditions listed in paragraph (b) of this section below are met:

(1) Non-tidal rivers, streams and their lakes and impoundments, including adjacent wetlands, that are located above the headwaters.[1]

(2) Other non-tidal waters of the United States (see 33 CFR 323.2(a)(3)) that are not part of a surface tributary system to interstate waters or navigable waters of the United States.[1]

(b) *Conditions.* The following special conditions must be followed in order for the nationwide permits identified in paragraph (a) of this section to be valid:

(1) That the discharge will not be located in the proximity of a public water supply intake;

(2) That the discharge will not destroy a threatened or endangered species as identified under the Endangered Species Act, or destroy or adversely modify the critical habitat of such species. In the case of Federal agencies, it is the agencies' responsibility to review its activities to determine if the action "may affect" any listed species or critical habitat. If so, the Federal agency must consult with the Fish and Wildlife Service and/or the National Marine Fisheries Service;

(3) That the discharge will consist of suitable material free from toxic pollutants in toxic amounts;

(4) That the fill created by the discharge will be properly maintained to prevent erosion and other non-point sources of pollution;

(5) That the discharge will not occur in a component of the National Wild and Scenic River System.

(6) That the best management practices listed in § 330.6 of this part should be followed to the maximum extent practicable.

§ 330.5 Nationwide permits for specific activities.

(a) *Authorized activities.* The following activities are hereby permitted provided the conditions specified in this paragraph and listed in paragraph (b) of this section are met:

(1) The placement of aids to navigation and regulatory markers which are

[1] The State of Wisconsin has denied water quality certification pursuant to Section 401 of the Clean Water Act for certain waters within these two Nationwide Permit Categories. Discharges of dredged or fill material into those specified waters are not authorized under these two nationwide permits. A list of the specific waters may be obtained from the St. Paul District Engineer, 1135 U.S. Post Office & Customhouse, St. Paul, MN 55101.

approved by and installed in accordance with the requirements of the U.S. Coast Guard (33 CFR Part 66, Subchapter C).

(2) Structures constructed in artificial canals within principally residential developments where the connection of the canal to a navigable water of the United States has been previously authorized (see 33 CFR 322.4(g)).

(3) The repair, rehabilitation, or replacement of any previously authorized, currently serviceable, structure or fill or of any currently serviceable structure or fill constructed prior to the requirement for authorization; provided such repair, rehabilitation, or replacement does not result in a deviation [2] from the plans of the original structure or fill, and further provided that the structure or fill to be maintained has not been put to uses differing from uses specified for it in any permit authorizing its original construction. Maintenance dredging is not authorized by this nationwide permit.

(4) Fish and wildlife harvesting devices and activities such as pound nets, crab traps, eel pots, lobster traps, duck blinds, clam and oyster digging.

(5) Staff gages, tide gages, water recording devices, water quality testing and improvement devices, and similar scientific structures.

(6) Survey activities including core sampling, seismic exploratory operations, and plugging of seismic shot holes and other exploratory-type bore holes.

(7) Outfall structures and associated intake structures [3] where the effluent from that outfall has been permitted under the National Pollutant Discharge Elimination System program (Section 402 of the Clean Water Act) (see 40 CFR Part 122) provided that the individual and cumulative adverse environmental effects of the structure itself are minimal.

[2] Minor deviations due to changes in materials or construction techniques and which are necessary to make repair, rehabilitation, or replacement are permitted.

[3] Intake structures per se are not included—only those directly associated with an outfall structure are covered by this nationwide permit.

(8) Structures for the exploration, production, and transport of oil, gas, and minerals on the outer continental shelf within areas leased for such purposes by the Department of Interior, Bureau of Land Management, provided those structures are not placed within the limits of any designated shipping safety fairway or traffic separation scheme (where such limits have not been designated or where changes are anticipated, District Engineers will consider recommending the discretionary authority provided by § 330.7 of this part), and further subject to the provisions of the fairway regulations in 33 CFR 209.135.

(9) Structures placed within anchorage or fleeting areas to facilitate moorage of vessels where such areas have been established by the U.S. Coast Guard.

(10) Non-commercial, single-boat, mooring buoys.

(11) Temporary buoys and markers placed for recreational use such as water skiing and boat racing provided that the buoy or marker is removed within 30 days after its use has been discontinued. At Corps of Engineers reservoirs, the reservoir manager must approve each buoy or marker individually.

(12) Discharge of material for backfill or bedding for utility lines including outfall and intake structures provided there is no change in preconstruction bottom contours (excess material must be removed to an upland disposal area). A "utility line" is defined as any pipe or pipeline for the transportation of any gaseous, liquid, liquifiable, or slurry substance, for any purpose, and any cable, line, or wire for the transmission for any purpose of electrical energy, telephone and telegraph messages, and radio and television communication. (The utility line and outfall and intake structures will require a Section 10 permit if in navigable waters of the United States. See 33 CFR Part 322. See also paragraph (a)(7) of this section.)

(13) Bank stabilization activities provided:

(i) The bank stabilization activity is less than 500 feet in length;

(ii) The activity is necessary for erosion prevention;

(iii) The activity is limited to less than an average of one cubic yard per running foot placed along the bank within waters of the United States;

(iv) No material is placed in excess of the minimum needed for erosion protection;

(v) No material is placed in any wetland area;

(vi) No material is placed in any location or in any manner so as to impair surface water flow into or out of any wetland area;

(vii) Only clean material free of waste metal products, organic materials, unsightly debris, etc. is used; and

(viii) The activity is a single and complete project.

(14) Minor road crossing fills including all attendant features both temporary and permanent that are part of a single and complete project for crossing of a non-tidal waterbody, provided that the crossing is culverted, bridged or otherwise designed to prevent the restriction of and to withstand expected high flows [4] and provided further that discharges into any wetlands adjacent to the waterbody do not extend beyond 100 feet on either side of the ordinary high water mark of that waterbody. A "minor road crossing fill" is defined as a crossing that involves the discharge of less than 200 cubic yards of fill material below the plane of ordinary high water. The crossing will require a permit from the U.S. Coast Guard if located in navigable waters of the United States (see 33 U.S.C. 301). Some road fills may be eligible for an exemption from the need for a Section 404 permit altogether (see 33 CFR 323.4).

(15) Fill placed incidental to the construction of bridges across navigable waters of the United States including cofferdams, abutments, foundation seals, piers, and temporary construction and access fills provided such fill has been authorized by the U.S. Coast Guard under Section 9 of the River and Harbor Act of 1899 as part of the bridge permit. Causeways and approach fills are not included in this nationwide permit and will require an individual or regional Section 404 permit.

(16) Return water [5] from a contained dredged material disposal area provided the State has issued a certification under Section 401 of the Clean Water Act (see 33 CFR 325.2(b)(1)). The dredging itself requires a Section 10 permit if located in navigable waters of the United States.

(17) Fills associated with small hydropower projects at existing reservoirs where the project which includes the fill is licensed by the Department of Energy under the Federal Power Act of 1920, as amended; has a total generating capacity of not more than 1500 kw (2,000 horsepower); qualifies for the short-form licensing procedures of the Department of Energy (see 18 CFR 4.61); and the individual and cumulative adverse effects on the environment are minimal.

(18) Discharges of dredged or fill material into waters of the United States that do not exceed ten cubic yards as part of a single and complete project provided no material is placed in wetlands [6] [7]

(19) Dredging of no more than ten cubic yards from navigable waters of the United States as part of a single and complete project. [6]

(20) Structures, work and discharges for the containment and cleanup of oil and hazardous substances which are subject to the National Oil and Hazardous Substances Pollution Contin-

[4] District Engineers are authorized, where regional conditions indicate the need, to define the term "expected high flows" for the purpose of establishing applicability of this nationwide permit.

[5] The return water or runoff from a contained disposal area is administratively defined as a discharge of dredged material by 33 CFR 323.2(j) even though the disposal itself occurs on the upland and thus does not require a Section 404 permit. This nationwide permit satisfies the technical requirement for a Section 404 for the return water where the quality of the return water is controlled by the state through the Section 401 certification procedures.

[6] These nationwide permits are designed for very minor dredge and fill activities such as the removal of a small shoal in a boat slip; they cannot be used for piecemeal dredge and fill activities.

[7] The State of Wisconsin has denied water quality certifications pursuant to Section 401 of the Clean Water Act for these two nationwide permits. Consequently, the permits do not apply in Wisconsin.

gency Plan provided the Regional Response Team which is activated under the Plan concurs with the proposed containment and cleanup action.

(21) Structures, work, and discharges associated with surface coal mining activities provided they are authorized by the Department of the Interior, Office of Surface Mining, or by states with approved programs under Title V of the Surface Mining Control and Reclamation Act of 1977; the appropriate district engineer is given the opportunity to review the Title V permit application and all relevant Office of Surface Mining or state (as the case may be) documentation prior to any decision on that application; and the district engineer makes a determination that the individual and cumulative adverse effects on the environment from such structures, work, or discharges are minimal.

(22) Minor work or temporary structures required for the removal of wrecked, abandoned, or disabled vessels or the removal of obstructions to navigation.

(23) Activities, work, and discharges undertaken, assisted, authorized, regulated, funded, or financed, in whole or in part, by another Federal agency or department where that agency or department has determined, pursuant to the CEQ Regulation for Implementing the Procedural Provisions of the National Environmental Policy Act (40 CFR Part 1500 et seq.), that the activity, work, or discharge is categorically excluded from environmental documentation because it is included within a category of actions which neither individually nor cumulatively have a significant effect on the human environment and the Office of the Chief of Engineers (ATTN: DAEN-CWO-N) has been furnished notice of the agency or department's application for the categorical exclusion and concurs with that determination.[7]

(24) Any activity permitted by a state administering its own permit program for the discharge of dredged or fill material authorized at 33 U.S.C. 1344(g)-(1) shall be permitted pursuant to Section 10 of the River and Harbor Act of 1899 (33 U.S.C. Part 403). Those activities which do not involve a Section 404 state permit are not included in this nationwide permit but many will be exempted by Sec. 154 of Pub. L. 94-587. (See 33 CFR 322.2(a)(2)).

(25) Discharge of concrete into tightly sealed forms or cells where the concrete is used as a structural member which would not otherwise be subject to Clean Water Act jurisdiction.

(b) *Conditions.* The following special conditions must be followed in order for the nationwide permits identified in paragraph (a) of this section to be valid:

(1) That any discharge of dredged or fill material will not occur in the proximity of a public water supply intake;

(2) That any discharge of dredged or fill material will not occur in areas of concentrated shellfish production unless the discharge is directly related to a shellfish harvesting activity authorized by paragraph (a)(4) of this section.

(3) That the activity will not jeopardize a threatened or endangered species as identified under the Endangered Species Act, or destroy or adversely modify the critical habitat of such species. In the case of Federal agencies, it is the agencies' responsibility to review its activities to determine if the action "may affect" any listed species or critical habitat. If so, the Federal agency must consult with the Fish and Wildlife Service and/or National Marine Fisheries Service;

(4) That the activity will not significantly disrupt the movement of those species of aquatic life indigenous to the waterbody (unless the primary purpose of the fill is to impound water);

(5) That any discharge of dredged or fill material will consist of suitable material free from toxic pollutants (See Section 307 of Clean Water Act) in toxic amounts;

(6) That any structure or fill authorized will be properly maintained;

(7) That the activity will not occur in a component of the National Wild and Scenic River System; and

[7] The State of Wisconsin has denied water quality certifications pursuant to Section 401 of the Clean Water Act for these two nationwide permits. Consequently, the permits do not apply in Wisconsin.

(8) That the activity will not cause an unacceptable interference with navigation.

(9) That the best management practices listed in § 330.6 of this part should be followed to the maximum extent practicable.

§ 330.6 Management practices.

(a) In addition to the conditions specified in §§ 330.4 and 330.5 of this part, the following management practices should be followed, to the maximum extent practicable, in the discharge of dredged or fill material under nationwide permits in order to minimize the adverse effects of these discharges on the aquatic environment. Failure to comply with these practices may be cause for the district engineer to recommend or the division engineer to take discretionary authority to regulate the activity on an individual or regional basis pursuant to § 330.7 of this part.

(1) Discharges of dredged or fill material into waters of the United States shall be avoided or minimized through the use of other practical alternatives.

(2) Discharges in spawning areas during spawning seasons shall be avoided.

(3) Discharges shall not restrict or impede the movement of aquatic species indigenous to the waters or the passage of normal or expected high flows or cause the relocation of the water (unless the primary purpose of the fill is to impound waters).

(4) If the discharge creates an impoundment of water, adverse impacts on the aquatic system caused by the accelerated passage of water and/or the restriction of its flow, shall be minimized.

(5) Discharge in wetlands areas shall be avoided.

(6) Heavy equipment working in wetlands shall be placed on mats.

(7) Discharges into breeding areas for migratory waterfowl shall be avoided.

(8) All temporary fills shall be removed in their entirety.

§ 330.7 Discretionary authority.

Division engineers on their own initiative or upon recommendation of a district engineer are authorized to modify nationwide permits by adding regional conditions or to override nationwide permits by requiring individual permit applications on a case-by-case basis. Discretionary authority will be based on concerns for the aquatic environment as expressed in the guidelines published by EPA pursuant to § 404(b)(1). (40 CFR Part 230)

(a) *Regional conditions.* Division engineers are authorized to modify nationwide permits by adding conditions applicable to certain activities or specific geographic areas within their divisions. In developing regional conditions, division and district engineers will follow standard permit processing procedures as prescribed in 33 CFR Part 325 applying the evaluation criteria of 33 CFR Part 320 and appropriate parts of 33 CFR Parts 321, 322, 323, and 324. A copy of the Statement of Findings will be forwarded to the Office of the Chief of Engineers, ATTN: DAEN-CWO-N. Division and district engineers will take appropriate measures to inform the public at large of the additional conditions.

(b) *Individual permits.* In nationwide permit cases where additional regional conditioning may not be sufficient or where there is not sufficient time to develop regional conditions under paragraph (a) of this section, the division engineer may require individual permit applications on a case-by-case basis. Where time is of the essence, the district engineer may telephonically recommend that the division engineer assert discretionary authority to require an individual permit application for a specific activity. If the division engineer concurs, he may verbally authorize the district engineer to implement that authority. Both actions will be followed by written confirmation with copy to the Chief of Engineers (DAEN-CWO-N). Additionally, after notice and opportunity for public hearing, division engineers may recommend to the Chief of Engineers that individual permit applications be required for categories of activities, or in a specific geographic area. The division engineer will announce the decision to persons affected by the action. The district engineer will then regulate the activity or activities by processing an application(s)

for individual permit(s) pursuant to 33 CFR Part 325.

(c) Discretionary authority which has been exercised under nationwide permits issued on 19 July 1977 expires four months from the effective date of this regulation. Such authority may be extended or reinstated after appropriate procedures of this regulation and 33 CFR Parts 320 through 325 have been followed.

§ 330.8 Expiration of nationwide permits.

The Chief of Engineers will review nationwide permits at least every five years. Based on this review, which will include public notice and opportunity for public hearing through publication in the FEDERAL REGISTER, he will either modify, reissue (extend) or revoke the permits. If a nationwide permit is not modified or reissued within five years of publication in the FEDERAL REGISTER, it automatically expires and becomes null and void.

PART 384—INTERGOVERNMENTAL REVIEW OF DEPARTMENT OF THE ARMY CORPS OF ENGINEERS PROGRAMS AND ACTIVITIES

Sec.

AUTHORITY: E.O. 12372, July 14, 1982 (47 FR 30959), as amended April 8, 1983 (48 FR 15887); and Section 401 of the Intergovernmental Cooperation Act of 1968, as amended (31 U.S.C. 6506).

SOURCE: 48 FR 29153, June 24, 1983, unless otherwise noted.

§ 384.1 What is the purpose of these regulations?

(a) The regulations in this part implement Executive Order 12372, "Intergovernmental Review of Federal Programs," issued July 14, 1982 and amended on April 8, 1983. These regulations also implement applicable provisions of section 401 of the Intergovernmental Cooperation Act of 1968.

(b) These regulations are intended to foster an intergovernmental partnership and a strengthened Federalism by relying on state processes and on state, areawide, regional and local coordination for review of proposed federal financial assistance and direct federal development.

(c) These regulations are intended to aid the internal management of the Corps of Engineers, and are not intended to create any right or benefit enforceable at law by a party against the Corps of Engineers or its officers.

§ 384.2 What definitions apply to these regulations?

"Order" means Executive Order 12372, issued July 14, 1982, and amended April 8, 1983 and titled "Intergovernmental Review of Federal Programs."

"Responsible Corps official" means a District Engineer, Division Engineer, or the Chief of Engineers, or a designated representative, who is considering a decision or recommendation on a proposed Federal action and is responsible for coordinating such action with the state process under the provisions of this regulation.

"State" means any of the 50 states, the District of Columbia, the Commonwealth of Puerto Rico, the Commonwealth of the Northern Mariana Islands, Guam, American Samoa, the

U.S. Virgin Islands, or the Trust Territory of the Pacific Islands.

§ 384.3 What programs and activities of the Corps of Engineers are subject to these regulations?

The Chief of Engineers publishes in the FEDERAL REGISTER a list of the Corps of Engineers Civil Works programs and activities that are subject to these regulations.

§ 384.4 [Reserved]

§ 384.5 What is the Corps of Engineers' obligation with respect to federal interagency coordination?

Responsible Corps officials, to the extent practicable, consult with and seek advice from all other substantially affected federal departments and agencies in an effort to assure full coordination between such agencies and the Corps of Engineers regarding programs and activities covered under these regulations.

§ 384.6 What procedures apply to the selection of programs and activities under these regulations?

(a) A state may select any program or activity published in the FEDERAL REGISTER in accordance with § 384.3 of this part for intergovernmental review under these regulations. Each state, before selecting programs and activities shall consult with local elected officials.

(b) Each state that adopts a process shall notify the appropriate Division Engineer of the programs and activities selected for that process.

(c) A state may notify the appropriate Division Engineer of changes in its selections at any time. For each change, the state shall submit to the Division Engineer an assurance that the state has consulted with local elected officials regarding the change. The Division Engineer may establish deadlines by which states are required to inform the Corps of Engineers of changes in their program selections.

(d) The Corps of Engineers uses a state's process as soon as feasible, depending on individual programs and activities, after the Division Engineer is notified of its selections.

§ 384.7 How does the Corps of Engineers communicate with state and local officials concerning its programs and activities?

(a) For those programs and activities covered by a state process under § 384.6, the responsible Corps official, to the extent permitted by law:

(1) Uses the state process to determine views of state and local elected officials; and

(2) Communicates with state and local elected officials, throught the state process, as early in a program planning cycle as is reasonably feasible to explain specific plans and actions.

(b) The District Engineer provides notice to directly affected state, areawide, regional, and local entities in a state of proposed Federal financial assistance or direct Federal development if:

(1) The state has not adopted a process under the Order; or

(2) The assistance or development involves a program or activity not selected for the state process.

This notice may be made by publication in the FEDERAL REGISTER or other appropriate means, which the District Engineer in his discretion deems appropriate.

§ 384.8 How does the Corps of Engineers provide states an opportunity to comment on proposed federal financial assistance and direct federal development?

(a) Except in unusual circumstances, the responsible Corps official gives state processes or directly affected state, areawide, regional and local officials and entities at least 60 days from the date established by such official to comment on proposed direct federal development or federal financial assistance.

(b) This section also applies to comments in cases in which the review, coordination, and communication with the Corps of Engineers have been delegated.

§ 384.9 How does the Corps of Engineers receive and respond to comments?

(a) The responsible Corps official follows the procedures in § 384.10 if:

(1) A state office or official is designated to act as a single point of contact between a state process and all federal agencies, and

(2) That office or official transmits a state process recommendation for a program selected under § 384.6.

(b)(1) The single point of contact is not obligated to transmit comments from state, areawide, regional or local officials and entities where there is no state process recommendation.

(2) If a state process recommendation is transmitted by a single point of contact, all comments from state, areawide, regional, and local officials and entities that differ from it must also be transmitted.

(c) If a state has not established a process, or is unable to submit a state process recommendation, state, areawide, regional and local officials and entities may submit comments to the responsible Corps official.

(d) If a program or activity is not selected for a state process, state, areawide, regional and local officials and entities may submit comments to the responsible Corps official. In addition, if a state process recommendation for a nonselected program or activity is transmitted to the responsible Corps official by the single point of contact, such official follows the procedures of § 384.10 of this part.

(e) The responsible Corps official considers comments which do not constitute a state process recommendation submitted under these regulations and for which such official is not required to apply the procedures of § 384.10 of this part, when such comments are provided by a single point of contact or directly to such official by a commenting party.

§ 384.10 How does the Corps of Engineers make efforts to accommodate intergovernmental concerns?

(a) If a state process provides a state process recommendation to the Corps of Engineers through its single point of contact, the responsible Corps official either:

(1) Accepts the recommendation;

(2) Reaches a mutually agreeable solution with the state process; or

(3) Provides the single point of contact with a written explanation of the decision in such form as such Corps official in his or her discretion deems appropriate. The Corps official may also supplement the written explanation by providing the explanation to the single point of contact by telephone, other telecommunication, or other means.

(b) In any explanation under paragraph (a)(3) of this section, the responsible Corps official informs the single point of contact that:

(1) The Corps of Engineers will not implement its decision for at least 10 days after the single point of contact receives the explanation; or

(2) The Assistant Secretary of the Army (Civil Works), or the next higher level responsible Corps official, has reviewed the case and determined that, because of unusual circumstances, the waiting period of at least 10 days is not feasible.

(c) For purposes of computing the waiting period under paragraph (b)(1) of this section, a single point of contact is presumed to have received written notification 5 days after the date of mailing of such notification.

§ 384.11 What are the Corps of Engineers obligations in interstate situations?

(a) The responsible Corps official is responsible for:

(1) Identifying proposed federal financial assistance and direct federal development that have an impact on interstate areas;

(2) Notifying appropriate officials and entities in states which have adopted a process and which select the Corps of Engineers program or activity.

(3) Making efforts to identify and notify the affected state, areawide, regional, and local officials and entities in those states that have not adopted a process under the Order or do not select the Corps of Engineers program or activity;

(4) Responding pursuant to § 384.10 of this part if the responsible Corps official receives a recommendation from a designated areawide agency transmitted by a single point of contact, in cases in which the review, coordination, and communication with

the Corps of Engineers has been delegated.

(b) The responsible Corps official uses the procedures in § 384.10 if a state process provides a state process recommendation to such official through a single point of contact.

§ 384.12 [Reserved]

§ 384.13 May the Corps of Engineer waive any provision of these regulations?

(a) Emergency and disaster recover actions performed under Pub. L. 9 84th Congress, are excluded from th requirements of the Order and thi regulation.

(b) In other emergencies, the Divi sion Engineer may waive any provisio of these regulations.

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ACT AUTHORIZING A STATE GOVERNMENT

[Passed Feb. 26, 1857]

Section 1. *Be it enacted by the Senate and House of Representatives of the United States of America, in Congress assembled,* That the inhabitants of that portion of the Territory of Minnesota which is embraced within the following limits, to-wit: Beginning at the point in the center of the main channel of the Red River of the North, where the boundary line between the United States and the British Possessions crosses the same; thence up the main channel of said river to that of the Bois de Sioux river; thence up the main channel of said river to Lake Traverse; thence up the center of said lake to the southern extremity thereof, thence in a direct line to the head of Big Stone lake; thence through its center to its outlet; thence by a due south line to the north line of the State of Iowa; thence along the northern boundary of said state to the main channel of the Mississippi river; thence up the main channel of said river, and following the boundary line of the State of Wisconsin, until the same intersects with the St. Louis river; thence down the said river to and through Lake Superior, on the boundary line of Wisconsin and Michigan, until it intersects the dividing line between the United States and the British Possessions; thence up Pigeon river and following said dividing line to the place of beginning, be and they hereby are authorized to form for themselves a constitution and state government by the name of the State of Minnesota, and to come into the Union on an equal footing with the original states, according to the Federal Constitution.

Sec. 2. *And be it further enacted,* That the State of Minnesota shall have concurrent jurisdiction on the Mississippi and all other rivers and waters bordering on the said State of Minnesota, so far as the same shall form a common boundary to said state and any state or states now or hereafter to be formed or bounded by the same; and said river or waters leading into the same shall be common highways, and forever free, as well to the inhabitants of said state as to all other citizens of the United States, without any tax, duty, impost, or toll therefor.

Sec. 3. *And be it further enacted,* That on the first Monday in June next, the legal voters in each representative district then existing within the limits of the proposed state, are hereby authorized to elect two delegates for each representative to which said district shall be entitled according to the apportionment for representatives to the territorial legislature; which election for delegates shall be held and conducted, and the returns made, in all respects in conformity with the laws of said Territory regulating the election of representatives, and the delegates so elected shall assemble at the capitol of said Territory on the second Monday in July next, and first determine by a vote whether it is the wish of the people of the proposed State to be admitted into the Union at that time; and if so, shall proceed to form a constitution, and take all necessary steps for the establishment of a state government, in conformity with the Federal Constitution, subject to the approval and ratification of the people of the proposed State.

Sec. 4. *And be it further enacted,* That in the event said convention shall decide in favor of the immediate admission of the proposed State into the Union, it shall be the duty of the United States marshal for said Territory to proceed to take a census or enumeration of the inhabitants within the limits of the proposed State, under such rules and regulations as shall be prescribed by the secretary of the interior, with the view of ascertaining the number of representatives to which said State may be entitled in the Congress of the United States. And said State shall be entitled to one representative, and such additional representatives as the population of the State shall, according to the census, show it would be entitled to according to the present ratio of representation.

Sec. 5. *And be it further enacted,* That the following propositions be and the same are hereby offered to the said convention of the people of Minnesota for their free acceptance or rejection, which, if accepted by the convention, shall be obligatory on the United States, and upon the said State of Minnesota, to-wit:

First--That sections numbered sixteen and thirty-six in every township of public lands in said State, and where either of said sections, or any part thereof, has been sold or otherwise been disposed of, other lands, equivalent thereto, and as contiguous as may be, shall be granted to said State for the use of schools.

Second--That seventy-two sections of land shall be set apart and reserved for the use and support of a state university, to be selected by the governor of said State, subject to the approval of the commissioner at the general land office, and to be appropriated and applied in such manner as the legislature of said State may prescribe; for the purpose aforesaid, but for not other purpose.

Third--Ten entire sections of land to be selected by the governor of said State, in legal subdivisions, shall be granted to said State for the purpose of completing the public buildings, or for the erection of others at the seat of government, under the direction of the legislature thereof.

Fourth--That all salt springs within said State, not exceeding twelve in number, with six sections of land adjoining or as contiguous as may be to each, shall be granted to said State for its use; and the same to be selected by the governor thereof within one year after the admission of said State, and, when so selected, to be used or disposed of on such terms, conditions and regulations as the legislature shall direct; *provided,* that no salt spring or land the right whereof is now vested in any individual or individuals, or which may be hereafter confirmed or adjudged to any individual or individuals, shall by this article be granted to said State.

Fifth--That five per centum of the net proceeds of sales of all public lands lying within said State, which shall be sold by Congress after the admission of said State into the Union, after deducting all the expenses incident to the same, shall be paid to said State for the purpose of making public roads and internal improvements as the legislature shall direct; *provided,* the foregoing propositions herein offered are on the condition that the said convention which shall form the constitution of said State shall provide, by a clause in said constitution, or an ordinance, irrevocable without the consent of the United States, that said State shall never interfere with the primary disposal of the soil within the same by the United States, or with any regulations Congress may find necessary for securing the title in said soil to *bona fide* purchasers thereof; and that no tax shall be imposed on lands belonging to the United States, and that in no case shall nonresident proprietors be taxed higher than residents.

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ACT OF ADMISSION INTO THE UNION

An Act for the admission of Minnesota into the Union.

[Passed May 11, 1858.]

Whereas, An act of Congress was passed February twenty-sixth, eighteen hundred and fifty-seven, entitled "An act to authorize the people of the Territory of Minnesota to form a constitution and state government preparatory to their admission into the Union on an equal footing with the original states"; and, whereas, the people of said Territory did, on the twenty-ninth day of August, eighteen hundred and fifty-seven, by delegates elected for that purpose, form for themselves a constitution and state government, which is republican in form, and was ratified and adopted by the people at an election held on the thirteenth day of October, eighteen hundred and fifty-seven, for that purpose; therefore,

Be it enacted by the Senate and House of Representatives of the United States of America, in Congress assembled, That the State of Minnesota shall be one, and is hereby declared to be one, of the United States of America, and admitted into the Union on an equal footing with the original states in all respects whatever.

Sec. 2. *And be it further enacted,* That said State shall be entitled to two representatives in Congress, until the next apportionment of representatives among the several states.

Sec. 3. *And be it further enacted,* That from and after the admission of the State of Minnesota, as hereinbefore provided, all the laws of the United States which are not locally inapplicable shall have the same force and effect within that State as in other States of the Union; and the said State is hereby constituted a judicial district of the United States, within which a district court, with like powers and jurisdiction as the district court of the United States for the district of Iowa, shall be established; the judge, attorney and marshal of the United States of the said district of Minnesota shall reside within the same, and shall be entitled to the same compensation as the judge, attorney and marshal of the district of Iowa; and in all cases of appeal or writ of error heretofore prosecuted and now pending in the supreme court of the United States, upon any record from the supreme court of Minnesota Territory, the mandate of execution or order of further proceedings shall be directed by the supreme court of the United States to the district court of the United States for the district of Minnesota, or to the supreme court of the State of Minnesota, as the nature of such appeal or writ of error may require; and each of those courts shall be the successor of the supreme court of Minnesota Territory, as to all such cases, with full power to hear and determine the same, and to award mesne or final process therein.

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Sec. 17. Religious tests and property qualifications prohibited. No religious test or amount of property shall be required as a qualification for any office of public trust in the state. No religious test or amount of property shall be required as a qualification of any voter at any election in this state; nor shall any person be rendered incompetent to give evidence in any court of law or equity in consequence of his opinion upon the subject of religion.

ARTICLE II
NAME AND BOUNDARIES

Section 1. Name and boundaries; acceptance of organic act. This state shall be called the state of Minnesota and shall consist of and have jurisdiction over the territory embraced in the act of Congress entitled, "An act to authorize the people of the Territory of Minnesota to form a constitution and state government, preparatory to their admission into the Union on equal footing with the original states," and the propositions contained in that act are hereby accepted, ratified and confirmed, and remain irrevocable without the consent of the United States.

Sec. 2. Jurisdiction on boundary waters. The state of Minnesota has concurrent jurisdiction on the Mississippi and on all other rivers and waters forming a common boundary with any other state or states. Navigable waters leading into the same, shall be common highways and forever free to citizens of the United States without any tax, duty, impost or toll therefor.

ARTICLE III
DISTRIBUTION OF THE POWERS OF GOVERNMENT

Section 1. Division of powers. The powers of government shall be divided into three distinct departments: legislative, executive and judicial. No person or persons belonging to or constituting one of these departments shall exercise any of the powers properly belonging to either of the others except in the instances expressly provided in this constitution.

ARTICLE IV
LEGISLATIVE DEPARTMENT

Section 1. Composition of legislature. The legislature consists of the senate and house of representatives.

Sec. 2. Apportionment of members. The number of members who compose the senate and house of representatives shall be prescribed by law. The representation in both houses shall be apportioned equally throughout the different sections of the state in proportion to the population thereof.

Sec. 3. Census enumeration apportionment; congressional and legislative district boundaries; senate districts. At its first session after each enumeration of the inhabitants of this state made by the authority of the United States, the legislature shall have the power to prescribe the bounds of congressional and legislative districts. Senators shall be chosen by single districts of convenient contiguous territory. No representative district shall be divided in the formation of a senate district. The senate districts shall be numbered in a regular series.

Sec. 4. Terms of office of senators and representatives; vacancies. Representatives shall be chosen for a term of two years, except to fill a vacancy. Senators shall be chosen for a term of four years, except to fill a vacancy and except there shall be an entire new election of all the senators at the first election of representatives after each new legislative apportionment provided for in this article. The governor shall call elections to fill vacancies in either house of the legislature.

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ARTICLE XI

derived from swamp lands granted to the state, (c) all cash and investments credited to the permanent school fund and to the swamp land fund, and (d) all cash and investments credited to the internal improvement land fund and the lands therein. No portion of these lands shall be sold otherwise than at public sale, and in the manner provided by law. All funds arising from the sale or other disposition of the lands, or income accruing in any way before the sale or disposition thereof, shall be credited to the permanent school fund. Within limitations prescribed by law, to secure the maximum return thereon consistent with the maintenance of the perpetuity of the fund, and with the approval of the board of investment, the fund may be invested in: (1) interest bearing fixed income securities of the United States and of its agencies, fixed income securities guaranteed in full as to payment of principal and interest by the United States, bonds of the state of Minnesota or its political subdivisions or agencies, or of other states, but not more than 50 percent of any issue by a political subdivision shall be purchased; (2) stocks of corporations on which cash dividends have been paid from earnings for five consecutive years or longer immediately prior to purchase, but not more than 20 percent of the fund shall be invested therein at any given time nor more than one percent in stock of any one corporation, nor shall more than five percent of the voting stock of any one corporation be owned; (3) bonds of corporations whose earnings have been at least three times the interest requirements on outstanding bonds for five consecutive years or longer immediately prior to purchase, but not more than 40 percent of the fund shall be invested in corporate bonds at any given time. The percentages referred to above shall be computed using the cost price of the stocks or bonds. The principal of the permanent school fund shall be perpetual and inviolate forever. This does not prevent the sale of any public or private stocks or bonds at less than the cost to the fund; however, all losses not offset by gains shall be repaid to the fund from the interest and dividends earned thereafter. The net interest and dividends arising from the fund shall be distributed to the different school districts of the state in proportion to the number of students in each district between the ages of 5 and 21 years.

A board of investment consisting of the governor, the state auditor, the state treasurer, the secretary of state, and the attorney general is hereby constituted for the purpose of administering and directing the investment of all state funds. The board shall not permit state funds to be used for the underwriting or direct purchase of municipal securities from the issuer or his agent.

Sec. 9. Investment of permanent university fund; restrictions. The permanent university fund of this state may be loaned to or invested in the bonds of any county, school district, city or town of this state and in first mortgage loans secured upon improved and cultivated farm lands of this state, but no such investment or loan shall be made until approved by the board of investment; nor shall a loan or investment be made when the bonds to be issued or purchased would make the entire bonded indebtedness exceed 15 percent of the assessed valuation of the taxable property of the county, school district, city or town issuing the bonds; nor shall any farm loan or investment be made when the investment or loan would exceed 30 percent of the actual cash value of the farm land mortgaged to secure the investment; nor shall investments or loans be made at a lower rate of interest than two percent per annum nor for a shorter period than one year nor for a longer period than 30 years.

Sec. 10. Exchange of public lands; reservation of rights. As the legislature may provide, any of the public lands of the state, including lands held in trust for any purpose, may be exchanged for lands of the United States or privately held lands with the unanimous approval of the governor, the attorney general and the state auditor. Lands so acquired shall be subject to the trust, if any, to which the lands exchanged therefor were subject. The state shall reserve all mineral and water power rights in lands transferred by the state.

domain proceedings hereunder, any value which the land taken may have by reason of its location or availability for the depositing of stripping, tailings or other wastes from general mining operations in its vicinity, or for the erection of buildings or structures thereon in connection with such operations, shall be considered in determining the damages to be awarded the owner thereof.

History: *1907 c 411 s 1,2; 1949 c 593 s 1; 1969 c 1129 art 10 s 2 (6399, 6400)*

93.055 ACTION TO QUIET TITLE TO LANDS COVERED BY MINERAL PERMIT OR LEASE.

Upon written request of the holder of any mineral prospecting permit or mineral lease from the state, not in default, with the approval of the commissioner of natural resources, the attorney general may institute proceedings to quiet the title and determine adverse claims or to register the title of the state to the lands or interests covered by the permit or lease. All costs and expenses of such proceedings including compensation of attorneys for the state shall be paid by the holder of the permit or lease. Upon receipt of such request from the holder of a prospecting permit, if approved by the commissioner of natural resources, and if such action is authorized by the attorney general, the running of the time within which the permit holder must begin prospecting thereunder and the time within which he must apply for a lease or do any other act required by the permit shall be suspended until the entry of final judgment in the action, and the term of the permit and the time required for any action by the holder thereunder shall be extended by a period equivalent to the time from the receipt of the request to the entry of the judgment.

History: *1949 c 594 s 1; 1969 c 1129 art 10 s 2*

93.06 RESERVATION OF MINERALS UNDER NAVIGABLE LAKES.

All iron ores and other minerals on, in or under lands within this state which lie beneath the waters of navigable lakes and rivers belong to the state, together with the right to enter upon such lands and explore for and mine and remove such iron ore and other minerals and that the state now has and since its organization has had the right to sell, lease, or otherwise use or dispose of such mineral lands and such iron ores and other minerals in the same manner as any other mineral lands, ores, or minerals belonging to the state, and that the title of the state to such iron ore or other minerals, together with the right to explore for, mine, or remove the same, shall not be affected by the subsequent drying up of such lakes or rivers.

History: *1909 c 49 s 1; 1947 c 521 s 1 (6401)*

93.07 DISPOSAL OF FUNDS.

The principal of all funds derived from the sale or other disposition of such minerals and lands so situate shall forever be preserved inviolate and undiminished, but the same may be invested as the permanent school fund of the state is now invested, and the proceeds arising therefrom shall be paid into the school endowment fund.

History: *1909 c 49 s 3; 1965 c 313 s 1 (6402-1)*

93.08 PROSPECTING FOR MINERALS UNDER WATERS OF MEANDERED LAKES AND STREAMS.

Subdivision 1. **Rules and regulations for issuance of permits.** The department, with the approval of the executive council, shall adopt rules and regulations for the issuance of permits to prospect for gold, silver, copper, cobalt, coal, graphite, petroleum, sand, gravel, stone, natural gas, and all minerals, excepting iron ore,

under the waters of any public lake or stream in the state, including that portion of boundary lakes and streams within the boundaries of the state, and for the issuance of leases for the mining and removal of such minerals upon such terms and conditions as such regulations may prescribe.

Subd. 2. **Scope of regulations.** It shall be provided in such regulations, among other things:

(1) No permit to prospect shall be issued for a period to exceed two years;

(2) Each permit shall authorize prospecting only within the area designated therein, which area shall not exceed the limitations upon size prescribed by the regulations;

(3) At any time prior to the expiration of any such prospective permit, the holder thereof shall have the right to a lease giving him the exclusive right to mine and remove the minerals specified in such permit within the area specified in the permit; provided, if the regulations adopted hereunder shall permit or prescribe larger areas for permits than for leases, the permit holder shall designate the specific part of the area covered by his permit (not exceeding the limitations upon size of lease areas) upon which he desires a lease;

(4) Minimum rents and royalties, and the other terms, conditions, and covenants of all such leases shall be prescribed by such regulations prior to the issuance of any permits hereunder; provided no rents or royalties shall be paid for muck and silt, or sand, or gravel removed under a lease or permit issued to any department of the state, any political subdivisions, the federal government, watershed district, drainage and conservancy district, drainage and flood control district, sanitary district of the state, or any port authority, if such materials are used for public purposes only, and are not resold to any private party; and provided further that no rents or royalties shall be charged for muck and silt, or sand, or gravel furnished to or taken by any department of the state or any political subdivision of the state, or any port authority, subsequent to July 1, 1958, and prior to the effective date of Laws 1961, Chapter 336, if such materials were used for public purposes;

(5) No such lease shall be for a longer term than 50 years;

(6) All rents and royalties paid under such leases shall be paid to the state treasurer on the order of the commissioner of finance and shall be credited to the permanent school funds of the state;

(7) No minerals shall be removed under such permits until lease has been issued as provided by such regulations, except that, with the approval of the commissioner, sufficient minerals or ore material may be removed for exploratory or assaying purposes;

(8) The grantee of such permit or lease, his or their assigns, representatives, and successors in interest, may be required to secure riparian owners against damage from the use of such lease or permit.

Subd. 3. **Issuance of permits.** The commissioner shall issue permits and leases in accordance with such rules and regulations.

Subd. 4. **Recording of permits and leases.** All permits and leases, with the names and post-office addresses of all parties having an interest, issued by the commissioner under authority of sections 93.08 to 93.12 and the regulations adopted thereunder, before delivery, shall be duly recorded at length by the commissioner of finance in his office in the record books to be provided and kept for that purpose, and a certificate of such record showing the date of record and the book and page thereof shall be endorsed on each such permit or lease.

History: *Ex1935 c 42 s 1-4; 1947 c 473 s 1,2; 1953 c 537 s 1; 1961 c 336 s 1; 1963 c 647 s 1; 1973 c 492 s 14 (6402-2, 6402-3, 6402-4, 6402-5)*

93.09 ASSIGNME

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93.09 ASSIGNMENTS AND CONTRACTS.

Subdivision 1. **Written; registered.** All assignments and agreements or contracts affecting any such permit or lease shall be made in writing and signed by both parties thereto, witnessed by two witnesses, and properly acknowledged, and contain the post-office addresses of all parties having an interest; and when so executed shall be presented to the commissioner of finance for recording. The commissioner of finance shall then record such assignment, agreement, or contract at length in his office in record books kept and provided for that purpose, and a certificate of such record showing the date thereof and the book and page shall be endorsed on the assignment, agreement, or contract which then shall be returned to the party entitled thereto.

Subd. 2. **Approval; recording; fee.** All instruments by virtue of which the title to any permit or lease provided for in sections 93.08 to 93.12 is in any way affected shall receive, as to form and execution, the approval of the commissioner, which approval shall be endorsed thereon, and such instrument when so approved shall be duly recorded. For recording any assignment or other instrument affecting the title to any permit or lease or for furnishing certified copies of the records, the commissioner of finance shall charge a fee of ten cents per folio. All such fees shall be turned into the state treasury.

History: *Ex1935 c 42 s 5,6; 1973 c 492 s 14 (6402-6, 6402-7)*

93.10 RIGHT OF LESSEE TO PROSPECT FOR MINERALS.

The holder of any such lease shall have the right to prospect for, mine, and remove any such minerals under the public waters within the area described by such lease.

History: *Ex1935 c 42 s 7 (6402-8)*

93.11 MINERALS MATTER OF PUBLIC INTEREST.

The discovery and mining or removing of the minerals described in section 93.08 under the public waters in the state is a matter of public interest to the state.

History: *Ex1935 c 42 s 8 (6402-9)*

93.12 FORFEITURE OF PERMITS AND LEASES.

In the event the holder of such permit or lease shall fail to comply with all the provisions contained in sections 93.08 to 93.12 to be by him performed or observed and such default shall continue for a period of 30 days the commissioner of natural resources upon 30 days notice to the holder of such permit or lease by certified mail to the address of such holder as shown by the records of the commissioner of natural resources may declare such permit or lease and all rights acquired thereunder forfeited. Upon the filing of the order of forfeiture with the commissioner of natural resources all rights under such lease or permit shall cease.

History: *Ex1935 c 42 s 9; 1973 c 492 s 14; 1976 c 231 s 22; 1978 c 674 s 60 (6402-10)*

93.13 DRAINING OF LAKES AND LEASING OF ORE LANDS IN BEDS THEREOF.

When a meandered or public lake does not exceed 80 acres in area, within the original meander line, and is surrounded in part by state land upon which a state mineral lease has been issued and is in force and effect, then such lake, with the approval of the executive council, may be drained and the iron ore removed from the

bed thereof by the lessee or its assigns under such state mineral lease for the purpose of mining iron ore owned by the state underneath the bed of such lake adjoining the lands covered by such state mineral lease under the terms and conditions of such state mineral lease.

The royalty payments by the lessee to the state for the ore that shall be removed from such lake bed shall be fixed by the executive council and shall be not less than the minimum royalties provided for in section 93.20. In case the addition of the lake bed to the area subject to such state mineral lease shall increase the area covered by such lease to an area exceeding 80 acres then the annual ground rental for such enlarged area shall be increased by $1,000.

The lessee or its assigns shall have the power to institute condemnation proceedings, to pay for the interests of private persons or corporations who or which may be injured or whose rights may be destroyed by the carrying on of such operations.

History: *1937 c 118 s 1; 1945 c 340 s 1 (6402-11)*

93.14 ISSUANCE OF PERMITS TO PROSPECT FOR ORES; LEASES.

The commissioner may execute permits to prospect for iron ore and other ores upon lands belonging to the state or in which the state has an interest and leases for the mining of such ores, subject to the conditions provided in sections 93.15 to 93.28.

History: *1921 c 412 s 1; 1925 c 395 s 1; 1927 c 389 s 1 (6403)*

93.15 MINING UNITS; DESIGNATION; AREA.

Subdivision 1. The commissioner of natural resources may designate any lands belonging to the state or in which the state has an interest as mining units and may rearrange or modify such mining units from time to time, subject to the limitations herein prescribed. No mining unit shall contain lands belonging to more than one permanent trust fund. Lands which have been sold by the state and are in use as part of the site of a plant for the production of taconite concentrates shall not be designated as mining units. Each mining unit shall consist of a contiguous tract not exceeding 80 acres in area except as follows:

(1) An area not exceeding 90 acres consisting of or including one or more government lots or fractional or oversized subdivisions according to the government survey may be included in one mining unit.

(2) An area of any size which has been covered by a state mining lease or contract heretofore issued and heretofore or hereafter terminated may be included in one mining unit.

(3) An area of any size within the bed of any public waters belonging to the state may be included in one mining unit.

Subd. 2. The commissioner shall prepare and keep on file in the office of the division of lands and minerals of the department of natural resources and at such other places as he may direct a list of the mining units designated hereunder, giving the descriptions thereof and such other information as he deems necessary. In case the commissioner shall prescribe special conditions to be included in a prospecting permit or lease for any mining unit as authorized by law, he shall include a statement of such conditions with the designation of such unit in the list.

Subd. 3. Except as otherwise expressly provided by law, each prospecting permit or mining lease shall cover only one entire mining unit designated as herein provided, and the designation of a mining unit in force at the time an application for a prospecting permit therefor is received by the commissioner according to law shall

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80 percent to the respective counties in which the lands lie, to be apportioned among the taxing districts interested therein as follows: county, three-ninths; town, or city, two-ninths; and school district, four-ninths.

There is hereby appropriated from such moneys in the state treasury not otherwise appropriated to such persons or political subdivisions as are entitled to payment herein, an amount sufficient to make the payment.

Subd. 5. **Disposition of funds.** Except as provided by subdivision 4, and except where the disposition of proceeds of the lands involved may be otherwise directed by existing law, all rentals and royalties payable hereunder shall be paid into the general fund of the state.

History: *1943 c 287; 1949 c 587 s 1; 1951 c 451 s 1; 1959 c 158 s 11; 1963 c 685 s 1; 1967 c 152 s 1; 1969 c 399 s 1; 1969 c 1129 art 10 s 2; 1973 c 123 art 5 s 7; 1973 c 492 s 14*

93.34 UNLAWFUL TO MINE UNDER PUBLIC WATERS.

Subdivision 1. **Authority required.** It shall be unlawful for any individual, copartnership, or corporation to mine any mineral below the low water mark of any public lake or river without first having obtained authority from the state.

Subd. 2. **Draining of meandered public lake for mineral purposes forbidden.** It shall be unlawful for any individual, copartnership, or corporation to drain any meandered public lake for the purpose of mining of minerals without first having received the consent of the executive council.

Subd. 3. **Violation; penalty.** Any individual, copartnership, or corporation violating the provisions of this section shall upon conviction thereof be punished by a fine of not exceeding $10,000 or by imprisonment in the Minnesota correctional facility-Stillwater for not to exceed five years or by both such fine and imprisonment, at the discretion of the court.

History: *1915 c 78 s 1-3; 1979 c 102 s 13 (6425, 6426, 6427)*

93.351 PROSPECTING FOR IRON ORE IN BED OF STATE WATERS.

The commissioner of natural resources may, in his discretion, semiannually give public notice of sale permits to prospect for iron ore situate in the bed of any public lake or river within the state in the same manner and at the same time as provided for sale of permits to prospect for iron ore under the provisions of section 93.16.

History: *1943 c 208 s 1; 1969 c 1129 art 10 s 2*

93.352 APPLICATION FOR PERMITS TO PROSPECT.

Applications for permits to prospect for iron ore shall conform in all respects to the requirements set forth in section 93.17, and the permits issued thereunder shall be issued in the same manner and upon the same conditions as therein provided.

History: *1943 c 208 s 2*

93.353 RIGHTS OF PERMIT HOLDERS.

The holder of any such permit shall have the right to prospect for iron ore on the land described therein for one year from the date thereof, and no longer; but no ore shall be removed therefrom until a lease has been executed. The work of prospecting under such permit shall begin in a substantial manner as soon after the date thereof as conditions will permit and shall be continued until the permit expires, is surrendered or a lease asked for. The holder of such permit shall report in writing to the commissioner of natural resources on the first business day of each

provisions of section 84A.23 the sum necessary to pay such portion and pay the same to the treasurer of the school district or town. All moneys received by any school district or town pursuant to sections 94.31 and 94.32 shall be applied solely to the payment of past due bonds and interest.

History: *Ex1936 c 47 s 4; 1973 c 492 s 14 (6452-17)*

94.34 [Renumbered 92.461, subdivision 1]

94.341 MINNESOTA LAND EXCHANGE BOARD.

The board created by the constitution of the state of Minnesota, Article XI, Section 10, consisting of the governor, the attorney general, and the state auditor, shall be known as the Minnesota land exchange board. The term "board" as used in sections 94.341 to 94.347 refers to such board. The governor shall be chairman of the board. The state auditor shall be secretary of the board and keep a record of its proceedings. Approvals of land exchanges and other official acts of the board may be evidenced by the certificate of the state auditor as secretary, under his official seal. When a land exchange has been approved by the board it shall be presumed that all other pertinent requirements of the law have been complied with, and no exchange shall be invalidated by reason of any defect or omission in respect of any such other requirement.

History: *1941 c 393 s 1; 1965 c 51 s 15; 1975 c 271 s 6; 1976 c 2 s 172*

94.342 CLASSES OF LAND.

Subdivision 1. **Class A.** All land owned by the state and controlled or administered by the commissioner or by any division or agency of the department of natural resources shall be known as Class A land for the purposes of sections 94.341 to 94.347. Class A land shall include school, swamp, internal improvement, and other land granted to the state by acts of congress, state forest land, tax-forfeited land held by the state free from any trust in favor of taxing districts, and other land acquired by the state in any manner and controlled or administered as aforesaid; but this enumeration shall not be deemed exclusive.

Subd. 2. **Class B.** All lands heretofore or hereafter acquired by the state through tax-forfeiture, held subject to a trust in favor of taxing districts, and under the control of county authorities for classification, appraisal, and sale shall be known as Class B land for the purposes of sections 94.341 to 94.347.

Subd. 3. **Class C.** No land specifically designated by law as a state park shall be given in exchange hereunder unless expressly authorized by the legislature. No land bordering on or adjacent to any meandered or other public waters and withdrawn from sale by law shall be given in exchange unless expressly authorized by the legislature or unless through the same exchange the state acquires land on the same or other public waters in the same general vicinity affording at least equal opportunity for access to the waters and other riparian use by the public; provided, that any exchange with the United States or any agency thereof may be made free from this limitation upon condition that the state land given in exchange bordering on public waters shall be subject to reservations by the state for public travel along the shores as provided by Minnesota Statutes 1945, Section 92.45, and that there shall be reserved by the state such additional rights of public use upon suitable portions of of such state land as the commissioner of natural resources, with the approval of the land exchange board, may deem necessary or desirable for camping, hunting, fishing, access to the water, and other public uses.

History: *1941 c 393 s 2; 1949 c 373 s 1; 1969 c 1129 art 10 s 2; 1975 c 271 s 6*

94.343 CLASS A LAND EXCHANGED; CONDITIONS.

Subdivision 1. Except as otherwise herein provided, any Class A land may, with the unanimous approval of the board, be exchanged for land of the United States or privately owned land in the manner and subject to the conditions herein prescribed. The commissioner, with the approval of the board, shall formulate general programs of exchange of Class A land designed to serve the best interests of the state in the acquisition, development, and use of lands for purposes within the province of the department of natural resources.

Subd. 2. Except as herein expressly prohibited, Class A land may be exchanged, though devoted to a specific public use, if the use is discretionary and the authority in charge thereof shall approve the exchange, or if the commissioner, with the approval of the board, shall determine that the exchange will not materially curtail the activity or project for which the land is used; provided, that exchanges of land belonging to any state forest, game preserve, conservation area, or other territory designated by law for particular purposes shall be made so as to consolidate or fill out the state's holdings of land therein, and not materially to reduce the same.

Subd. 3. Except as otherwise herein provided, Class A land shall be exchanged only for land of at least substantially equal value to the state, as determined by the commissioner, with the approval of the board. For the purposes of such determination, the commissioner shall cause the state land and the land proposed to be exchanged therefor to be examined and appraised by qualified state appraisers in like manner as state land to be offered for sale; provided, that in exchanges with the United States or any agency thereof the examination and appraisal may be made in such manner as the land exchange board may direct. The appraisers shall determine the fair market value of the lands involved, disregarding any minimum value fixed for state land by the state constitution or by law, and shall make a report thereof, together with such other pertinent information respecting the use and value of the lands to the state as they deem pertinent or as the commissioner or the board may require. Such reports shall be filed and preserved in the same manner as other reports of appraisal of state lands. The appraised values shall not be conclusive, but shall be taken into consideration by the commissioner and the board, together with such other matters as they deem material, in determining the values for the purposes of exchange.

Subd. 4. There shall be reserved to the state in all Class A land conveyed in exchange all mineral and water power rights and such other rights and easements as the commissioner, with the approval of the board, shall direct. All Class A land which at the time of exchange is subject to the provisions of section 110.13 shall remain subject thereto as a condition of the exchange, and all land received by the state in exchange for Class A land within the area to which those provisions apply shall become subject thereto. Land may be received in exchange subject to any mineral reservations or other reservations thereon. All such reservations and conditions shall be taken into consideration in determining the value of the lands exchanged.

Subd. 5. Class A land may be exchanged for land of greater value if the other party to the exchange shall waive payment for the difference or if there is an appropriation available for the acquisition of such land from which the difference may be paid.

Subd. 6. Class A land may be exchanged for land of less value in any case where disposal of the state land is not limited by the state constitution to public sale, provided the other party to the exchange shall pay to the state the amount of the difference in value either upon consummation of the exchange or by deferred payment, as the commissioner, with the approval of the board, may direct. In case of deferred payment, a certificate of sale of the state land shall be issued to

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the other party as in case of sale of state public land, crediting the value of the land received by the state in exchange as an initial payment, and providing for payment of the balance upon like terms and subject to like conditions as in case of such sale; provided, that the commissioner, with the approval of the board, may require a further initial cash payment and may shorten the time for payment of the balance. Money received in such cases shall be credited to the same fund as in case of sale of the land, if such fund exists, otherwise to the special fund, if any, from which the cost of the land was paid, otherwise to the general fund.

Subd. 7. Before giving final approval to any exchange of Class A land, the board shall hold a public hearing thereon at the capital city or at some place which it may designate in the general area where the lands involved are situated; provided, that the board may direct such hearing to be held in its behalf by any of its members or by the commissioner or by a referee appointed by the board. The commissioner shall furnish to the auditor of each county affected a notice of the hearing signed by the state auditor as secretary of the board, together with a list of all the lands proposed to be exchanged and situated in the county, and the county auditor shall post the same in his office at least two weeks before the hearing. The county auditor shall also cause a copy of the notice, referring to the list of lands posted in his office, to be published at least two weeks before the hearing in a legal newspaper published in the county. The cost of publication of the notice shall be paid by the state out of any moneys appropriated for the expenses of the board.

Subd. 8. The commissioner, with the approval of the board, may submit a proposal for exchange of Class A land to any land owner concerned. Any land owner may submit to the commissioner and the board a proposal for exchange in such form as the commissioner, with the approval of the board, may prescribe.

Subd. 9. No exchange of Class A land shall be consummated unless the attorney general shall have given his opinion in writing that the title to the land proposed to be conveyed to the state is good and marketable, free from all liens and encumbrances except reservations herein authorized. If required by the attorney general, the land owner shall submit an abstract of title and make and file with the commissioner an affidavit as to possession of the land, improvements, liens, and encumbrances thereon, and other matters affecting the title.

Subd. 10. Conveyance of Class A land given in exchange shall be made by deed executed by the commissioner in the name of the state, with a certificate of unanimous approval by the board appended. All such deeds received by the state shall be recorded or registered in the county in which the lands lie, and all recorded deeds and certificates of registered title shall be filed in the office having custody of the state public land records in the department of natural resources.

Subd. 11. Land received in exchange for Class A land shall be subject to the same trust, if any, and shall otherwise have the same status as the state land given in exchange. The commissioner, with the approval of the board, shall determine accordingly the status of each tract of such land received in exchange, and shall make and file a certificate thereof in the office having custody of the state public land records in the department of natural resources.

Subd. 12. When an exchange of Class A tax-forfeited land, which is subject to sale by county authorities is under consideration, the commissioner may notify the county auditor to withdraw the land from sale. Thereupon the land shall be withdrawn from sale until the proposed exchange is consummated or rejected, of which the commissioner shall notify the county auditor.

History: *1941 c 393 s 3; 1949 c 373 s 2; 1961 c 326 s 1; 1969 c 399 s 1; 1969 c 522 s 1; 1969 c 1129 art 10 s 2; 1975 c 271 s 6*

94.344 CLASS B LAND EXCHANGED; CONDITIONS.

Subdivision 1. Except as otherwise herein provided, any Class B land may, by resolution of the county board of the county in which the land is situated and with the unanimous approval of the land exchange board, be exchanged for land of the United States or privately owned land in the same county in the manner and subject to the conditions herein prescribed.

Subd. 2. No Class B land which is not classified for sale, and no Class B land, however classified, lying within any zone or district which is restricted against any use for which the land may be suitable shall be given in exchange for any privately owned land.

Subd. 3. Except as otherwise herein provided, Class B land shall be exchanged only for land of at least substantially equal value to the state, as determined by the county board, with the approval of the commissioner and the board. For the purposes of such determination the county board shall appraise the state land and the land proposed to be exchanged therefor in like manner as tax-forfeited land to be offered for sale. The appraised values shall not be conclusive, but shall be taken into consideration, together with such other matters as may be deemed material, in determining the values for the purposes of exchange.

Subd. 4. There shall be reserved to the state in all Class B land conveyed in exchange the same rights and easements as may be required by law in case of sale of tax-forfeited land and such other rights and easements as the county board, with the approval of the commissioner and the board, shall direct. Land may be received in exchange subject to any mineral reservations or other reservations thereon. All such reservations and conditions shall be taken into consideration in determining the value of the lands exchanged.

Subd. 5. Class B land may be exchanged for land of greater value only in case the other party to the exchange shall waive payment for the difference.

Subd. 6. Class B land may be exchanged for land of less value, provided the other party to the exchange shall pay the amount of the difference to the county treasurer either upon consummation of the exchange or by deferred payment, as the county board may direct. In case of deferred payment, a certificate of sale of the state land shall be issued to the other party in like manner as in the case of sale of tax-forfeited land, crediting the value of the land received by the state in exchange as an initial payment, and providing for payment of the balance upon like terms and subject to like conditions as in case of such sale; provided, that the county board may require a further initial cash payment and may shorten the time for payment of the balance. Money received in such cases shall be disposed of in like manner as the proceeds of sale of tax-forfeited land.

Subd. 7. Before giving final approval to any exchange of Class B land, the county board shall hold a public hearing thereon. At least two weeks before the hearing the county auditor shall post in his office a notice thereof, containing a description of the lands affected, and shall cause a copy of the notice to be published in the newspaper designated for publication of the official proceedings of the county board.

Subd. 8. By direction of the county board the county auditor may submit a proposal for exchange of Class B land to any land owner concerned. Any land owner may file with the county auditor a proposal for exchange for consideration by the county board. Forms for such proposals shall be prescribed by the commissioner.

Subd. 9. No exchange of Class B land shall be consummated unless the title to the land proposed to be exchanged therefor shall first be approved by the county attorney in like manner as provided for approval by the attorney general in

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case of Class A land. The county attorney's opinion on the title shall be subject to approval by the attorney general.

Subd. 10. After approval by the county board, every proposal for the exchange of Class B land shall be transmitted to the commissioner in such form and with such information as he may prescribe, for consideration by him and by the board. The county attorney's opinion on the title, with the abstract and other evidence of title, if any, shall accompany the proposal. If the proposal be approved by the commissioner and the board and the title be approved by the attorney general, the same shall be certified to the commissioner of revenue, who shall execute a deed in the name of the state conveying the land given in exchange, with a certificate of unanimous approval by the board appended, and transmit the deed to the county auditor to be delivered upon receipt of a deed conveying to the state the land received in exchange, approved by the county attorney; provided, that if any amount is due the state under the terms of the exchange, the deed from the state shall not be executed or delivered until such amount is paid in full and a certificate thereof by the county auditor is filed with the commissioner of revenue. The county auditor shall cause all deeds received by the state in such exchanges to be recorded or registered, and thereafter shall file the deeds or the certificates of registered title in his office.

Subd. 11. Forthwith after the consummation of any land exchange the county board shall determine the amount to be paid, if any, to the governmental subdivision wherein the Class B lands were located as full compensation for the trusts said governmental subdivision held in such land, and the amount so determined shall be transferred by the county auditor from the tax-forfeited funds accruing to the governmental subdivision wherein the privately owned lands were situated to the governmental subdivision wherein the Class B lands lay. The lands received shall thereupon become subject to trust in favor of the governmental subdivision wherein they lie and to all laws relating to tax-forfeited lands.

The county board may also make a determination of payment to be made as to land exchanges heretofore made and direct the county auditor to make such transfer; and when such transfer has been made, such lands shall become subject to trust in favor of the governmental subdivision in which they lie.

The maximum which may be fixed as payment for the equity held by any governmental subdivision shall in no case exceed the amount said governmental subdivision would have received if the lands had been sold for the appraised value as determined for the purpose of the exchange.

History: *1941 c 393 s 4; 1949 c 437 s 1; 1973 c 582 s 3; 1975 c 271 s 6*

94.345 FORMS PRESCRIBED BY ATTORNEY GENERAL.

The attorney general shall prescribe or approve the forms for all deeds, certificates, and other instruments required in these proceedings, and the procedure for delivery thereof.

History: *1941 c 393 s 5*

94.346 TITLES.

Subdivision 1. **State may quiet.** The state may bring and maintain an action to quiet or register the title to any land or interest in land which it owns or claims in any capacity and to determine all adverse claims thereto under any law pertaining to such proceedings, whether or not the land is actually in possession of or occupied by the state or any other person or corporation.

Subd. 2. **Attorney general may perfect.** The attorney general, at the request or with the approval of the board, may commence and carry on any necessary or proper actions to perfect the titles to lands owned by the state and subject to

exchange under sections 94.341 to 94.347, and may authorize any county attorney or other attorney to assist in conducting any such action. The expenses of these actions, including such attorneys' fees as the attorney general may allow to county attorneys or other attorneys representing the state, shall be payable out of any appropriations available for the purposes of sections 94.341 to 94.347. Any county attorney performing such service shall be entitled to the fees allowed therefor in addition to his regular compensation unless his salary is fixed on a full time basis.

In case an action is necessary to perfect the title to any privately owned land involved in an exchange hereunder, and the owner of the land is unable to bear the expense thereof, the land exchange board may authorize the attorney general to conduct such action and pay the expenses thereof as in case of actions to perfect the title to state lands. The expenses of the action, including attorney's fees, shall be deducted from the value of the land for the purpose of exchange, subject to payment by the owner for any difference in value as herein provided, or shall be repaid by the owner otherwise upon such terms as the board may direct. All money received on account of such expenses shall be remitted to the state treasurer and credited to the fund from which the expenses were paid.

History: *1941 c 393 s 6,7; 1975 c 271 s 6*

94.347 CERTAIN LAND SUBJECTED TO LIKE TRUSTS.

The lands acquired by the state under Laws 1939, Chapter 343, shall be subject to like trusts as the state lands involved in the actions for damages mentioned therein. The commissioner shall determine to what trusts the several tracts of land so acquired shall be subject according to their location, character, and value, making due allowance for the relative proportions of the different trusts to which the damaged lands were subject, and make and file a certificate thereof in the office having custody of the records of such lands in the department. The determination of the commissioner so certified shall be deemed conclusive as to the trust status of the lands affected unless thereafter changed by act of the legislature.

History: *1941 c 393 s 8*

94.348 EXCHANGES OF STATE OWNED LAND, APPRAISAL FEE.

Subdivision 1. Whenever a private land owner presents to the Minnesota land exchange board, an offer to exchange private land for Class A state owned land as defined in section 94.342, he shall deposit with the board an appraisal fee of not less than $25 nor more than $100, the amount to be determined by the board, depending upon the area of land involved in the offer.

Subd. 2. If the offer of the private land owner is accepted by the board and the land exchange is consummated, or, if the board refuses to accept the offer the appraisal fee shall be refunded, otherwise the appraisal fee shall be retained by the board.

History: *1957 c 586 s 1,2; 1975 c 271 s 6*

94.349 TRANSFERS OF TITLE INVOLVING THE STATE AND GOVERNMENTAL SUBDIVISIONS OF THE STATE.

Subdivision 1. For the purpose of consolidating ownership or for any other public purpose, the state, acting through the commissioner of natural resources, or a local unit of government of the state may submit a proposal involving transfer of titles of land of the state and the local unit of government to the land exchange board, for review and recommendation of the board.

Subd. 2. The procedures relating to appraisal, title examination, and hearings set forth in sections 94.341 to 94.348 for land exchanges shall be followed, insofar as applicable, in matters relating to transfers of land titles under this section, subject to such further limitations as may be provided in this section.

Subd. 3. The classes of state land which may be involved in a transfer of title are the same as those which may be exchanged under land exchange laws and are subject to the same limitations as are applied to state lands under land exchange laws. In addition, land subject to the public sale requirements of Minnesota Constitution, Article XI, Section 8, shall be condemned prior to any title transfer. The condemnation award must be paid and the time to appeal from the award must have expired prior to any title transfer under this section.

Subd. 4. For the purposes of this section, lands acquired through tax-forfeiture, held subject to a trust in favor of taxing districts, and under the control of county authorities for classification, appraisal and sale may be considered as land of a local unit of government for the purposes of this section. This land is subject to the same limitations as are applied to the same lands under land exchange laws.

Subd. 5. The land exchange board shall recommend such legislation as may be necessary to complete the transfer of titles under this section.

Subd. 6. Upon satisfaction of the requirements of this section, and upon the unanimous approval of the land exchange board, the commissioner of natural resources, as to the state land involved in the transfer of titles, and the governing body of the local unit of government, as to the local government land involved in the transfer of titles, shall execute deeds in the name of the respective government involved in the transfer, which deeds shall be executed and recorded in the same manner as deeds in land exchanges.

Subd. 7. The commissioner of natural resources, with the approval of the board, shall determine the status of each tract of land received by the state in the transfer of titles. The county board, in a situation where the land given in a transfer is that type of land described in subdivision 4, shall proceed as required in section 94.344, subdivision 11.

Subd. 8. State land involved in a transfer of title shall be subject to the provisions of section 94.343, subdivision 4. Tax-forfeited land under the control of a county involved in a title transfer shall be subject to the provisions of section 94.344, subdivision 4.

Subd. 9. The provisions of this section shall be supplementary to other laws relating to transfer of title of land or interests in land involving the state and local units of government.

History: *1979 c 142 s 1*

94.35 [Renumbered 92.461, subd 2]

94.351 ESCHEAT SUBJECT TO ENCUMBRANCE.

When any land has become the property of the state by escheat and is subject to any encumbrance arising from taxes, assessments, or otherwise the commissioner of finance, with the approval of the governor and the attorney general and for a consideration to be determined by them, may execute in the name of the state a deed of the land to the holder of the encumbrance.

History: *RL s 2441; 1973 c 492 s 14 (6329)*

94.36 [Repealed, 1975 c 61 s 26]
94.37 [Repealed, 1975 c 61 s 26]
94.38 [Repealed, 1975 c 61 s 26]
94.39 [Repealed, 1975 c 61 s 26]
94.40 [Repealed, 1975 c 61 s 26]

105.21 [Repealed, 1947 c 143 s 67]
105.22 [Repealed, 1947 c 143 s 67]
105.23 [Repealed, 1947 c 143 s 67]
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105.34 [Repealed, 1947 c 143 s 67]
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105.36 [Repealed, 1947 c 143 s 67]

WATER RESOURCES, CONSERVATION

105.37 DEFINITIONS.

Subdivision 1. Unless the language or context clearly indicates that a different meaning is intended, the following words and terms, for the purposes of sections 105.37 to 105.55, shall have the meanings subjoined to them.

Subd. 2. "Commissioner" means the commissioner of natural resources of the state of Minnesota.

Subd. 3. "Division" means the division of waters, soils and minerals of the department of natural resources of the state of Minnesota.

Subd. 4. "Director" means the director of the division of waters, soils and minerals of the department of natural resources of the state of Minnesota.

Subd. 5. "Appropriating" includes but is not limited to "taking", regardless of the use to which the water is put.

Subd. 6. [Repealed, 1979 c 199 s 17]

Subd. 7. "Waters of the state" means any waters, surface or underground, except those surface waters which are not confined but are spread and diffused over the land. "Waters of the state" includes all boundary and inland waters.

Subd. 8. "Abandon" means to give up the use and maintenance of the described structures or improvements to realty and to surrender the same to deterioration, without reference to any intent to surrender or relinquish title to or possessory interest in the real property constituting the site of the structures or improvements. "Abandoned" and "abandonment" have meanings consistent with this definition of "abandon".

Subd. 9. "Waterbasin" means an enclosed natural depression with definable banks capable of containing water which may be partly filled with waters of the state and which is discernible on aerial photographs.

Subd. 10. "Natural watercourse" means any natural channel which has definable beds and banks capable of conducting confined runoff from adjacent lands.

Subd. 11. "Altered natural watercourse" means a former natural watercourse which has been affected by man made changes in straightening, deepening, narrowing, or widening of the original channel.

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History: *1947 c 142*
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Subd. 12. "Artificial watercourse" means a watercourse which has been artificially constructed by man where there was no previous natural watercourse.

Subd. 13. "Meandered lakes" means all bodies of water except streams lying within the meander lines shown on plats made by the United States General Land Office.

Subd. 14. "Public waters" includes and shall be limited to the following waters of the state:

(a) All water basins assigned a shoreland management classification by the commissioner pursuant to section 105.485, except wetlands less than 80 acres in size which are classified as natural environment lakes;

(b) All waters of the state which have been finally determined to be public waters or navigable waters by a court of competent jurisdiction;

(c) All meandered lakes, except for those which have been legally drained;

(d) All waterbasins previously designated by the commissioner for management for a specific purpose such as trout lakes and game lakes pursuant to applicable laws;

(e) All waterbasins designated as scientific and natural areas pursuant to section 84.033;

(f) All waterbasins located within and totally surrounded by publicly owned lands;

(g) All waterbasins where the state of Minnesota or the federal government holds title to any of the beds or shores, unless the owner declares that the water is not necessary for the purposes of the public ownership;

(h) All waterbasins where there is a publicly owned and controlled access which is intended to provide for public access to the water basin; and

(i) All natural and altered natural watercourses with a total drainage area greater than two square miles, except that trout streams officially designated by the commissioner shall be public waters regardless of the size of their drainage area.

The public character of water shall not be determined exclusively by the proprietorship of the underlying, overlying, or surrounding land or by whether it is a body or stream of water which was navigable in fact or susceptible of being used as a highway for commerce at the time this state was admitted to the union.

For the purposes of statutes other than sections 105.37, 105.38 and 105.391, the term "public waters" shall include "wetlands" unless the statute expressly states otherwise.

Subd. 15. "Wetlands" includes, and shall be limited to all types 3, 4 and 5 wetlands, as defined in U. S. Fish and Wildlife Service Circular No. 39 (1971 edition), not included within the definition of public waters, which are ten or more acres in size in unincorporated areas or 2-1/2 or more acres in incorporated areas.

Subd. 16. "Ordinary high water level" means the boundary of public waters and wetlands, and shall be an elevation delineating the highest water level which has been maintained for a sufficient period of time to leave evidence upon the landscape, commonly that point where the natural vegetation changes from predominantly aquatic to predominantly terrestrial. For watercourses, the ordinary high water level shall be the elevation of the top of the bank of the channel. For reservoirs and flowages the ordinary high water level shall be the operating elevation of the normal summer pool.

History: *1947 c 142 s 1; 1967 c 905 s 5; 1969 c 1129 art 3 s 1; 1973 c 315 s 1-3; 1973 c 344 s 1; 1976 c 83 s 2-6; 1979 c 199 s 1-4*

105.38 DECLARATION OF POLICY.

In order to conserve and utilize the water resources of the state in the best interests of the people of the state, and for the purpose of promoting the public health, safety and welfare, it is hereby declared to be the policy of the state:

(1) Subject to existing rights all public waters and wetlands are subject to the control of the state.

(2) The state, to the extent provided by law from time to time, shall control the appropriation and use of surface and underground waters of the state.

(3) The state shall control and supervise, so far as practicable, any activity which changes or which will change the course, current, or cross-section of public waters or wetlands, including but not limited to the construction, reconstruction, repair, removal, abandonment, the making of any other change, or the transfer of ownership of dams, reservoirs, control structures, and waterway obstructions in any of the public waters or wetlands of the state.

History: *1947 c 142 s 2; 1957 c 502 s 1; 1973 c 315 s 4; 1973 c 344 s 2; 1976 c 83 s 7; 1979 c 199 s 5*

105.39 AUTHORITY AND POWERS OF COMMISSIONER.

Subdivision 1. **Water conservation program.** The commissioner shall devise and develop a general water resources conservation program for the state. The program shall contemplate the conservation, allocation, and development of all the waters of the state, surface and underground, for the best interests of the people. The commissioner shall be guided by such program in the issuance of permits for the use and appropriation of the waters of the state and the construction, reconstruction, repair, removal, or abandonment of dams, reservoirs and other control structures, as provided by sections 105.37 to 105.55.

Subd. 2. **Surveys and investigations.** The commissioner is authorized to cause to be made all such surveys, maps, investigations and studies of the water resources and topography of the state as he may deem necessary to provide the information to formulate a program and carry out the provisions of sections 105.37 to 105.55.

Subd. 3. **Allocation and control of wetlands and waters.** The commissioner shall have administration over the use, 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 level of any public waters and wetlands.

Subd. 4. **Power to acquire property; eminent domain.** The commissioner shall have the power to acquire title to any private property for any authorized purpose by purchase or by the exercise of the right of eminent domain; and the use of such property in the furtherance of lawful projects under sections 105.37 to 105.55 is hereby declared to be a public purpose. On request by the commissioner, the attorney general shall proceed to acquire the necessary title to private property for such use under the provisions of Minnesota Statutes 1945, Chapter 117.

Subd. 5. **Contracts.** The commissioner is authorized to approve contracts for all works under sections 105.37 to 105.55, to change the plans thereof when necessary, and to supervise, control, and accept the same when complete. He is further authorized to cause the same, together with expenses incurred in connection therewith, to be paid for out of any funds made available to the use of the commissioner.

Subd. 6. **Statewide water information system.** The commissioner in cooperation with other state agencies, including the Minnesota geologic survey, shall

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History: *1947 c 142*

105.391 WATERS INV

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establish and maintain a statewide system to gather, process, and disseminate information on the availability, distribution, quality, and use of waters of the state. Each local, regional, and state governmental unit, its officers and employees shall cooperate with the commissioner in accomplishing the purpose of this subdivision.

History: *1947 c 142 s 3; 1973 c 315 s 5; 1979 c 199 s 6*

105.391 WATERS INVENTORY AND CLASSIFICATION.

Subdivision 1. On the basis of all information available to him and the criteria set forth in section 105.37, subdivisions 14 and 15, the commissioner shall inventory the waters of each county and make a preliminary designation as to which constitute public waters and wetlands. The commissioner shall send a list and map of the waters which he has preliminarily designated as public waters and wetlands in each county to the county board of that county for its review and comment. The county board shall conduct at least one public informational meeting within the county regarding the commissioner's preliminary designation. After conducting the meetings and within 90 days after receipt of the list or maps, the county board shall present its recommendation to the commissioner, listing any waters regarding which the board disagrees with the commissioner's preliminary designation and stating with particularity the waters involved and the reasons for disagreement. The commissioner shall review the county board's response and, if he agrees with any of the board's recommendations, he shall revise the list and map to reflect the recommendations. Within 30 days after receiving the county board's recommendations, he shall also notify the county board as to which recommendations he accepts and rejects and the reasons for his decision. After the revision of the map and list, if any, or if no response is received from the county board within the 90 days review period, the commissioner shall file the revised list and map with the recorder of each county and shall cause the list and map to be published in the official newspaper of the county. The published notice shall also state that any person or any county may challenge the designation of specific waters as public waters or wetlands or may request the designation of additional waters as public waters or wetlands, by filing a petition for a hearing with the commissioner within 90 days following the date of publication. The petition shall state with particularity the waters for which the commissioner's designation is disputed and shall set forth the reasons for disputing the designation. If any designations are disputed by petition, the commissioner shall order a public hearing to be held within the county within 60 days following the 90 day period, notice of which shall be published in the state register and the official newspaper of the county. The hearings shall be conducted by a hearings unit composed of one person appointed by the affected county board, one person appointed by the commissioner and one board member of the local soil and water conservation district or districts within the county who shall be selected by the other two members at least 20 days prior to the hearing date. The expenses of and per diem payments to any member of the hearings unit who is not a state employee shall be paid as provided for in section 15.059, subdivision 3, within the limits of funds available from grants to the county pursuant to Laws 1979, Chapter 199, Section 16. In the event there is a watershed district whose boundaries include the waters involved, the district may provide the hearings unit with its recommendations. Within 60 days following completion of the hearing, the hearings unit shall issue its findings of fact, conclusions and an order, which shall be considered the decision of an agency in a contested case for purposes of judicial review pursuant to sections 14.63 to 14.69. The commissioner, the county or any person aggrieved by the decision of the hearings unit may appeal from the hearings unit's order. Upon receipt of the order of the hearings unit and after the appeal period has expired, or upon receipt of the final order of the court in the case of an appeal, the

commissioner shall publish a list of the waters determined to be public waters and wetlands. The commissioner shall complete the public waters and wetlands inventory by December 31, 1982.

Subd. 2. [Repealed, 1979 c 199 s 17]

Subd. 3. Except as provided below, no public waters or wetlands shall be drained, and no permit authorizing drainage of public waters or wetlands shall be issued, unless the public waters or wetlands being drained are replaced by public waters or wetlands which will have equal or greater public value. However, after a state waterbank program has been established, wetlands which are eligible for inclusion in that program may be drained without a permit and without replacement of wetlands of equal or greater public value if the commissioner does not elect, within 60 days of the receipt of an application for a permit to drain the wetlands, to either (1) place the wetlands in the state waterbank program, or (2) acquire it pursuant to section 97.481, or (3) indemnify the landowner through any other appropriate means, including but not limited to conservation restrictions, easements, leases, or any applicable federal program. If the applicant is not offered his choice of the above alternatives, he is entitled to drain the wetlands involved.

In addition, the owner or owners of lands underlying wetlands situated on privately owned lands may apply to the commissioner for a permit to drain the wetlands at any time after the expiration of ten years following the original designation thereof. Upon receipt of an application, the commissioner shall review the current status and conditions of the wetlands. If he finds that the current status or conditions are such that it appears likely that the economic or other benefits to the owner or owners which would result from drainage would exceed the public benefits of maintaining the wetlands, he shall grant the application and issue a drainage permit. If the application is denied, no additional application shall be made until the expiration of an additional ten years.

Subd. 4. [Repealed, 1979 c 199 s 17]

Subd. 5. [Repealed, 1979 c 199 s 17]

Subd. 6. [Repealed, 1979 c 199 s 17]

Subd. 7. [Repealed, 1979 c 199 s 17]

Subd. 8. [Repealed, 1979 c 199 s 17]

Subd. 9. In order to protect the public health or safety, local units of government may establish by ordinance restrictions upon public access to any wetlands from city, county or township roads which abut wetlands.

Subd. 10. Nothing in this chapter shall prevent a landowner from utilizing the bed of wetlands or public waters for pasture or cropland during periods of drought, provided there is no construction of dikes, ditches, tile lines or buildings, and the agricultural use does not result in the drainage of the wetlands or public waters. This chapter shall not prevent a landowner from filling any wetland to accommodate wheeled booms on irrigation devices so long as the fill does not impede normal drainage.

Subd. 11. When the state owns wetlands on or adjacent to existing public drainage systems, the state shall give consideration to the utilization of the wetlands as part of the drainage system. If the wetlands interfere with or prevent the authorized functioning of the public drainage system, the state shall provide for any necessary work to allow the proper use and maintenance of the drainage system while still preserving the wetlands.

Subd. 12. The designation of waters as "public waters" or "wetlands" pursuant to this section shall not grant any additional or greater right of access to the public to those waters, nor is the commissioner required to acquire access to those

waters under section 97.48
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History: *1976 c 83 s 8*
c 424 s 130

105.392 WATER BANK

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waters under section 97.48, subdivision 15, nor is any right of ownership or usage of the beds underlying those waters diminished. Notwithstanding the designation of waters or lands as public waters or wetlands, all provisions of Minnesota law forbidding trespass upon private lands shall remain in full force and effect.

History: *1976 c 83 s 8; 1978 c 505 s 1; 1979 c 199 s 7-12; 1979 c 289 s 6; 1982 c 424 s 130*

105.392 WATER BANK PROGRAM.

Subdivision 1. The legislature finds that it is in the public interest to preserve the wetlands of the state and thereby to conserve surface waters, to preserve wildlife habitat, to reduce runoff, to provide for floodwater retention, to reduce stream sedimentation, to contribute to improved subsurface moisture, to enhance the natural beauty of the landscape, and to promote comprehensive and total water management planning. Therefore, the commissioner of natural resources is authorized to promulgate rules, which shall include the procedures and payment rates designed to effectuate the terms of this section. This program is intended to supplement and complement the federal water bank program and the payment rates established shall be at least equal to the federal rates existing at the time any agreements are entered into.

Subd. 2. The commissioner shall have authority to enter into agreements with landowners for the conservation of wetlands. These agreements shall be entered into for a period of ten years, with provision for renewal for additional ten year periods. The commissioner may re-examine the payment rates at the beginning of any ten year renewal period in the light of the then current land and crop values and make needed adjustments in rates for any renewal period.

Wetlands eligible for inclusion in the waterbank program shall have all the following characteristics as determined by the commissioner: (a) types 3, 4, or 5 as defined in U. S. Fish and Wildlife Service Circular No. 39 (1971 edition); (b) its drainage is lawful, feasible, and practical; and (c) its drainage would provide high quality cropland and that is the projected land use. Waters which have the foregoing characteristics but are less than ten acres in size in unincorporated areas or less than 2-1/2 acres in size in incorporated areas shall also be eligible for inclusion in the waterbank program, at the discretion of the commissioner.

Subd. 3. In the agreement between the commissioner and an owner, the owner shall agree:

(1) to place in the program for the period of the agreement eligible wetland areas he designates, which areas may include wetlands covered by a federal or state government easement which permits agricultural use, together with such adjacent areas as determined desirable by the commissioner;

(2) not to drain, burn, fill, or otherwise destroy the wetland character of such areas, nor to use such areas for agricultural purposes, as determined by the commissioner;

(3) to effectuate the wetland conservation and development plan for his land in accordance with the terms of the agreement, unless any requirement thereof is waived or modified by the commissioner;

(4) to forfeit all rights to further payments or grants under the agreement and to refund to the state all payments or grants received thereunder upon his violation of the agreement at any stage during the time he has control of the land subject to the agreement if the commissioner determines that such violation is of such a nature as to warrant termination of the agreement, or to make refunds or accept such payment adjustments as the commissioner may deem appropriate if he determines that the violation by the owner does not warrant termination of the agreement;

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FACE SOURCES.

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No. 25, "An Inventory of

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water shall adopt and enforce restrictions consistent with rules adopted by the commissioner of natural resources within their areas of jurisdiction to restrict lawn sprinkling, car washing, golf course and park irrigation, and other non-essential uses, together with appropriate penalties for failure to comply with the restrictions. The commissioner may adopt emergency rules pursuant to section 15.0412, subdivision 5 relating to matters covered by this section during the year 1977. Disregard of critical water deficiency orders, even though total appropriation remains less than that permitted, shall be adequate grounds for immediate modification of any public water supply authority's appropriator's permit.

History: *1977 c 446 s 20*

105.42 PERMITS; WORK IN PUBLIC WATERS.

Subdivision 1. It shall be unlawful for the state, any person, partnership, association, private or public corporation, county, municipality or other political subdivision of the state, to construct, reconstruct, remove, abandon, transfer ownership, or make any change in any reservoir, dam or waterway obstruction on any public water; or in any manner, to change or diminish the course, current or cross-section of any public waters, wholly or partly within the state, by any means, including but not limited to, filling, excavating, or placing of any materials in or on the beds of public waters, without a written permit from the commissioner previously obtained. Application for such permit shall be in writing to the commissioner on forms prescribed by him. No permit shall be required for work in altered natural watercourses which are part of drainage systems established pursuant to chapters 106 and 112 when the work in the waters is undertaken pursuant to those chapters.

This section does not apply to any public drainage system lawfully established under the provisions of chapter 106 which does not substantially affect any public waters.

The commissioner, subject to the approval of the county board, shall have power to grant permits under such terms and conditions as he shall prescribe, to establish, construct, maintain and control wharfs, docks, piers, levees, breakwaters, basins, canals and hangars in or adjacent to public waters of the state except within the corporate limits of cities.

Subd. 1a. The commissioner shall recommend by January 15, 1975, to the legislature a comprehensive law containing standards and criteria governing the issuance and denial of permits under this section. These standards and criteria shall relate to the diversion of water from other uses and changes in the level of public waters to insure that projects will be completed and maintained in a satisfactory manner. The commissioner may by rule identify classes of activities in waterbasins and classes of watercourses on which the commissioner may delegate permit authority to the appropriate county or city under such guidelines as the commissioner may provide based on agreement with the involved county or city and in compliance with the requirements of section 105.45. After November 15, 1975, a permit shall be granted under this section only when the project conforms to state, regional, and local water and related land resources management plans, and only when it will involve a minimum of encroachment, change, or damage to the environment, particularly the ecology of the waterway. In those instances where a major change in the resource is justified, permits shall include provisions to compensate for the detrimental aspects of the change.

In unincorporated areas and, after January 1, 1976, in incorporated areas, permits that will involve excavation in the beds of public waters shall be granted only where the area in which the excavation will take place is covered by a shoreland conservation ordinance approved by the commissioner and only where the work to

be authorized is consistent with the shoreland conservation ordinance. Each permit that will involve excavation in the public waters shall include provisions governing the deposition of spoil materials.

No permit affecting flood waters shall be granted except where the area covered by the permit is governed by a flood plain management ordinance approved by the commissioner and the conduct authorized by the permit is consistent with the flood plain management ordinance, provided that the commissioner has determined that sufficient information is available for the adoption of a flood plain ordinance. No permit involving the control of flood waters by structural means, such as dams, dikes, levees, and channel improvements, shall be granted until after the commissioner has given due consideration to all other flood damage reduction alternatives. In developing his policy with regard to placing emergency levees along the banks of public waters under flood emergency conditions, the commissioner shall consult and cooperate with the office of emergency services.

No permit that will involve a change in the level of public waters shall be granted unless the shoreland adjacent to the waters to be changed is governed by a shoreland conservation ordinance approved by the commissioner and the change in water level is consistent with that shoreland conservation ordinance. Standards and procedures for use in deciding the level of a particular lake must insure that the rights of all persons are protected when lake levels are changed and shall include provisions for providing technical advice to all persons involved, for establishing alternatives to assist local agencies in resolving water level conflicts, and mechanics necessary to provide for local resolution of water problems within the state guidelines.

Subd. 2. Nothing in this section shall prevent the owner of any dam, reservoir, control structure, or waterway obstruction from instituting repairs which are immediately necessary in case of emergency. However, the owner shall notify the commissioner at once of the emergency and of the emergency repairs being instituted and, as soon as practicable, shall apply for a permit for the emergency repairs and any necessary permanent repairs. Nothing in this section shall apply to routine maintenance, not affecting the safety of the structures.

In case of an emergency where the commissioner declares that repairs or remedial action is immediately necessary to safeguard life and property, the repairs, remedial action, or both, shall be started immediately by the owner.

Subd. 3. The owner of any dam, reservoir, control structure, or waterway obstruction constructed before a permit was required by law shall maintain and operate all such dams, reservoirs, control structures, and waterway obstructions in a manner approved by the commissioner and in accordance with any rules and regulations promulgated by the commissioner in the manner prescribed by chapter 14.

History: *1947 c 142 s 6; 1973 c 123 art 5 s 7; 1973 c 315 s 7; 1973 c 344 s 3; 1974 c 428 s 5; 1974 c 558 s 4; 1976 c 83 s 10; 1978 c 779 s 1; 1979 c 199 s 15; 1982 c 424 s 130*

105.43 APPLICATION FOR ESTABLISHMENT OF LAKE LEVELS.

Application for authority to establish and maintain levels on any public water and applications to establish the natural ordinary high water level of any body of public water may be made to the commissioner by any public body or authority or by a majority of the riparian owners thereon; or, for the purpose of conserving or utilizing the water resources of the state, the commissioner may initiate proceedings therefor.

History: *1947 c 142 s 7; 1973 c 315 s 8*

105.44 PROCEDURE U

Subdivision 1. **Perm** 105.37 to 105.55 shall be the proposed appropriatic abandonment proposed tc as the commissioner may statement of the effect th the environment, such as: anticipated; (b) unavoida the actions proposed in th requested, is within a city water conservation distric specifications shall be ser and the secretary of the district and on the mayor the application and filed

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Subd. 2. **Authority** for permits and to grant hereinafter set forth. Pro requested is within a city water conservation distric tion of the managers of water conservation distric permit. The managers within 30 days after rece

Subd. 3. **Waiver of** hearing on any application In such case, if any applic the applicant, the manager soil and water conservatic after mailed notice thereo application together with thereupon be fully heard as though no previous orc shall be conducted as a commissioner elects to wa a hearing is demanded bu shall become final at the applicant, the managers o and water conservation di may be taken to the distr

Subd. 4. **Time.** Th appropriations for irrigat application and all requir making an order thereon

Subd. 5. **Notice.** date, place and time fixec shall show the waters aff structures proposed. Th expense of the applicant absence of an applicant, a

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REVIEW OF PERMIT APPLICATIONS

6115.0150 PURPOSE AND STATUTORY AUTHORITY.

The purpose of these parts is to provide for the orderly and consistent review of permit applications in order to conserve and utilize the water resources of the state in the best interest of its people. In deciding whether to issue permits, the department shall be guided by the policies and requirements declared in Minnesota Statutes, sections 105.38, 105.42, and 116D.04.

The proposed development must also be consistent with the goals and objectives of applicable federal, state, and local environmental quality programs and policies including but not limited to shoreland management, floodplain management, water surface use management, boat and water safety, wild and scenic rivers management, water quality management, recreational or wilderness management, critical areas management, scientific and natural areas management, and protected vegetative species management.

Statutory Authority: *MS s 105.415*

6115.0160 SCOPE.

To achieve the policies declared in part 6115.0150 these parts set forth minimum standards and criteria for the review, issuance, and denial of permits for proposed projects affecting public waters.

These standards and criteria apply to any and all work which will cause or result in the alteration of the course, current, or cross-section of public waters except for the following:

A. utility crossings of public waters which are regulated under Minnesota Statutes, section 84.415 and rules promulgated thereunder;

B. destruction and control of aquatic vegetation which is regulated under Minnesota Statutes, section 98.48, subdivision 9 and rules promulgated thereunder; and

C. changes in the course, current, or cross-section of public waters necessary for the mining of metallic and nonmetallic minerals, sand and gravel, peat; coal, and marl. See Minnesota Statutes, section 105.64.

Statutory Authority: *MS s 105.415*

6115.0170 DEFINITIONS.

Subpart 1. **Certain terms.** For the purposes of these parts, certain terms or words used herein shall be interpreted as follows: The word "shall" is mandatory, not permissive. All distances unless otherwise specified shall be measured horizontally.

Subp. 2. **Alteration.** "Alteration" means any activity that will change or diminish the course, current, or cross-section of public waters.

Subp. 3. **Beds of public waters.** "Beds of public waters" means all portions of public waters located below the ordinary high water mark.

Subp. 4. **Breakwater.** "Breakwater" means an off-shore structure protecting a shore area, harbor, or marina from waves.

Subp. 5. **Class I public watercourse.** "Class I public watercourse" means a natural watercourse serving as the major drainage outlet or a major tributary of such an outlet, which is capable of serving a number of beneficial public purposes. Smaller natural watercourses serving specific values such as trout streams and scenic watercourses are also included.

Subp. 6. **Class II public watercourse.** "Class II public watercourse" means a natural watercourse serving as a tributary of a Class I watercourse. Class II public watercourses are often perennial streams serving more than one beneficial public purpose.

Subp. 7. **Class III public watercourse.** "Class III public watercourse" means a smaller natural watercourse or an altered natural watercourse not constructed under Minnesota Statutes, chapter 106 (and which is tributary to

other Class I, II, or III watercourses), and which may be an intermittent stream serving at least one beneficial public purpose.

Subp. 8. **Class IV watercourse.** "Class IV watercourse" means any artificial watercourse or altered natural watercourse constructed under the provisions of Minnesota Statutes, chapter 106 or 112 or prior laws, or as the result of private actions without any public drainage proceedings, and which is tributary to a public drainage system.

Subp. 9. **Commissioner.** "Commissioner" means the commissioner of natural resources.

Subp. 10. **Dam.** "Dam" means any artificial barrier or appurtenant works which does or may impound or divert water.

Subp. 11. **Department.** "Department" means the Department of Natural Resources.

Subp. 12. **Dredge.** "Dredge" means the removal of the sediment or other materials from the beds of public waters by means of hydraulic suction or mechanical excavation.

Subp. 13. **Emergency spillway.** "Emergency spillway" means a spillway designed to convey water in excess of that impounded for flood control or other beneficial purposes.

Subp. 14. **Fill.** "Fill" means any material placed or intended to be placed on the bed or bank of any public water.

Subp. 15. **Filter.** "Filter" means a transitional layer of gravel, small stone, or fabric between the fine material of an embankment and riprap shore protection materials. The purposes of the filter are to prevent fine embankment material from being pulled through the riprap materials, distribute the weight of the overlying riprap to prevent settlement, and to provide relief of hydrostatic pressures inside the embankment.

Subp. 16. **Floodway.** "Floodway" means the channel of the watercourse and those portions of the adjoining floodplains which are reasonably required to carry and discharge the regional flood.

Subp. 17. **Harbor.** "Harbor" means either an inland or offshore area protected from waves which is intended for the mooring of watercraft either inland or offshore.

Subp. 18. **Inland boat slip.** "Inland boat slip" means an inland excavation generally having a uniform width which serves as a protective area for launching and mooring of a single watercraft.

Subp. 19. **Inland excavation.** "Inland excavation" means any excavation intended to extend the cross-section of public waters landward of the natural or preexisting shoreline.

Subp. 20. **Low-water ford type crossing.** "Low-water ford type crossing" means a stream crossing which conforms to the natural cross-section of the stream and utilizes the placement of a suitable substrate to allow vehicular passage without confining the stream flow within culverts or other hydraulic enclosures.

Subp. 21. **Marina.** "Marina" means either an inland or offshore area for the concentrated mooring of five or more watercraft wherein facilities are provided for any or all of the following ancillary services: boat storage, fueling, launching, mechanical repairs, sanitary pumpout, and restaurant services.

Subp. 22. **Maximum.** "Maximum," with respect to storage capacity, refers to the most severe design condition, including surcharge (floodwater storage).

Subp. 23. **Mooring.** "Mooring" means any containment of free-floating watercraft that provides a fixed fastening for the craft.

Subp. 24. **Natural watercourse.** "Natural watercourse" means any watercourse in a state provided by nature without artificial straightening, deepening, or widening. See "watercourse" as defined in subpart 42.

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Subp. 32. **Reconstr**
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Subp. 33. **Regional**
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Subp. 34. **Retaining**
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Subp. 35. **Riprap sh**
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Subp. 37. **Spillway.** "
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Subp. 38. **Standard pr**
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Subp. 25. **Offshore.** "Offshore" means the area waterward of the ordinary high water mark of a public water.

Subp. 26. **Ordinary high water mark.** "Ordinary high water mark" for purposes of these parts means an elevation delineating the highest water level which has been maintained for a sufficient period of time to leave evidence upon the landscape. The ordinary high water mark is commonly that point where the natural vegetation changes from predominantly aquatic to predominantly terrestrial. For watercourses, the ordinary high water mark shall be considered to be the elevation of the top of the bank of the channel (Re: part 6120.5000). For reservoirs and flowages the ordinary high water mark shall be the operating elevation of the normal summer pool.

Subp. 27. **Permanent dock.** "Permanent dock" means any dock other than seasonal docks and wharves as hereinafter defined.

Subp. 28. **Principal spillway.** "Principal spillway" means a spillway designed to convey water from an impoundment at release rates established for the structure.

Subp. 29. **Probable maximum flood.** "Probable maximum flood" means the most severe flood with respect to peak flow that may be expected from a combination of the most critical meteorological and hydrological conditions that are reasonably possible in the drainage basin.

Subp. 30. **Professional engineer.** "Professional engineer" means an engineer registered to practice in Minnesota.

Subp. 31. **Public waters.** "Public waters" means any waters of the state which serve a material beneficial public purpose as defined in Minnesota Statutes, section 105.37, subdivision 6.

Subp. 32. **Reconstruction.** "Reconstruction" means the rebuilding or renovation of an existing structure, where the cost of such work will exceed 50 percent of the replacement cost of a dam or 50 percent of the assessed value of other structures.

Subp. 33. **Regional flood.** "Regional flood" means the flood which is representative of large floods known to have occurred generally in Minnesota and reasonably characteristic of what can be expected to occur on an average frequency in the magnitude of the 100-year recurrence interval (Re: part 6120.5000).

Subp. 34. **Retaining walls.** "Retaining walls" means vertical or nearly vertical alongshore structures constructed of mortar-rubble masonry, handlaid rock or stone, vertical timber pilings, horizontal timber planks with piling supports, sheet pilings, poured concrete, concrete blocks, or other durable materials.

Subp. 35. **Riprap shore protection.** "Riprap shore protection" means coarse stones, boulders, cobbles, or artificially broken rock fragments or concrete or brick materials, laid loosely or within gabion baskets against the basal slope of the existing bank of a public water.

Subp. 36. **Seasonal dock.** "Seasonal dock" means a dock so designed and constructed that it may be removed from the lake or stream bed on a seasonal basis. All components such as supports, decking, and footings must be capable of removal by nonmechanized means.

Subp. 37. **Spillway.** "Spillway" means a channel available to discharge excess water from a reservoir.

Subp. 38. **Standard project flood.** "Standard project flood" means the flood that may be expected from the most severe combination of meteorological and hydrological conditions that is considered reasonably characteristic of the geographical area in which the drainage basin is located, excluding extremely

rare combinations. Such floods are intended as practicable expressions of the degree of protection that should be sought in the design of flood control works, the failure of which might be disastrous (Re: part 6120.5000).

Subp. 39. **Structure.** "Structure" means any building, footing, foundation, slab, roof, boathouse, deck, wall, dam, or any other object permanently attached to the bed or bank of a public water. These parts shall not pertain to floating structures such as houseboats, mooring and navigation bouys, swimming and diving platforms, water ski jumps, and watercraft, provided such floating structures are not permanently anchored by means of pilings, foundations, gabion baskets, or other materials which are not capable of removal by nonmechanical means.

Subp. 40. **Structural height.** "Structural height" means the overall vertical distance from the lowest point of construction to the top of the dam including the foundation or cutoff but excluding driven sheet piling primarily intended for cutoff purposes.

Subp. 41. **Swellhead.** "Swellhead" means the difference between the headwater elevation necessary to pass the regional flood through the proposed structure and the tailwater elevation below the structure.

Subp. 42. **Watercourse.** "Watercourse" means any channel having definable beds and banks capable of conducting generally confined runoff from adjacent lands. During floods water may leave the confining beds and banks but under low and normal flows water is confined within the channel. A watercourse may be perennial or intermittent.

Subp. 43. **Watercraft.** "Watercraft" means any contrivance used or designed for navigation on water other than a duck boat during the duck hunting season, a rice boat during the harvest season, or a seaplane.

Subp. 44. **Wharf.** "Wharf" means a permanent structure constructed into navigable waters for the sole purpose of transferring cargo to and from watercraft in an industrial or commercial enterprise.

Statutory Authority: *MS s 105.415*

6115.0180 SEVERABILITY.

The provisions of these rules shall be severable, and the invalidity of any paragraph, subparagraph, or subdivision thereof shall not make void any other paragraph, subparagraph, subdivision, or any other part.

Statutory Authority: *MS s 105.415*

6115.0190 FILLING INTO PUBLIC WATERS.

Subpart 1. **Policy.** It is the policy of the department to limit the placement of any fill material into public waters in order to preserve the natural character of public waters and their shorelands, and maintain suitable aquatic habitat for fish and wildlife.

Subp. 2. **Permitted placement.** Placement in conformance with these parts shall be permitted in the following cases:

A. development of beach areas;

B. protection of shoreline from continued erosion by placement of riprap materials;

C. recovery of shoreland lost by erosion or other natural forces which has occurred within the last five years;

D. limited filling to allow raising of previous development constructed at too low an elevation; and

E. provision of navigational access from riparian properties, where such access cannot be gained by alternative means.

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Subp. 4. **Beach sa**
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Subp. 6. **Other filling.**
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commissioner; and

D. where erosion
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Statutory Authority: *M*

Subp. 3. **Nonpermitted placement.** Placement shall not be permitted in the following cases:

A. to achieve vegetation control;

B. to create upland areas for development or subdivision;

C. to stabilize lake and stream beds which cannot support fill materials (e.g. excessive depths of muck, steep bank, or bed slope, etc.); and

D. to stabilize areas of flowing water, active springs, or subject to substantial wave action, drift, sedimentation, or other disruptive forces.

Subp. 4. **Beach sand blankets.** No permit shall be required to install a beach sand blanket provided the conditions of subpart 6 are met and the sand and/or gravel layer does not exceed six inches in thickness, 50 feet in width along the shoreline, and does not extend more than ten feet waterward of the ordinary high water mark, provided local watershed district and county zoning officials are given at least seven days' notice. A permit shall be required for any other beach sand blanket and shall be granted provided the conditions of subpart 6 are met.

Subp. 5. **Riprap shore protection.** The protection of shoreline from continued erosion by placement of natural rock riprap along the shore shall be permitted provided the following general standards and the conditions of subpart 6 are met:

A. The riprap materials are of sufficient size, quality, and thickness to withstand ice and wave action. The riprap shall be placed with a minimum amount of space between the larger materials and the space between them shall be filled with firmly seated smaller rocks or gabion baskets to procure a uniform surface.

B. The site soils are capable of supporting riprap and a filter consisting of well-graded gravel, crushed stone, or fabric is installed to prevent undercutting of the riprap.

C. The encroachment into the water is the minimum amount necessary to provide protection and does not unduly interfere with the flow of water.

Except along the shores of Lake Superior and officially designated trout streams, no permit shall be required where the riprap materials consist of natural rock and conform with the natural alignment of the shoreline, with a minimum finished slope not steeper than 3:1, and no materials are placed more than five feet waterward of the ordinary high water mark.

A permit shall be required for any other riprap shore protection and shall be granted provided the conditions of the first paragraph in subpart 5 and of subpart 6 are met.

Subp. 6. **Other filling.** A permit shall be required for all other filling and shall be granted provided:

A. the project is not unduly detrimental to the public purposes listed in Minnesota Statutes, section 105.37, subdivision 6, including but not limited to fish and wildlife habitat, navigation, water supply, and storm water retention (filling of posted fish spawning areas is prohibited);

B. the fill consists of clean inorganic material that is free of pollutants and nutrients;

C. the existence of a stable, supporting foundation is established by appropriate means, including soil boring data where deemed necessary by the commissioner; and

D. where erosion protection is deemed necessary by the commissioner, the site conditions and fill material are capable of being stabilized by an approved erosion control method (riprap, retaining wall, etc.) which is consistent with existing land uses on the affected public water.

Statutory Authority: *MS s 105.415*

6115.0200 EXCAVATION OF PUBLIC WATERS.

Subpart 1. **Policy and general restrictions.** It is the policy of the department to discourage the excavation of materials from the beds of public waters in order to preserve the natural character of public waters and their shorelands, and maintain suitable aquatic habitat for fish and wildlife. Excavation shall be permitted provided the conditions of subparts 2 to 4 are met, except:

A. where it is intended to gain access to navigable water depths when such access can be reasonably attained by utilizing a temporary or permanent dock;

B. where inland excavation is intended solely to extend riparian rights to nonriparian lands, or to promote the subdivision and development of nonriparian lands; and

C. where the proposed excavation will be detrimental to significant fish and wildlife habitat, or protected vegetation.

Subp. 2. **Dredging.** Dredging:

A. General standards: a permit shall be required for all dredging subject to the following general standards:

(1) The project must be adequate in relation to appropriate geologic and hydrologic factors including but not limited to quantity and quality of local drainage at the site: type of sediment/soil strata and underground formations in the vicinity; life expectancy of the dredging with respect to bedload, long-shore drift, and siltation patterns in the project vicinity; and protection of the water body from increased seepage, pollution, and other hydrologic impacts.

(2) Adequate and stable on-land spoil disposal sites located above the ordinary high water mark and outside of floodway districts must be available for containment of dredged spoils, and project plans must include provisions for sodding, seeding, or otherwise properly protecting these spoils. Dredge spoils may be placed below the ordinary high water mark only when the department determines that one or more beneficial public purposes will be enhanced.

(3) The proposed project must represent the "minimal impact" solution to a specific need with respect to all other reasonable alternatives such as weed removal without dredging, beach sanding, excavation above the bed of public water, less extensive dredging in another area of the public water, or management of an alternate water body for the intended purpose.

(4) The dredging must be limited to the minimum dimensions necessary for achieving the desired purpose.

(5) Where excavation is proposed on a water body that is perched on an impervious stratum, soil borings must show that the proposed excavation will not rupture the impervious stratum.

B. Additional specific standards: the following categories of dredging projects shall be permitted, subject to the following specific restrictions:

(1) Beach development: the existing site conditions will not provide a suitable beach using a sand blanket alone. The area to be dredged shall be consistent with the general dimensions authorized for beach sanding under part 6115.0190, subpart 4. The depth of dredging needed to reach a suitable beach stratum shall not be excessive considering anticipated site maintenance and desired water depths.

(2) Public waters serving commercial or recreational navigation or access to existing boat harbors: the dredging shall be confined to the recognized navigational channel(s) in the area or the length, width, and depth dimensions of the original boat harbor.

The channel or harbor shall not be maintained to a depth or width greater than the minimum necessary to allow reasonable navigational use by the anticipated watercraft.

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Subp. 3. **Inland excav** connected to public waters:

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(3) Lake improvement: the dredging shall be limited to the removal of accumulated sediment or rock debris where such materials constitute an impairment to the use of a common navigational corridor, impede reasonable access, or where it is intended to create open areas in aquatic vegetation to improve fish or wildlife habitat; or large-scale lake dredging shall be permitted where:

(a) the proposed project is intended to achieve one or more of the following purposes: to improve navigation, swimming, and other recreational uses; to reduce winter fish-kill potential; sediment removal to eliminate a source of nutrients and/or contaminants;

(b) a public need for the dredging has been established by local governmental resolution specifying the public interests to be enhanced;

(c) the proposed dredging is part of an overall lake restoration project based upon adequate background and field test data for which a comprehensive lake restoration plan is submitted at the time of application detailing all of the following: objectives to be accomplished; sufficient soil boring and bottom sampling data to evaluate sediment quality and bottom "seal" conditions; location of spoil disposal sites; existing water quality data and provision for future water quality monitoring of both lake water and return water; a timetable which indicates yearly dredging areas and volumes of materials to be removed, plus the selected spoil disposal site(s) for any given dredging period; a detailed description of proposed dredging equipment and discharge facilities, including the length of discharge pipe purchased or available for the project and the pumping characteristics of the dredging equipment.

Subp. 3. **Inland excavations connected to public waters.** Inland excavations connected to public waters:

A. General standards: a permit shall be required for all excavations which extend the cross-section of public waters landward of the ordinary high water mark subject to the following restrictions:

(1) The applicant must establish either of the following: where a private inland boat slip or harbor is proposed, the applicant's entire shoreline shall be subject to wind and wave conditions of a magnitude occurring with an expected average frequency of at least once each year or possess lakebed conditions which would preclude the use of a temporary or permanent dock; or where a commercial or public marina or harbor is proposed, there shall be adequate existing demand in the area to support an inland marina or harbor without creating user conflicts.

(2) The facility shall be adequate in relation to appropriate engineering factors including but not limited to: adequate entrance openings, ample turning radius, adequate depth and size for the anticipated watercraft usage, adequate reduction of wave heights in mooring areas, proper harbor shape to reduce wave resonance, need for and feasibility of maintenance dredging, adequate height of perimeter wall, need for wave absorbers within the harbor, bank stabilization by an appropriate erosion control measure, and location of the mooring area of the harbor at an adequate distance from the shoreline for wave protection and to prevent breakthrough.

(3) The development plan shall be adequate in relation to appropriate geologic and hydrologic factors including but not limited to: quantity and quality of stream flow and local drainage at the proposed project site; water stagnancy problems including the capability of being flushed or drained; interference with stream flow or longshore drift; type of soil strata and underground formations in the project vicinity; and protection of the water body itself in terms of reduced water supply, increased seepage or drainage, pollution, increased flooding, and other adverse hydrologic impacts.

(4) The mooring area of the harbor shall be compactly shaped in order to minimize the surface area excavated in relation to the number of mooring spaces to be provided.

(5) No branch or connecting channels shall be permitted extending laterally outward from authorized inland excavations.

(6) If practical, a "dogleg" shall be incorporated in the approach channel located between the mooring area and the shoreline to minimize visual impact from the water body and promote wave dissipation.

(7) Suitable onland disposal shall be utilized for containment of excavated materials without erosion into public waters.

(8) Unless specifically prohibited, the excavation shall not extend more than 200 feet inland from the public water.

B. Additional specific requirements: the following types of inland excavations shall be subject to the following specific restrictions:

(1) Private riparian boat slips for inland mooring purposes: watercraft size shall be sufficiently great that a temporary dock or other seasonal mooring structure cannot reasonably be utilized along the subject shoreline for mooring of the riparian owner's watercraft. The width and length of the slip shall not exceed 150 percent of the width and length of the anticipated watercraft. Authorized boat slips shall be oriented to maximize the degree of wave protection.

(2) Private inland harbors serving one or more residential riparian lots: the harbor shall be appropriately sized to provide a single mooring space for each riparian lot served; and if practical, the facility shall be located along the mutual boundary of properties to be served.

(3) Private inland harbors for proposed multi-family or cluster developments, or for residential planned unit developments: the harbor shall be appropriately sized to provide a single mooring space for each riparian lot to be served. The number of mooring spaces to be provided shall generally be the amount of natural shoreline to be served divided by the lot requirements of the local land use control authority. The development plan shall be approved by the local governmental unit. The permit shall be of the title-registration type including a provision that the individual waterfront lots in the development have priority rights to the available mooring spaces thus obviating issuance of future permits for individual harbors for these lots.

(4) Inland harbors for private resorts, campgrounds, or similar enterprises: the harbor shall be sized to accomodate one mooring space for each rental cabin or campsite unit plus a reasonable number of mooring spaces for transient watercraft, and the permit shall be of the title-registration type to assure harbor maintenance and usage in the event of future property sale or subdivision.

(5) Public inland harbor projects: a public need for the proposed inland harbor shall be established by local governmental resolution specifying public interests to be enhanced. The harbor shall be appropriately sized consistent with the demand for mooring facilities in the area and the number of watercraft to be served. The harbor shall be available for use by the general public. The harbor may extend more than 200 feet inland provided the plans minimize the total length by which the public water is proposed to be extended in keeping with the number of watercraft to be served and the topography.

(6) Inland marinas: the marina may extend more than 200 feet inland from the public water, where appropriate deed covenants will preclude any future subdivision of the tract upon which the marina is located. The area shall be zoned specifically for such use or local government shall grant a land use permit. The plans shall minimize the width of the marina parallel to the shoreline consistent with the number of watercraft to be served and the site topography. The harbor shall be appropriately sized consistent with the demand

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for mooring facilities in the area and the number of watercraft to be served. The permit shall be of the title-registration type in the case of privately owned land to assure proper maintenance of the facility.

(7) Private inland boat slips for access to on-land boathouses: under the circumstances of the proposed site, mechanical systems such as rollers, winch and track systems, sliderails, etc., which are normally used to hoist watercraft out of the water, must be impractical, and the slip shall be no more than 25 feet long and is not wider than 150 percent of the width of the anticipated watercraft.

Subp. 4. **Alterations of natural watercourses.** Alterations of natural watercourses:

A. General standards: except as noted in item B, a permit shall be required for any alteration of a natural watercourse and shall be subject to the following requirements:

(1) The altered watercourse capacity shall be sufficient to adequately convey normal runoff.

(2) The altered watercourse bottom gradients shall be such that normal low flow velocities are nonerosive and the sideslopes shall be graded such that bank slumping is not a hazard.

(3) The outlet shall be adequate in that it sufficiently conveys the discharge waters from the area proposed for alterations, does not produce substantial increases in downstream overbank flooding, does not produce downstream erosion hazards as a result of the watercourse alterations.

(4) To protect the altered watercourse banks, all sideslopes which contribute direct surface runoff into the authorized altered watercourse, and a strip of land along both sides of the watercourse, one rod wide or to the top of the spoil bank, whichever is the greater, shall be seeded and maintained in permanent grasses. No mowing of this grassed strip shall be allowed until after July 31 of each year.

(5) Class I and Class II public watercourses: alterations of Class I and Class II public watercourses may be permitted, provided the proposed project will enhance at least one of the beneficial public purposes identified in Minnesota Statutes, section 105.37, subdivision 6, and does not cause undue detriment to all other beneficial public purposes presently served by the watercourse.

(6) Class III public watercourses: where the county board of commissioners has not assumed administrative responsibility pursuant to Minnesota Statutes, section 105.42, subdivision 1a, alterations of Class III public watercourses shall be permitted upon demonstration that the project accomplishes a reasonable objective and that no feasible and prudent alternatives are available.

B. Exceptions:

(1) No permit shall be required to remove debris such as trees, logs, stumps, and trash deposited by flood waters, provided such debris removal does not alter the original alignment, slope, or cross-section of the channel.

(2) No permit shall be required for the alteration of Class IV watercourses and of Class III watercourses where the county board of commissioners has assumed administrative responsibility pursuant to Minnesota Statutes, section 105.42, subdivision 1a, except in the following cases:

(a) any activity which would require widening, deepening, or straightening of a Class I or Class II public watercourse as a result of the change in the Class IV or county administered Class III watercourse;

(b) any diversion of water from a Class III or Class IV watercourse into a different watershed which is not a part of the same drainage basin;

(c) any lowering of the streambed elevation which would result in an overfall of two feet or more in elevation of a channelization project when there is no provision for erosion control structures to prevent headward erosion;

(d) construction of any dam 20 feet or more in structural height and/or impounding 50 acre-feet or more of water at maximum storage capacity.

(3) Pursuant to Minnesota Statutes, section 105.42, subdivision 1, no permit shall be required for Minnesota Statutes, chapter 106 drainage projects which do not substantially affect public waters.

Statutory Authority: *MS s 105.415*

6115.0210 STRUCTURES IN PUBLIC WATERS.

Subpart 1. **Policy and general requirements.** It is the policy of the department to discourage the waterward occupation of the beds of public waters by offshore navigational facilities, retaining walls, and other structures in order to preserve the natural character of public waters and their shorelands, and provide a balance between the protection and utilization of public waters; and to encourage the removal of existing waterway obstructions which do not serve the public interest from the beds of public waters at the earliest practicable date.

The placement of structures in public waters shall not be permitted where the structure:

A. is intended to gain access to navigable water depths where such access can be reasonably attained by alternative means;

B. will obstruct navigation and/or create a water safety hazard;

C. will be detrimental to significant fish and wildlife habitat, or protected vegetation. Construction is prohibited in posted fish spawning areas.

Except for docks and boat ramps, all new structures shall have a title-registered permit (or public agency or local governmental unit accepts responsibility for future maintenance or removal).

Subp. 2. **Permanent docks.** Permanent uses: no permit shall be required to construct or reconstruct a permanent dock on wood pilings where the site is subject to unusual physical conditions which would preclude the use of a seasonal dock, and the dock will not exceed 50 feet in length or extend to a depth greater than four feet, whichever is less.

Permit: a permit shall be required for the construction or reconstruction of any other permanent dock and shall be granted provided:

A. similarly situated permanent docks in the vicinity have not experienced maintenance difficulty or the use of a seasonal dock is precluded because:

(1) long fetches would subject seasonal docks to damaging storm wave conditions;

(2) bottom conditions such as bedrock or an extremely gradual offshore slope would preclude the use of seasonal dock stringers;

(3) the number of users (private and/or public) are so great the seasonal docking equipment would not provide adequate stability;

B. piling docks shall be used in all cases unless the depth to bedrock is too shallow to allow the driving of piles, in which case rock crib docks may be authorized; and

C. the docks shall extend lakeward only to a navigable depth. generally considered to be no greater than four feet.

Subp. 3. **Wharves.** A permit shall be required for the construction or reconstruction of all wharves. The following order of preference for construction types shall be utilized: bulkheaded shoreline, inland slip with bulkheaded sidewalls, wharf projecting into public waters.

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Permit: wharves shall be permitted provided the structure:

A. is the only reasonable alternative for loading or unloading a specific cargo;

B. is consistent with local land use controls;

C. does not extend further waterward than any existing wharves in the area or beyond any established harbor line, whichever is less;

D. size is the minimum practicable and the purpose is not to increase the amount of land available for waterfront development;

E. plans prohibit buildings or shelters on the deck, other than superstructures needed for cargo handling; and

F. is not an obstruction to flood flows or longshore drift and is adequately designed to resist the natural forces of ice, wind, and wave.

Subp. 4. **Off-shore breakwaters, harbors, and marinas.** Offshore breakwaters, harbors, and marinas:

A. General standards: a permit shall be required for the construction or reconstruction of all off-shore breakwaters, harbors, and marinas consistent with the requirements of subpart 1. Such structures shall be permitted provided the following general conditions and the additional listed specific conditions are met:

(1) Alternative dock or inland facilities are infeasible.

(2) The facility shall be adequate in relation to appropriate engineering factors including but not limited to:

(a) adequate entrance openings;

(b) ample turning radius;

(c) adequate depth and size for the anticipated watercraft usage;

(d) adequate reduction of wave heights in mooring areas;

(e) proper harbor shape to reduce wave resonance;

(f) necessity for and feasibility of maintenance dredging;

(g) adequate breakwater foundation conditions;

(h) need for wave absorbers within the harbor;

(i) adequate structural strength to withstand the pressures of wind, wave, and ice;

(j) proper orientation of breakwaters to achieve maximum wave attenuation, without causing additional sedimentation or erosion problems; and

(k) proper materials selection and placement preclude transmission of wave energy into mooring areas while adequately resisting erosive forces.

(3) The plan shall be adequate in relation to appropriate geologic and hydrologic factors including but not limited to:

(a) quantity and quality of streamflow and local drainage at the proposed project site;

(b) water stagnancy problems including the capability of being flushed or drained;

(c) interference with streamflow or longshore drift;

(d) type of soil strata and underground formations in the project vicinity; and

(e) protection of the water body itself in terms of reduced water supply, increased seepage or drainage, pollution, increased flooding, and other hydrologic impacts.

(4) The size and shape shall be designed in a compact fashion so as to blend in with the surrounding shoreline while minimizing the surface area occupied in relation to the number of watercraft to be served.

(5) The breakwaters shall not exceed the minimum thickness necessary to withstand the anticipated forces consistent with maintenance requirements and shall be faced with an adequate layer of natural rock riprap of appropriate size and gradation.

B. Additional specificc conditions: the following types of offshore structures shall be permitted, subject to the listed specific conditions:

(1) Private off-shore harbors serving several contiguous riparian lots:

The site shall meet the standards of subparts 1 and 2 for a permanent dock. The breakwater shall minimize encroachment waterward of the ordinary high water mark. The total length of the breakwater shall be appropriately sized to provide a single mooring space for each riparian lot served.

(2) Private offshore harbors for proposed multi-family or cluster or residential planned unit developments:

The breakwater shall minimize encroachment waterward of the ordinary high water mark and its total length shall be appropriately sized to provide a single mooring space for each riparian lot to be served. The number of mooring spaces to be provided shall generally be the amount of natural shoreline to be served divided by the lot frontage requirements of the local land use control authority.

The development plan shall be approved by the local land use control authority.

(3) Private off-shore harbors for resorts, campgrounds, or similar enterprises: the breakwater shall minimize encroachment waterward of the ordinary high water mark and its total length shall be appropriately sized to provide one mooring space for each rental cabin or campsite unit plus a reasonable number of mooring spaces for transient watercraft.

The development plan shall be approved by the local land use control authority.

(4) Public offshore harbor projects: the local unit of government shall pass a resolution which specifies the public interests to be benefited by the proposal. The harbor shall be appropriately sized consistent with the demand for mooring facilities in the area and the number of watercraft to be served. The harbor shall be available for use by the general public. The development plans shall minimize the waterward encroachment of the facilities.

(5) Offshore marinas: the area shall be zoned for such use or local government shall grant a land use permit. The proposed marina shall minimize encroachment waterward of the ordinary high water mark. The marina shall be sized consistent with the demand for mooring facilities in the area and the number of watercraft to be served.

Subp. 5. **Retaining walls.** Retaining walls:

A. General standards: a permit shall be required for the construction or reconstruction of all retaining walls which should be discouraged because their appearance is generally not consistent with the natural environment and their construction and maintenance cost is generally greater than riprap.

B. Permit: the issuance of permits shall be contingent on all of the following conditions:

(1) Existing or expected erosion problems shall preclude the use of riprap shore protection, or there shall be a demonstrated need for direct shoreland docking.

(2) Design shall be consistent with existing uses in the area. Examples are: riverfront commercial/industrial areas having existing structures of this nature, dense residential shoreland areas where similar retaining walls are common, resorts where floating docks may be attached to such a bulkhead, or where barges are utilized to transport equipment and supplies.

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(3) Adequate engineering studies shall be performed of foundation conditions, tiebacks, internal drainage, construction materials, and protection against flanking.

(4) The facility shall not be an aesthetic intrusion upon the area and is consistent with all applicable local, state, and federal management plans and programs for the water body.

(5) Encroachment below the ordinary high water mark shall be held to the absolute minimum necessary for construction.

Subp. 6. **Other waterway obstructions.** A permit shall be required for the construction, reconstruction, relocation, removal, and abandonment of all other offshore structures, cables other than utility crossings, pilings, or other facilities not covered by specific regulations:

A. Repair: permits for structural repair or modification (not including minor maintenance work such as reroofing, painting, etc.) of structures shall be issued provided all of the following conditions are met:

(1) applicant shall demonstrate a need for such work;

(2) cost shall not exceed 50 percent of assessed value;

(3) the degree of permanence of the structure shall not be materially increased by virtue of constructing a new foundation, replacing the majority of the structure above the foundation, etc;

(4) the structure being repaired shall not be in violation of local land use or sanitary regulations;

(5) degree of obstruction or structure size shall not be increased.

B. New structures: permits for new publicly-sponsored or relocation of existing structures shall be issued where:

(1) public need is documented and outweighs adverse environmental impact;

(2) the site is adequately protected from the forces of ice and wave pressures;

(3) the proposed construction is of sound design and is not unnecessarily obtrusive or visually incompatible with the natural surroundings;

(4) a governmental agency or local governmental unit accepts responsibility for future maintenance of the structure or its removal.

Subp. 7. **Boat launching ramps.** Boat launching ramps:

A. Permitted uses: no permit shall be required to construct a boat launching ramp provided:

(1) the site is capable of supporting a ramp without the use of pilings, dredging, or other special site preparation;

(2) the ramp shall not exceed 12 feet in width, and extend more than ten feet beyond the ordinary high water mark or into water more than four feet in depth, whichever is less;

(3) the ramp shall be constructed of gravel, natural rock, concrete, steel matting, or other durable nonorganic material not exceeding six inches in thickness.

B. Permit: a permit shall be granted for the construction or reconstruction of any other ramp provided:

(1) the applicant shall demonstrate a need for a launching facility;

(2) the proposed ramp shall be of the minimum dimensions necessary for launching of watercraft;

(3) the proposed ramp shall not obstruct flowing water;

(4) construction shall not necessitate alteration of shoreland which could result in substantial erosion and sedimentation.

Subp. 8. **Removal or abandonment.** A permit is required for the removal or abandonment of all existing waterway obstructions including boathouses, bridges, culverts, pilings, piers, and docks. However, when such work is to be accomplished by simple hand tool methods, the requirement for a permit may be waived. Permits shall be issued provided:

A. the original cross-section and bed conditions shall be restored insofar as practicable;

B. the structure shall be completely removed including any footings or pilings which obstruct navigation;

C. adequate provisions shall be made to mitigate any side effects resulting from removal, such as restoration of wave or current forces.

Statutory Authority: *MS s 105.415*

6115.0220 WATER LEVEL CONTROLS AND DAM CONSTRUCTION OR RECONSTRUCTION.

Subpart 1. **Policy.** It is the policy of the department to manage lake resources to maintain natural flow and water level conditions to the maximum feasible extent and to encourage the construction of small upstream retarding dams for the conservation of water in natural water basins and watercourses, consistent with any overall plans for the affected watershed area. The department shall oppose the artifical manipulation of water levels except where the balance of affected public interests clearly warrants the establishment of appropriate controls and it is not proposed solely to satisfy private interests. The construction or reconstruction of dams or changing the level of an existing structure may be permitted to:

A. control flood waters;

B. maintain low flows;

C. manage water quality, including the prevention and/or control of erosion and sedimentation;

D. improve water-based recreation;

E. create, improve, and maintain water supplies; and

F. maintain aquatic habitat for fish and wildlife species.

Subp. 2. **Permit requirements.** A permit shall be required for the construction, reconstruction, and abandonment of a dam or changing the level of an existing structure for the following projects:

A. Permanent lake level control facilities shall be approved when the commissioner initiates proceedings for the purpose of conserving or utilizing the water resources of the state and assumes responsibility for operation and future maintenance, or if:

(1) the ordinary high water mark and runout elevation of the water body have been determined by a detailed engineering survey, or by order of the commissioner following a public hearing;

(2) the proposed facilities shall be reasonably consistent with natural conditions:

(a) where a functioning outlet existed in a state of nature or for a long period of time following lawful creation or alteration of an outlet by the activities of man or animals, or cataclysmic events, the proposed outlet is at essentially the same control elevation;

(b) where no natural or artificial outlet exists and the lake is for all practical purposes landlocked, the control elevation shall not be more than 1.5 feet below the ordinary high water mark;

(3) the project is sponsored by a local governmental unit which assumes responsibility for operation and future maintenance, except that title-registration type permits may be issued where the majority of the riparian owners sign the permit application;

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(4) justification has been made of the need in terms of public and private interests and the available alternatives, including the impact on receiving waters and public uses thereof, through a detailed hydrologic study; and

(5) a detailed plan is developed for operation and control including manner and time of operation; frequency of maintenance; appropriate monitoring (water levels, water quality, etc.); management of excess waters.

B. Fish and wildlife management proposals made pursuant to Minnesota Statutes, section 97.48, subdivision 11, or other appropriate authority shall be approved where:

(1) the public water has been designated for wildlife management purposes;

(2) there is a specific water level management plan for the lake basin;

(3) any drawdown of the lake is only temporary and the management plans include a permanent facility for restoration of water levels following such drawdowns;

(4) any alteration of a natural watercourse included in the plan is minimal and follows the requirements specified in part 6115.0220, subpart 4;

(5) appropriate easements or fee title have been obtained for the construction area and the lakeshore;

(6) specified management personnel are required to establish a lake level gauge and keep a record of water levels with a specified frequency during seasons of active water level manipulation and with a lesser frequency during all other open water seasons.

C. Plans for landlocked water basins less than 25 acres in surface area and contained completely within the municipal boundaries of a single city shall be approved where:

(1) a municipal drainage plan for the affected tributary watershed is prepared by a qualified engineer or hydrologist and is approved by the affected watershed district and the city;

(2) the city has a field survey made of the water basin after consultation with the department including but not limited to the elevation of the aquatic fringe; the elevation of the tree line and a description of the location, type, and size of representative trees; groundwater elevations, if appropriate; other information as requested by the department;

(3) control elevations and associated physical parameters are approved by the department and the city;

(4) the city holds a public hearing on the proposal and provides a transcript of the proceedings to the department. Provision of a transcript may be waived by the department.

D. Other dam construction or reconstruction:

(1) Permitted uses: No permit shall be required to construct, reconstruct, or abandon a dam with a contributing watershed of 300 acres or less, provided structural height shall not exceed 20 feet; storage capacity shall not exceed 50 acre-feet; the land(s) occupied by the dam and its associated reservoir shall be in common ownership.

(2) Permit: a permit shall be required for the construction, reconstruction, and abandonment of all other dams and shall be issued provided:

(a) the need is established in terms of quantifiable benefits;

(b) new dams shall be adequate in relation to the following factors:

The hydraulic capacity of the spillway(s) must be established by a competent technical study performed by a professional engineer or by a qualified engineer of the U.S. Soil Conservation Service or the U.S. Corps of Engineers and must be adequate:

i. for the probable maximum flood, where failure may cause loss of human life and serious damage to homes, industrial and commercial buildings, important public utilities, main highways, or railroads;

ii. for the standard project flood, in predominantly rural or agricultural areas where failure may damage isolated homes, main highways or minor railroads, or cause interruption of use or service of relatively important public utilities;

iii. for the regional flood, in rural or agricultural areas where failure may damage farm buildings, agricultural land, or township or county roads;

iv. for such other floods as may be specified in the procedures of federal agencies such as the Corps of Engineers or the Soil Conservation Service for analysis of a structure in its risk category; and

v. the estimation of the magnitude of the design flood must include the anticipated effects of the development of the tributary watershed area expected over the project life and the assessment of the risks involved must be based upon anticipated development in the floodplain.

The department may require preparation of an inundation map of the area which would be inundated in the event of dam failure for a structure with a height of 20 feet or more, or a maximum storage capacity of more than 50 acre-feet. It shall be prepared by a professional engineer showing areas where human life would be endangered and areas subject to serious damage to homes, commercial and industrial buildings, public utilities, and transportation facilities. Where failure may endanger human life, the map shall include a feasibility report on floodplain evacuation, emergency warning systems, or other techniques to eliminate this risk factor.

An emergency spillway must be installed unless the hydraulic capacity of the principal spillway is increased to the capacity that would be required for the combination of principal and emergency spillways.

A mechanism for drawing down the water surface to facilitate repairs and maintenance work must be installed.

The height of all portions of the dam and associated dikes or other facilities not designed to withstand overtopping must include appropriate freeboard above the maximum storage capacity for wind and wave conditions and to provide a safety factor.

Earthen emergency spillways and the upstream and downstream faces of earthen dams must be adequately riprapped, sodded, or seeded to prevent erosion.

The storage pool must provide adequate space to store sediment from upstream over the project life without detracting from the public purposes served.

An adequate stilling basin or other means of controlling downstream erosion must be installed.

A stage-discharge curve must be developed for the watercourse immediately below the dam to ascertain whether or not the dam capacity is reduced due to backwater effects.

Information as to the extent, configuration, and capacity of the reservoir at various pool stages must be provided.

(c) The structural design shall be done by a professional engineer or by a qualified engineer of the Soil Conservation Service or the Corps of Engineers and must include the following considerations:

i. gravity forces;

ii. hydrostatic pressure;

iii. uplift forces;

iv. overturning moment;

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6115.0230 BRIDGES AND CROSSINGS, INTAKES

Subpart 1. **Policy.** public waters, including structures in public wa unavailable or unreasonab health, safety, and welfar project:

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Subp. 2. **Bridge and cu**

A. Permitted use low-water ford type crossin provided all of the following

(1) Low-water supporting the crossing with special site preparation. T

v. resistance to sliding;

vi. ice pressures;

vii. earthquake forces;

viii. slope stability including consolidation and pore pressures;

ix. seepage collection or prevention;

x. foundation conditions including appropriate borings and determination of the strength of foundation materials;

xi. specifications for materials of construction and their placement or installation;

xii. adequate construction inspection to assure conformance with design assumptions; and

xiii. adequacy of the cofferdam, if any.

(d) Adequate assurances shall be made for future maintenance of new dams.

For dams 20 feet or more in structural height or having a maximum storage capacity of 50 acre-feet or more, permits will be issued only to governmental agencies, public utilities, or corporations having authority to construct and maintain such projects, except that a title-registration type permit may be issued to the owner or owners of the private property upon which the proposed dam will be located if an authorized governmental sponsor assumes maintenance responsibility.

For other dams, title-registration permits may be issued to the owner or owners of the private property upon which the dam will be located which shall run with the land and require breaching or removal if it ever falls into a state of disrepair or becomes unsafe.

Periodic engineering inspections of authorized dams may be made by the department or its designee.

Statutory Authority: *MS s 105.415*

6115.0230 BRIDGES AND CULVERTS, WATERMAIN AND SEWER CROSSINGS, INTAKES AND OUTFALLS.

Subpart 1. **Policy.** It is the policy of the department to allow crossings of public waters, including the construction of water intake and sewer outfall structures in public waters, only when less detrimental alternatives are unavailable or unreasonable, and where such facilities adequately protect public health, safety, and welfare. Such crossings shall not be permitted where the project:

A. will obstruct navigation or create a water safety hazard;

B. will cause or contribute to significant increases in flood elevations and flood damages either upstream or downstream;

C. would involve extensive channelization above and beyond minor stream channel realignments to improve hydraulic entrance/exit conditions, except where a separate permit is obtained pursuant to part 6115.0200, subpart 4;

D. will be detrimental to water quality, and/or significant fish and wildlife habitat, or protected vegetation.

Abandonment or removal of all crossings and structures governed by this section shall require a permit pursuant to part 6115.0210, subpart 8.

Subp. 2. **Bridge and culvert installations.** Bridge and culvert installations:

A. Permitted uses: No permit shall be required to construct a low-water ford type crossing or place a temporary bridge over public waters provided all of the following conditions are met:

(1) Low-water ford type crossings: The stream bed is capable of supporting the crossing without the use of pilings, culverts, dredging, or other special site preparation. The water depth does not exceed two feet under

normal summer flow conditions. The crossing conforms to the natural cross-section of the stream channel and does not reduce or restrict normal low-water flows. The original stream bank at the site does not exceed four feet in height. The crossing is constructed of gravel, natural rock, concrete, steel matting, or other durable inorganic material not exceeding one foot in thickness. The approach is graded to a finished slope not steeper than 5:1, and all graded banks are seeded or mulched to prevent erosion and sedimentation. The crossing is not placed on an officially designated trout stream or on a federal wild, scenic, or recreational river.

(2) Temporary bridges: The stream bank is capable of supporting the bridge without the use of foundations, pilings, culverts, excavation, or other special site preparation. Nothing is placed in the bed of the stream. The bridge is designed and constructed so that it can be removed for maintenance and flood damage prevention. The bridge is firmly anchored at one end and so constructed as to swing away in order to allow flood waters to pass. The lowest portion of the bridge shall be at least three feet above normal summer streamflow.

B. Permit: A permit shall be required for the construction, reconstruction, or relocation of all other bridges, culverts, or other crossings over public waters. Except as noted in subpart 3 relating to sewer and water main crossings, crossings shall be permitted provided all of the following criteria are met:

(1) The hydraulic capacity of the structure must be established by a competent technical study. The sizing shall not be based solely on the size of existing upstream and downstream structures. If a state or federal flood plain information study exists for the area, or a U.S. Geological Survey gauging station is located nearby on the stream, the hydraulics of the proposed bridge/culvert design must be consistent with these data. If acquisition of the study by the applicant would cause undue hardship and would be unreasonable under the circumstances, the department may waive the requirement if:

(a) it has performed a rough hydraulic study based upon available information and reasonable assumptions;

(b) it has made a field investigation of the project site;

(c) the project will not cause flood-related damages or problems for upstream or downstream interests;

(2) New crossings and replacements of existing crossings must comply with local floodplain management ordinances and with provisions of part 6120.5700, subpart 4, item A.

(a) New crossings: No approach fill for a crossing can encroach upon a community designated floodway. Where a floodway has not been designated or where a floodplain management ordinance has not been adopted, increases in flood stage in the regional flood of up to 0.5 foot shall be permitted if they will not materially increase flood damage potential. Additional increases may be permitted if: a field investigation and other available data indicate that no significant increase in flood damage potential would occur upstream or downstream; any increases in flood stage are reflected in the floodplain boundaries and flood protection elevation adopted in the local floodplain management ordinance.

(b) Replacement of existing crossings: If the existing crossing has a swellhead of 0.5 feet or less for the regional flood, the replacement crossing shall comply with the provisions for new crossings in unit (a). If the existing crossing has a swellhead of more than 0.5 feet for the regional flood, stage increases up to the existing swellhead may be allowed provided field investigation and other available data indicate that no significant flood damage potential exists

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upstream from the crossing. The swellhead for the replacement crossing may exceed the existing swellhead if it complies with the provisions for new crossings found in the last sentence of unit (a).

(c) The decks and approaches to bridges or culverts on major transportation routes and on roads that provide access to development at urban densities shall be no lower than two feet below the flood protection elevation as defined in part 6100.5700, subpart 5, unless it can be shown that alternative routes or access can be provided during the regional flood.

(3) The structure shall provide for game fish movement, unless the structure is intended to impede rough fish movement or the stream has negligible fisheries value.

(4) The structure will not obstruct public navigation. For bridges, three feet above the calculated 50-year flood stage, in keeping with Federal Highway Administration standards, will ordinarily satisfy navigational clearance requirements. For culverts, three feet of clearance above the ordinary high water mark will ordinarily satisfy navigational requirements.

(5) Any project proposed near an existing or proposed segment of the state trails system should be consistent therewith.

(6) Footbridges and walkways:

(a) Over watercourses should be designed to cause negligible backwater effects during floods; should be securely anchored or otherwise capable of withstanding the dynamic forces of flowing water, ice, and debris. Approaches should not be raised above the adjacent floodplain lands.

(b) New walkways across any portion of a lakebed to provide access to an island will be prohibited. Permits for reconstruction of existing walkways will be issued only if: the walkway provides the only existing access to the island; there is existing development thereon; the design will provide for any public navigational needs and is consistent with the natural surroundings.

Subp. 3. **Watermain and sewer crossings.** A permit shall be required for the construction, reconstruction, or relocation of all watermain and sewer crossings. They shall be issued provided:

A. No site condition will cause frequent future disruption of the beds.

B. No alignment alternative is possible which would eliminate the crossing. The selection of an alignment shall consider the preservation of lakes, streams, wetlands, recreation lands, and other natural areas.

C. Minimum depth of cover is two feet.

D. Bed and banks must be restored as nearly as practicable to the original cross-section, alignment, and grade.

E. Banks must be revegetated by seeding and/or sodding.

F. The project must be designed by a professional engineer.

G. Pipe and pipe bedding/support specifications for sanitary sewer and force main crossings shall be submitted to the department for approval. Construction plans and specifications shall be prepared by a professional engineer.

Subp. 4. **Intakes and outfalls.** Intakes and outfalls:

A. Permitted uses: no permit shall be required to maintain the hydraulic adequacy of any storm sewer or agricultural drain tile outfall or ditch which has been functioning within the previous five years if such work does not alter the original course, current, or cross-section of the public waters.

B. Permit: a permit shall be required for the construction, reconstruction, or relocation of all other water intake and sewer outfall structures placed in public waters. It shall be issued where:

(1) Adequate attention is given to methods of screening the structure from view as much as possible from the surface of the public water through the use of existing vegetation and/or new plantings.

(2) The project is not detrimental to public values including but not limited to fish and wildlife habitat, navigation, water supply, and storm water retention.

(3) No site conditions will require frequent future disruption of the beds of public waters.

(4) Adequate precautions must be planned during and after construction to prevent silt, soil, and other suspended particles from being discharged into public waters.

(5) Adjacent to the intake structure, the banks and bed of the public water must be protected from erosion and scour by placement of suitable riprap shore protection.

(6) The banks must be revegetated by seeding and/or sodding.

(7) The structure must be designed by a professional engineer.

(8) Intake structures: dredging or excavation must be detailed in the application and on design plans. A water appropriation permit must be obtained from DNR prior to operation.

(9) Outfall structure design shall:

(a) where necessary, incorporate a stilling-basin, surge-basin, energy dissipator, or other device(s) to minimize disturbance and erosion of natural shoreline and bed resulting from peak flows;

(b) where feasible, utilize discharge to natural wetlands, natural or artificial stilling or sedimentation basins, or other devices for entrapment (and possible future removal) of sand, silt, debris, and organic matter;

(c) where feasible, maximize use of natural and/or artificial ponding areas to provide water retention and storage for the reduction of peak flows into public waters.

Statutory Authority: *MS s 105.415*

6115.0240 APPLICATION FOR WATER RESOURCE PERMITS.

Subpart 1. **Forms; submission.** All applications pursuant to parts 6115.0150 to 6115.0230 shall be made on forms prepared by the department and submitted to the regional office for the area where the majority of the proposed project is located.

Subp. 2. **Who may apply.** Applications shall be submitted by the riparian owner of the land(s) on which a project is proposed, except:

A. A governmental agency, public utility, or corporation authorized by law to conduct the project may apply if the property rights acquired or to be acquired are fully described in the application.

B. A holder of appropriate property rights such as a lease or easement may apply provided that the application is countersigned by the owner and accompanied by a copy of the lease or other agreement. A permit may be issued for the term of the lease only, subject to cancellation prior to the termination date of the agreement if the agreement is canceled.

C. A prospective lessee of state-owned lands may apply for a permit in his own name after he has requested a lease from the departmental official responsible for the affected lands. Both the lease request and the permit application will be processed concurrently with appropriate coordination.

Subp. 3. **Information required.** Pursuant to Minnesota Statutes, section 105.44, subdivision 4, an application shall be considered complete when:

A. It includes all of the information specified in the appropriate section(s) of these standards.

B. It is accompanied by appropriate photographs, maps, sketches, drawings, or other plans which adequately describe the proposed project.

C. It includes a brief statement regarding the following points: anticipated changes in water and related land resources; unavoidable anticipated

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6115.0250 PERMIT REV

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6115.0260 STATUTORY RE

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6115.0300 PURPOSE AND S

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D. Application fees have been paid. Note that final permits cannot be issued until any field inspection fees are paid.

E. Proof of service of a copy of the application and accompanying documents on the mayor of the city or the secretary of the board of the district is included with the application if the project is within or affects a city, watershed district, or soil and water conservation district.

Subp. 4. **Fees.** All applications shall be accompanied by an application fee as required by part 6115.0600. An additional fee may be charged for field inspections conducted by department personnel in the course of review subject to the provisions of part 6115.0080.

Statutory Authority: *MS s 105.415*

6115.0250 PERMIT REVIEW.

Subpart 1. **Field inspection.** The department may conduct field investigations to determine a project's nature, scope, and impact on water and related land resources. The department shall determine which applications must be investigated and such inspections shall be made in a timely fashion.

Subp. 2. **Coordination with other agencies.** Nothing in these standards is intended to supersede or rescind the laws, rules, regulations, standards, and criteria of other federal, state, regional, or local governmental subdivisions with the authority to regulate work in the beds or on the shorelands of public waters. The issuance of a permit shall not confer upon an applicant the approval of any other unit of government for the proposed project. The department shall coordinate the review with other units of government having jurisdiction in such matters.

Subp. 3. **Procedure upon decision.** The commissioner is authorized to grant permits, with or without conditions, or deny them. In all cases, the applicant, the managers of the watershed district, the board of supervisors of the soil and water conservation district, or the mayor of the city may demand a hearing in the manner specified in Minnesota Statutes, section 105.44, subdivision 3, within 30 days after receiving mailed notice outlining the reasons for denying or modifying an application. Any hearing shall be conducted as a contested case hearing before a referee appointed by the independent Office of Administrative Hearings in accordance with Minnesota Statutes, chapter 14, and sections 105.44 and 105.45.

Statutory Authority: *MS s 105.415*

6115.0260 STATUTORY REQUIREMENTS.

Further provisions for the administration of these parts are found in Minnesota Statutes, chapter 105, including but not limited to Minnesota Statutes, sections 105.44 to 105.463, 105.541, and 105.55.

Statutory Authority: *MS s 105.415*

DAMS

6115.0300 PURPOSE AND STATUTORY AUTHORITY.

The purpose of these rules is to regulate the construction and enlargement of dams, as well as the repair, alteration, maintenance, operation, transfer of ownership, and abandonment, in such a manner as to best provide for public health, safety, and welfare. In the application of these parts, the department shall be guided by the policies and requirements declared in Minnesota Statutes, chapters 105 and 116D.

The rules are pursuant to Laws of Minnesota 1978, chapter 779, section 8, and are intended to be consistent with the goals and objectives of applicable federal and state environmental quality programs and policies including, but not

from the full responsibility of providing adequate inspection and supervision for all programs and projects undertaken by the district.

Subp. 6. **Compliance with other laws and water management policies.** Lake improvement districts shall conform to federal, state, regional, and local laws, rules, and fish and wildlife, water, and related land management policies. Lake improvement districts shall obtain all necessary permits, as required by law, prior to implementing district purposes and programs.

Subp. 7. **Compliance by preexisting lake improvement districts.** Within one year following promulgation of these parts, lake improvement districts in existence prior to the promulgation of these rules shall submit to their county board and to the commissioner a certified copy of a document containing the information required by part 6115.0970. This document shall also contain a report on the past and current activities and financial condition of the district.

The commissioner shall review the document and prepare an advisory report stating his findings as to whether the district is consistent with these parts. The report may contain such recommendations as the commissioner determines is necessary to bring the district into compliance with these parts.

Within 60 days following the official filing of the commissioner's report with the county board, the board shall formally convene to consider the report. The county board shall give ten working days' notice to the commissioner of the time and place where it will convene to consider his report. If the commissioner or his representative does not appear, the report shall be publicly read into the record.

Statutory Authority: *MS s 378.41*

WATERCOURSES

6115.1000 STATUTORY AUTHORITY; EFFECTIVE DATE.

These parts are of no effect and null and void unless they are authorized and made valid and enforceable by an act of the 1976 Minnesota legislature establishing an accelerated program of inventorying, classifying, and designating waters of this state, and prescribing these parts by making specific reference to them. If such an act becomes law, these parts are effective on the effective date of that act, and shall remain in effect for each county until the designation and classification of public waters in that county pursuant to the act and these parts has been completed. Any procedure specified herein shall be modified as necessary so as not to conflict with the language of the act.

Statutory Authority: *MS s 84.415*

6115.1010 PURPOSE.

These parts supplement the above-referenced act by providing additional procedures and criteria for the identification and classification of public waters.

These parts also provide interim guidelines for making public waters determinations as the need arises prior to completion of the process described in the act.

Statutory Authority: *MS s 105.391 subd 8*

NOTE: Minnesota Statutes, section 105.391, subdivision 8 has been repealed by Laws 1979, chapter 199, section 17.

6115.1020 DESIGNATION OF WATER BASINS AND WATER COURSES AS PUBLIC WATERS.

Only those surface waters of the state which are confined may be considered for designation as public waters. There are two types of confining containers: water basins and watercourses. The definitions of the two types relate only to their ability to contain confined waters. The determination of whether or not the confined waters are public waters is based on the criteria in Minnesota

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Statutes, sections 105.37, subdivision 6, and 105.38, and on the further delineation of those criteria in these parts.

Statutory Authority: *MS s 105.391 subd 8*

NOTE: Minnesota Statutes, section 105.391, subdivision 8 has been repealed by Laws 1979, chapter 199, section 17.

6115.1030 DEFINITION OF WATER BASIN.

An enclosed basin normally filled or partly filled with water may be defined as a water basin. The water basin may have inlet and outlet streams, it may have only an inlet or outlet, or it may be completely enclosed.

All water basins have a natural fluctuation in water levels. Water basins with intermittent surface water inflow and little groundwater inflow fluctuate through great ranges in levels from very low to extremely high. Other water basins which have perennial streams as inlets and outlets may fluctuate within a narrow range. Water basins which receive a major portion of their water supply from groundwater, springs, and seeps will generally have fairly uniform levels as long as the groundwater supply to the basin remains somewhat constant.

Water basins may include all natural enclosed depressions which have substantial banks normally containing water and which are discernible on aerial photographs taken during normal conditions. This includes all bodies of water, except streams, which are shown within the meander lines on plats of the general lake office surveys.

Water basins constantly undergo changes in size, depth, and shape. The rate and type of change in a given water basin is dependent upon several factors including: the climatic and topographic conditions; the nature of the soil or rock materials which underlie the water basin and cover the basin watershed; the biological environment; the physical configuration; and the nature and extent of artificial and natural drainage within the watershed of the water basin.

Statutory Authority: *MS s 105.391 subd 8*

NOTE: Minnesota Statutes, section 105.391, subdivision 8 has been repealed by Laws 1979, chapter 199, section 17.

6115.1040 DEFINITION OF WATERCOURSE.

There are three kinds of watercourses:

A. natural watercourses may be defined as any natural channel having definable beds and banks capable of conducting generally confined runoff from adjacent lands. During floods water may leave the confining beds and banks, but under low and normal flows water is confined within the channel. A watercourse may be intermittent or perennial. Natural, as defined herein, means in a state provided by nature without deepening, straightening, or widening.

B. an altered natural watercourse is a former natural watercourse which has been affected by man-made changes resulting in straightening, deepening, and widening of the original channel. Altered natural watercourses have been altered as the result of legally authorized changes under provisions of Minnesota Statutes, chapter 106, public drainage laws, or prior applicable laws, or as the result of private actions without any public drainage procedures.

C. an artificial watercourse is a watercourse which has been artificially constructed by man where there was no previous natural watercourse.

Statutory Authority: *MS s 105.391 subd 8*

NOTE: Minnesota Statutes, section 105.391, subdivision 8 has been repealed by Laws 1979, chapter 199, section 17.

6115.1050 WETLANDS DEFINED.

Wetlands types referred to in these parts are as described in Circular 39, Wetlands of the United States, published by the United States Department of Interior.

Statutory Authority: *MS s 105.391 subd 8*

NOTE: Minnesota Statutes, section 105.391, subdivision 8 has been repealed by Laws 1979, chapter 199, section 17.

6115.1060 PUBLIC WATERS; WATER BASINS AND WATERCOURSES.

Subpart 1. **Mandatory designation.** The following water basins shall be public waters:

A. all water basins which have been classified as public waters under the Shoreland Management Act (Minnesota Statutes, section 105.485) and which have been specified as public waters under county and municipal shoreland zoning ordinances, subject to a determination that such water basin is not permanently dry or has not reverted to wetland type 1 or 2;

B. all meandered lakes, except those which have been legally drained;

C. all water basins designated by the commissioner for management for a specific purpose pursuant to applicable laws, for example, trout lakes; and

D. all water basins located within and surrounded by publicly owned lands, including, but not limited to state parks, scientific and natural areas, and wildlife management areas.

Subp. 2. **Water basins subject to additional criteria.** The following water basins not listed in subpart 1 may be public waters, subject to application of the statutory criteria of Minnesota Statutes, sections 105.37, subdivision 6 and 105.38, as further explained in part 6115.1150:

A. in unincorporated areas, water basins greater than ten acres in area, excluding type 1 and type 2 wetlands;

B. in incorporated areas, water basins of any size;

C. any water basin which a county or municipality asks to be considered for designation as public waters; and

D. any water basin which the private owners of all the land around the basin ask to be considered for designation as public waters.

Subp. 3. **Watercourses as public waters.** Any watercourse may be public waters which fits the criteria of Minnesota Statutes, sections 105.37, subdivision 6, and 105.38, as further explained in part 6115.1150.

Statutory Authority: *MS s 105.391 subd 8*

NOTE: Minnesota Statutes, section 105.391, subdivision 8 has been repealed by Laws 1979, chapter 199, section 17.

6115.1070 INVENTORY AND DESIGNATION OF WATER BASINS AS PUBLIC WATERS.

Subpart 1. **Preliminary designation procedures.** The commissioner, using an analysis of the data on file and a review and analysis of aerial photos, shall make preliminary evaluations of those water basins which may be considered for inclusion as public waters within each county.

The commissioner will prepare maps for each county showing the location of all water basins in each county originally inventoried in Bulletin 25, An Inventory of Minnesota Lakes published in 1968 by the Division of Waters, Soils and Minerals, and the location of any other water basins of any size in incorporated areas and of ten acres or more in unincorporated areas not listed in the bulletin but determined from the most recent available detailed aerial photographs of the county, not taken during a period of flooding, or drought. The use of the photos is only to determine if a basin exists and not to prove the basin is public waters solely on the photographic data.

The commissioner shall designate on the map, as a preliminary evaluation, those water basins which are considered to be public waters, utilizing the criteria specified in part 6115.1150. This preliminary designation will be supported by explanations of the basis for making the designation of each water basin as public waters. A listing of those basins, a map showing their general location in the county, and an explanation of the reason for the preliminary selection of the water basin as public waters will be submitted to those local governmental agencies with jurisdiction in the area where the water basin is located for their review, analysis, and comment. Local governments may add any water basin for consideration, regardless of the size of the water basin.

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Subp. 2. **County review; field investigations.** Where the county disagrees with the preliminary designation of the commissioner, the commissioner shall undertake discussions with the county in order to resolve differences. Where necessary, he may initiate a detailed field investigation.

A field investigation, when necessary, may be made by the Department of Natural Resources with full cooperation and consultation with local governmental authorities and any of their designated representatives in order to assure maximum input from the local governmental authorities and to allow maximum discussion and interchange of facts regarding the area involved, utilizing the criteria specified in part 6115.1150.

At a minimum, the commissioner shall seek assistance in making field investigations from the following:

A. counties and other local governmental agencies and their representatives;

B. soil and water conservation districts;

C. watershed districts, if there are any organized districts, located in the area where the water basins are situated;

D. any U.S. governmental agencies which may be willing to assist in the field investigation in a fact-finding capacity; and

E. affected property owners and parties who may wish to contribute technical expertise.

Subp. 3. **Further procedures.** The commissioner shall make maximum efforts to resolve any problems involving designations after completion of field investigations. Further procedures for designating water basins as public waters are specified in the act prescribing these parts.

Statutory Authority: *MS s 105.391 subd 8*

NOTE: Minnesota Statutes, section 105.391, subdivision 8 has been repealed by Laws 1979, chapter 199, section 17.

6115.1080 INVENTORY, DESIGNATION, AND CLASSIFICATION OF WATERCOURSES AS PUBLIC WATERS.

Subpart 1. **Access to maps.** The commissioner will furnish each county with copies of the latest available U.S. Geological Survey topographic (quadrangle) maps for use in making a preliminary designation and classification of watercourses which may be public waters within the county. Counties may use any other available maps and information in making the inventory. It is recommended that counties enter into agreements with soil and water conservation districts and watershed districts, where existent, in order to expedite the inventory and provide maximum local assistance and cooperation.

Subp. 2. **Use of maps by counties.** It is recommended that counties use, as official work maps, the U.S. Geological Survey topographic (quadrangle) maps of the county, and where such maps are not available, the use of similar scale aerial photographic blueline prints. These maps and prints form the best available base for showing the location and extent of the various watercourses. It should be noted that the maps may not and often will not contain all of the watercourses, especially since the maps were prepared at various times and some are quite old.

The commissioner will furnish each county with reproducible county maps at a scale of one inch equals one mile for use as an official designation map for final watercourse designation and classification.

Each county shall indicate on the official map the location of all watercourses, natural, altered, and artificial as defined in parts 6115.1020 to 6115.1050.

Counties shall include the location and extent of all these watercourses and identify them as to their character by using the following map symbol along the watercourse extent: natural watercourses, solid lines; altered natural watercourses, dashed lines; artificial watercourses, dotted lines.

Each county shall indicate on the official map the name of the natural watercourse or the number and designation of the altered natural or artificial watercourse.

Subp. 3. **Preliminary desigation by county.** The county shall designate on the map, as a preliminary evaluation, those watercourses which it considers to be public waters, utilizing the criteria specified in parts 6115.1060 and 6115.1150. The county shall classify each public watercourse as to the degree of regulation which shall apply to each watercourse. The criteria for each class, and the degree of regulation which the commissioner shall apply to each class, are as follows:

A. Class I public watercourses. Natural watercourses serving as major drainage outlets, or major tributaries to those outlets, which are capable of serving a number of beneficial public purposes. Examples include the Rainy River, Mississippi River, Red River, Root River, Blue Earth River and the Rum River. Smaller natural watercourses serving specific values such as trout streams and scenic watercourses. Examples might include: Nine Mile Creek, Hennepin County; Minnehaha Creek, Hennepin County; Baptism River, Lake County; and Spring Creek, Goodhue County. Permits shall be required under Minnesota Statutes, section 105.42, for all activities which change the course, current, or cross-section of Class I public watercourses and under Minnesota Statutes, section 84.415, for all utility crossings thereof.

B. Class II public watercourses. Natural watercourses serving as tributaries of Class I watercourses which are often perennial streams serving more than one beneficial public purpose. Permits shall be required under Minnesota Statutes, section 105.42, for all activities which change the course, current, or cross-section of Class II public watercourses and under Minnesota Statutes, section 84.415, for all utility crossings thereof.

C. Class III public watercourses. Smaller natural watercourses and altered natural watercourses not constructed under Minnesota Statutes, chapter 106, which are often intermittent streams serving at least one beneficial public purpose.

Permits shall not be required under Minnesota Statutes, section 84.415. Nor shall permits be required under Minnesota Statutes, section 105.42, except for the following types of activities on Class III public watercourses:

(1) any activity which would require widening, deepening, or straightening of a Class I or II public watercourse as a result of the change in the Class III public watercourse;

(2) construction of any dam 20 feet or more in structural height as measured vertically from the lowest point of the foundation surface to the top of the dam and/or impounding 50 acre-feet or more of water at maximum storage capacity (based on the national dam inspection program);

(3) any diversion of water from a Class III public watercourse into a different watershed which is not part of the same drainage basin;

(4) any lowering of the streambed elevation which would result in an overfall of two feet or more in elevation of a channelization project when there is no provision for erosion control structures to prevent headward erosion.

D. Class IV watercourses. These shall include any watercourses in existence at the time of inventory which are artificial watercourses and altered natural watercourses, constructed under the provisions of Minnesota Statutes, chapter 106, or prior laws, or as the result of private actions without any public drainage proceedings.

Permits shall not be required under Minnesota Statutes, section 84.415. Nor shall permits be required under Minnesota Statutes, section 105.42, except for the following types of actions on Class IV watercourses:

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(1) any activity which would require widening, deepening, or straightening of a Class I or II public watercourse as a result of the change in the Class IV public watercourse;

(2) construction of any dam 20 feet or more in structural height as measured vertically from the lowest point of the foundation surface to the top of the dam and/or impounding 50 acre-feet or more of water at maximum storage capacity (based on the national dam inspection program);

(3) any diversion of water from a Class IV public watercourse into a different watershed which is not part of the same drainage basin; and

(4) any lowering of the streambed elevation which would result in an overfall of two feet or more in elevation of a channelization project when there is no provision for erosion control structures to prevent headward erosion.

Counties shall indicate on the official designation map their preliminary classification of watercourses as to Class I, II, III, or IV.

Upon completion of the preliminary classification of watercourses delineated by the county, the county will submit the preliminary inventory and classification to the commissioner by indicating the classification review, evaluation, and comment.

Subp. 4. **Commissioner review.** Where the commissioner disagrees with the preliminary designations and classifications of the county, he shall undertake discussions with the county in order to resolve differences. He may initiate field investigations of the sort described in part 6115.1070, subpart 2.

Subp. 5. **Further procedures.** The commissioner shall make maximum efforts to resolve any problems involving designations and classifications after completion of discussions and field investigations. Further procedures for designating watercourses as public waters and classifying them are specified in the act prescribing these parts.

Statutory Authority: *MS s 105.391 subd 8*

NOTE: Minnesota Statutes, section 105.391, subdivision 8 has been repealed by Laws 1979, chapter 199, section 17.

6115.1090 INTERIM PROCEDURES AND CRITERIA FOR MAKING PUBLIC WATERS DETERMINATIONS.

Subpart 1. **Purpose.** In order to provide a systematic transition from the present method for dealing with determinations of public waters and the program for statewide delineation on a county-by-county basis, it is necessary that interim procedures for classifying public waters be adopted. It is intended that these procedures be especially applicable in the agricultural areas of the state and where, because of the need for agricultural land drainage, there are major problems involving these waters.

Subp. 2. **Procedure.** Any person contemplating a change in the course, current, or cross-section of a water basin or watercourse which may be one of the kinds described in part 6115.1060 shall consult with the nearest regional office of the Department of Natural Resources to find out if it is public waters, or ask county or municipal officials to contact the department for him or her. Except during periods when climatic conditions prevent adequate field investigations, the commissioner shall have not to exceed 60 days from the date of request by the party or county or municipality to determine whether or not the basin is public waters, and if the determination is not made within that time, then the water basin is not public waters for purposes of the particular change contemplated by the particular party, or the watercourse is Class III, or is Class IV if it is a part of a legal drainage system.

Subp. 3. **Criteria.** The commissioner's interim criteria for determining whether or not a water basin or watercourse is a public water are those specified in part 6115.1060. His criteria for classifying watercourses are those specified in part 6115.1080, subpart 3.

Statutory Authority: *MS s 105.391 subd 8*

NOTE: Minnesota Statutes, section 105.391, subdivision 8 has been repealed by Laws 1979, chapter 199, section 17.

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32. Agreements, assignments, or contracts. All assignments, agreements, or contracts affecting this lease shall be made in writing and signed by all parties thereto, witnessed by two witnesses, properly acknowledged and shall contain the post office addresses of all parties thereto, and when so executed shall be presented in quadruplicate to the commissioner for record. No such instrument shall be valid until approved in writing by the commissioner and approved as to form and execution by the attorney general. No assignment or other agreement shall relieve the lessee of any obligation or liability imposed by this lease, and all assignees, sublessees, and subcontractors shall also be liable for all obligations or liabilities imposed by this lease.

33. Lease binding on assignees and successors. The covenants, terms, and conditions of this lease shall run with the land and shall extend to and bind all assignees and other successors in interest of the lessee.

34. Notices. For the purposes of this lease, the addresses of the parties shall be as follows, unless changed by written notice to all parties: For the state -- Commissioner of Natural Resources, State of Minnesota, Centennial Office Building, Saint Paul, Minnesota 55101; for the lessee -- _____.

Statutory Authority: *MS s 93.08; 93.25*

PERMITS AND LEASES FOR GOLD AND OTHER ORES

6125.1000 AUTHORITY TO ISSUE PERMITS.

The commissioner of natural resources, with the approval of the conservation commission and the executive council, may issue permits to prospect for gold, silver, copper, cobalt, coal, graphite, petroleum, sand, gravel, stone, natural gas, and all other minerals, excepting iron ore, under the waters of any meandered lake or stream in the state of Minnesota, including that portion of boundary lakes and streams within the boundary of the state, and issue leases for the mining and removing of such minerals upon such terms and conditions as shall be approved as above.

Statutory Authority: *MS s 93.08*

6125.1100 PROSPECTING PERMITS.

Subpart 1. **Length of permit.** No prospecting permit shall be for a longer period than one year and cover a larger area than 160 acres of contiguous land except where operating conditions may demand not to exceed an increase in acreage of 25 percent over 160 acres.

Subp. 2. **Mining lease attached.** There shall be attached to each permit a copy of the mining lease to be issued as hereinafter provided.

Subp. 3. **Names and addresses.** The names and addresses of all parties to the permit and lease shall be shown on such permit or lease and shall be signed, witnessed, and acknowledged.

Subp. 4. **Fee.** For each permit there shall be charged a fee of $25.

Subp. 5. **Right to prospect.** The permit holder shall have the exclusive right to prospect in any manner he may see fit for ore within the area designated in the permit for a term not exceeding one year from the date of such permit.

Subp. 6. **Right to request and receive a lease.** At any time during the life of the permit the holder thereof may ask for and receive a lease in the form attached to such permit, provided he has kept and performed in a substantial manner its terms and covenants. Such lease shall cover the same tract of land as that set out in the permit, but the owner of the permit may choose a smaller acreage within such tract.

Subp. 7. **Removal of ore.** No ore shall be removed from the land during the term of the permit except such as is reasonably needed for assay, analysis, and record purposes.

Subp. 3. **Cancellation clause.** Such lease shall also contain a provision for its cancellation as set out in part 6125.1300 but with the addition that no reentry so made shall work a forfeiture of the rents, royalties, taxes, or other sums then due.

Subp. 4. **Payment of tax clause.** The lease shall provide that the lessee shall pay all taxes, general and special, ordinary and extraordinary, levied or assessed against the land, and the improvements thereon, made, used or controlled, and the ore product thereof, and any personal property, in all respects as if said land were owned in fee by the lessee.

Subp. 5. **Rental fee.** The lease shall provide for an annual rental of not less than $25 to be paid annually in advance during the full term the lease remains in force, when the full amount of the royalty on ore removed from the premises during any calendar year does not equal or exceed that sum. Such sum shall be deemed rental and not advance royalty.

Subp. 6. **Right of entry.** The right of the state through its engineers and agents to enter upon said premises at all reasonable times to survey, inspect, or sample the workings, mills, and other equipment, shall be reserved in all leases.

Subp. 7. **Lease conformity.** So far as possible the terms and conditions of any lease issued under the authority of Laws of Minnesota 1935, Special Session, chapter 42, above referred to, shall conform to leases for mining similar ores under authority of Laws of Minnesota 1927, chapter 389, section 12.

Statutory Authority: *MS s 93.08*

6125.1500 AMENDMENTS TO RULES.

The rules as adopted by the commissioner of natural resources with the approval of the conservation commission and the executive council shall not be altered or changed without the approval of each after a hearing on such change.

Statutory Authority: *MS s 93.08*

6125.1600 DAMAGE TO RIPARIAN OWNERS.

The grantee of such permit or lease, his or their assigns, representatives, and successors in interest shall be required to secure riparian owners against damage from the use of such permit or lease.

Statutory Authority: *MS s 93.08*

6125.1700 INSTRUMENTS AFFECTING TITLE TO PERMITS AND LEASES; WRITING REQUIREMENT.

All provisions of Laws of Minnesota 1935, Special Session, chapter 42, relating to the execution and recording of permits, leases, and assignments thereof shall be strictly followed. All instruments by which the title to any permit or lease is affected must be in writing, signed by both parties, witnessed by witnesses and acknowledged, and presented to the commissioner of natural resources for approval.

Statutory Authority: *MS s 93.08*

6125.1800 GOLD ORE PROSPECTING PERMIT FORM.

PERMIT NO. _____

(Issued under authority of Chapter 42, Extra Session Laws of 1935.)

_____, whose post office address is _____, having applied to the undersigned, conformably with the provisions of Chapter 42, Extra Session Laws of 1935, for a gold ore prospecting permit on the following described lands:

containing _____, more or less, according to the government survey thereof, and said _____, having duly paid to the State Treasurer the sum of Twenty-five

of any lease in any lawful manner, shall quietly and peaceably surrender possession of any land covered thereby to the lessor.

Statutory Authority: *MS s 93.25*

6125.4100 COVENANTS RUNNING WITH THE LAND.

The covenants, terms, and conditions of any permit or lease issued hereunder shall run with the land and shall extend to and bind all assignees and other successors in interest thereto.

Statutory Authority: *MS s 93.25*

PERMITS AND LEASES FOR MARL

6125.4500 AUTHORITY FOR RULES.

Pursuant to authority vested in me by law, I, George A. Selke, commissioner of conservation, do hereby prescribe the following rules covering the issuance hereafter of all permits and leases to prospect for, mine, or remove marl under the waters of public lakes or streams, or on state-owned lands.

Statutory Authority: *MS s 93.08; 93.25*

6125.4600 PURPOSE.

The purpose of issuing parts 6125.4500 to 6125.5700 is to encourage prospecting for marl and the development of a cement industry and construction of processing plants in the state of Minnesota. These parts shall be liberally construed to carry out that purpose.

Statutory Authority: *MS s 93.08; 93.25*

6125.4700 DURATION OF PERMIT AND AREA COVERED.

Each prospecting permit shall be issued for a period not to exceed one year and may cover four contiguous government quarter quarter sections or government lots comprising normally 160 acres, which 160 acres shall constitute one unit, except that in the case of lakes or river beds, or state lands adjacent thereto, the size of the unit shall be designated by the commissioner of natural resources. The land area covered by any permit or lease issued pursuant thereto shall be in accordance with the government survey thereof.

Statutory Authority: *MS s 93.08; 93.25*

6125.4800 ISSUANCE OF PERMIT.

Subpart 1. **Application.** A separate application for each prospecting permit shall be made to the commissioner of natural resources in writing and delivered in person or by registered mail to the commissioner at Room 301 Centennial Building, Saint Paul, Minnesota 55101, and shall be signed by all parties in interest. Such application shall be accompanied by a plat showing the boundaries of the area applied for, together with an adequate legal description thereof. The commissioner shall endorse upon each application the exact time of receipt during regular office hours and this shall establish the priority of the application. The first applicant for a permit whose application, with accompanying fees, is filed with the commissioner in accordance herewith shall be entitled to receive a permit hereunder. In the event two or more applications are received at the same time, covering the same land and conforming with the regulations prescribed herein, the permit shall be awarded in undivided equal fractional interests to the parties thereto as tenants in common.

Subp. 2. **Land for prospecting.** The commissioner may issue permits to prospect for marl on lands where the minerals are owned by the state, including trust fund lands, lands forfeited for nonpayment of taxes whether held in trust or otherwise, and lands otherwise acquired, provided such lands are not under

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mineral permit or lease and provided further that such lands are not located in areas that have been designated as state monuments, parks, recreation reserves, and waysides.

Subp. 3. **Restrictions.** The commissioner may refuse to issue permits on any lands being used at the time of the application for a permit for a tree plantation, nursery, administrative purposes, a game refuge, or a state forest, or may impose such conditions upon the issuance of any permit covering lands used for such purposes as he deems necessary. No permit for the same land shall be issued to the same permit holder nor to any partnership, corporation, or other legal entity in which the permit holder has any interest, financial or otherwise, for two successive one-year periods.

Statutory Authority: *MS s 93.08; 93.25*

6125.4900 FEES.

The fee for each permit hereunder shall be $50 per unit. Each application shall be accompanied by a certified or cashier's check on a national or state bank in Minnesota, payable to the state treasurer in the sum of $50 as the fee for the permit, together with a like check in the sum of $200 as a guarantee that the applicant will carry out and perform in good faith all the covenants set out in the permit.

No certified or cashier's check in payment of the fee for the permit shall be returned to the applicant after any valid application is filed in the event that the applicant determines to surrender his rights thereunder.

Statutory Authority: *MS s 93.08; 93.25*

6125.5000 PUBLIC WATERS AFFECTED BY PERMITS.

No prospecting permit or mining lease shall be issued hereunder unless and until a permit to change or diminish the course, current, or cross-section of any public water has been issued for all operations incident to the project which affect public waters. Such permit shall be issued pursuant to Minnesota Statutes, chapter 105, and shall be deemed to be a part of the prospecting permit or lease issued hereunder. No operations shall be conducted in violation thereof.

Statutory Authority: *MS s 93.08; 93.25*

6125.5100 RIGHTS AND DUTIES OF PERMIT HOLDERS.

Subpart 1. **Right to prospect in general.** The permit holder shall have the right to prospect in a reasonable manner for marl in the area designated in the permit, subject to the conditions thereof and subject to these parts and all statutes applicable thereto.

Subp. 2. **Commencement of work.** The work of prospecting under any permit issued hereunder shall begin in a substantial manner within six months from the date of the permit. This work shall be continued in such manner until the permit expires, is surrendered, or a lease is requested, unless and except an extension of time for commencement or a suspension of the work is permitted upon written authority of the commissioner of natural resources or his duly authorized representative. It is a condition of the issuance of any permit or lease issued hereunder that the permit or lease holder shall begin construction in this state of a cement processing plant in a substantial manner within one year after the issuance of the mining lease, which plant shall be completed to produce and shall produce at least 500,000 barrels of cement per year within three years after the issuance of the lease and shall continue to so produce for and during the length of any lease issued, unless otherwise agreed upon by the commissioner of natural resources, with the approval of the executive council.

Subp. 3. **Removal of marl.** No marl shall be removed from the permit area during the term of the permit except such as is reasonably needed for exploratory or assaying purposes.

Subp. 4. **Samples.** Upon request of the commissioner, the permit holder shall separate samples of material taken and furnish the commissioner or his representative with a portion of each sample properly marked for identification.

Subp. 5. **Quarterly reports.** The permit holder shall make an exact and truthful report in writing to the commissioner of natural resources on the first business day of April, July, October, and January, respectively, following the issuance of the permit, and during the time it remains in force, reporting the progress of the work of prospecting, and shall accompany such reports with prints, maps, and other information showing the character and extent of the work done, the nature of the materials encountered, and all assays or analyses made of marl and other mineral bearing materials encountered.

Subp. 6. **Right to enter.** The commissioner or his representatives shall have the right at all reasonable times to enter the permit or lease area and appurtenant premises used by the permit or lease holder and the plant where the marl removed is processed, and to inspect the work done under the permit or lease and the operation of such plant, and to carry on such engineering and sampling work and other investigations pertaining to the project as he may desire, not unnecessarily or unreasonably interfering with the work of the permit or lease holder or with such plant operation.

Statutory Authority: *MS s 93.08; 93.25*

6125.5200 LEASES.

Subpart 1. **Right to a lease.** At any time prior to the expiration of any prospecting permit, the permit holder shall have the exclusive right to receive from the commissioner of natural resources a mining lease, provided he has kept and performed in a substantial manner the terms and covenants of the permit. Such lease shall be subject to all the terms, conditions, and covenants set out in the permit and shall be subject to any rules now existing or hereafter promulgated by the commissioner of natural resources in accordance with the statutes applicable thereto. Such lease shall cover the same area as that set out in the permit, unless the holder of the permit, with the approval of the commissioner, chooses to omit one or more of the quarter quarter sections or government lots set out in the permit; and in the case of an underwater area, the holder with the approval of the commissioner may select a smaller acreage within the area set out in the permit, furnishing a metes and bounds description thereof or other adequate legal description. Upon any such selection a plat shall be furnished covering the same.

Subp. 2. **Report of explorations.** As a condition precedent to the issuance of such mining lease, the holder of the permit shall file with the commissioner of natural resources a full verified report of all work of exploration done under the permit in accordance with the terms and conditions thereof. If the application for a lease is made prior to the expiration of the six-month period referred to in part 6125.5100, subpart 2, no exploration work is required. In such case if no exploration work was done, the permit holder shall furnish an affidavit so stating. The permit holder shall pay as rental to the end of the first quarter under the lease, an amount commensurate with the unexpired portion of that quarter at the rate specified herein. All remittances shall be made payable to the state treasurer and shall be transmitted to the commissioner of natural resources.

Subp. 3. **Term of lease.** Any lease issued pursuant hereto shall be for a term not to exceed 50 years and may be issued for any lesser period in the discretion of the commissioner of natural resources.

Statutory Authority: *MS s 93.08; 93.25*

6125.5300 R[illegible]AL[illegible] LEASE.

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6125.5300 RENTALS, ROYALTIES, AND OTHER PAYMENTS UNDER A LEASE.

Subpart 1. **Payment of royalties.** Subject to the further provisions hereof, the royalty to be paid to the state on any marl mined under any lease issued hereunder and processed into cement shall be one percent of the bona fide gross sales value per barrel f.o.b. at the mill which processes the marl removed under such lease, which royalty shall in no event be less than four cents per barrel. Such royalty shall be payable on or before the 20th day of April, July, October, or January of each year for the cement so produced during the preceding quarter.

Subp. 2. **Rates.** In case any marl suitable for cement production is removed under such lease from the demised premises, but not processed within one year after removal, the leaseholder shall pay royalty thereon at the rate aforesaid on the basis of written estimates made by the commissioner or his authorized representative as to the quantity of cement which could have been made from such marl; payment in such case to be made within 30 days after mailing or delivery of such estimates to the leaseholder. All marl that is placed in stockpiles shall be stockpiled on the demised premises in such place or places as shall not unnecessarily hinder or embarass the future operations thereon, or on other state-owned lands conveniently located for that purpose, or may be otherwise stockpiled in such manner as the commissioner of natural resources may approve.

Subp. 3. **Rental fee.** The leaseholder shall pay rental to the state under a lease issued pursuant hereto at the rate of $1 per acre per calendar year, payable in advance for that part of the quarter remaining after the effective date of the lease, and thereafter the payment for any following quarter shall be payable quarterly on the 20th day of April, July, October, and January, respectively, each year during the term thereof. Each quarterly payment shall cover the rental at the rates hereinbefore specified for the respective calendar quarter or fraction thereof. The rental for any fraction of a quarter shall be computed at the applicable rate. Any amount payable for rental accrued during any calendar year shall be credited on any royalty that may become due for marl removed hereunder during the same calendar year but no further and any amount paid for such royalty in excess of such credit during such year shall be credited on rental, if any, subsequently accruing during such year but no further.

Subp. 4. **Use of marl.** All marl taken under any lease shall be used only for the purpose of making cement in a plant to be constructed and operated within the state of Minnesota, unless otherwise specifically authorized in writing by the commissioner of natural resources under such terms and conditions as he may prescribe.

Subp. 5. **Statement of number of barrels removed.** Every lease shall provide that the leaseholder be required to transmit to the commissioner of natural resources on or before the 15th day of each month a sworn statement of the number of barrels of cement produced and processed during the preceding month from state-owned property, together with a certified statement of the bona fide gross sales value per barrel f.o.b. at the mill.

Subp. 6. **Payments to state treasurer.** All permit fees, lease rentals, royalties, and other moneys paid to the state hereunder shall be by remittance, payable to the state treasurer and shall be transmitted to the commissioner of natural resources, and shall be credited to the proper state fund.

Subp. 7. **Taxes.** Every lease shall provide that the leaseholder pay when due all taxes, general and specific, personal and real, which may be assessed against land leased thereunder and the improvements made thereon, or used or controlled by said leaseholder and the marl products thereof and any personal property thereat owned, used, or controlled by the leaseholder.

Subp. 8. **Liability.** The permittee or lessee of state mineral rights, his or their assigns, representatives, or successors in interest, are obligated to pay all damages or losses caused directly or indirectly by operations under any permit or lease issued pursuant hereto whether to timber, minerals, growing crops, buildings, or to any person or property or for damages suffered by the owner of the surface rights through the loss of the surface of his lands and the state shall not incur or be subject to any liability therefor. With respect to any operation in public waters, each permittee or lessee, his or their assigns, representatives, or successors in interest shall secure from the riparian owners all rights necessary for such operation, and shall hold the state harmless against any cost or liability on account thereof.

Statutory Authority: *MS s 93.08; 93.25*

6125.5400 RIGHTS RESERVED TO THE STATE.

The state reserves the exclusive right to sell and dispose of, under the provisions of law now or hereafter governing the sale of timber on state lands, all the timber on land under any marl permit or lease, and reserves to the purchaser of such timber, his agents and servants, the right at all times to enter thereon, and to cut and remove any and all such timber therefrom, according to the terms of the purchaser's contract with the state, and without hindrance from any permit or lease holder; but such purchaser shall not unnecessarily or materially interfere with the operations carried on by the marl permit or lease holder. The state of Minnesota further reserves the exclusive right to grant leases, permits, or licenses to any portion of the surface of the demised premises to any person, partnership, association, or corporation under authority of Minnesota Statutes, section 92.50 or other applicable laws without let or hindrance from the permit or lease holder, but such leases, permits, or licenses shall not unnecessarily or materially interfere with the prospecting or mining operations carried on thereon.

Statutory Authority: *MS s 93.08; 93.25*

6125.5500 ASSIGNMENTS OR OTHER AGREEMENTS AFFECTING PERMITS AND LEASES.

All assignments, agreements, or contracts, underlying, overriding, or operating agreements affecting any permit or lease issued pursuant hereto shall be made in writing and signed by both parties thereto, witnessed by two witnesses, properly acknowledged and contain the post office addresses of all parties having an interest therein, and when so executed, shall be presented in quadruplicate to the commissioner of natural resources for record. Any such instrument shall be valid only after having received the written approval of the commissioner of natural resources and approval of the attorney general as to form and execution, and when so approved shall be duly recorded.

Statutory Authority: *MS s 93.08; 93.25*

6125.5600 TERMINATION, CANCELLATION, OR SURRENDER OF LEASES AND PERMITS.

Subpart 1. **Cancellation.** Any permit to prospect for marl or lease to mine the same shall be granted upon the condition that if the holder shall fail to perform any of the terms, covenants, or conditions specified in such permit, or in any lease issued pursuant thereto, to be performed by him, or should he fail to comply with any laws applicable thereto, together with all rules, and should any such default continue for a period of 30 days, then the commissioner may cancel the permit or lease, first having mailed or delivered to the permit or lease holder at least 30 days notice in writing thereof, by registered mail to the address of such holder. Thereupon the permit or lease shall terminate at the expiration of the said 30 days and the state shall reenter and again possess the premises as fully as if no permit or lease had been given, and the permit or lease holder and all persons claiming under him shall be wholly excluded therefrom except as

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hereinafter provided, but such expiration and reentries shall not relieve the permit or lease holder from any payment or other liability thereupon or theretofore incurred thereunder; provided nevertheless, that upon such notice of cancellation to any permit or lease holder given pursuant hereto for any cause or without cause the permit or lease holder shall be allowed a hearing upon application therefor before the commissioner of natural resources. Such application shall be made in writing, containing the reasons therefor, within 30 days after the giving of mailed notice of cancellation, otherwise such cancellation shall be final.

Subp. 2. **Hearing.** Such hearing shall be public and shall be conducted by the commissioner or a referee appointed by him. All affected parties shall have an opportunity to be heard. All testimony shall be taken under oath and the right of cross-examination shall be accorded. The commissioner shall provide a stenographer to take testimony and a record of the testimony and all proceedings at the hearing shall be taken and preserved. Thereafter, the commissioner shall either order the lease or permit reinstated or the same shall be terminated in accordance with the notice of cancellation originally given.

Subp. 3. **Right to terminate.** The leaseholder shall have the right at any time to terminate the lease by delivering written notice of such intention to terminate to the commissioner of natural resources, who shall acknowledge receipt of such notice, and the lease shall terminate 60 days after such delivery, unless such notice is revoked by the leaseholder by further written notice delivered to the commissioner before expiration of said 60 days, and all arrearages and sums which shall be due the state under the lease up to the date of such termination shall be paid upon settlement and adjustment thereof, by the leaseholder.

Subp. 4. **Lien.** The state shall reserve and shall at all times have a lien upon all marl mined and upon all improvements made upon the premises leased for any unpaid sums due under any lease.

Subp. 5. **Security and forfeiture of money.** Upon the request for a mining lease pursuant hereto, or upon the surrender or expiration of a prospecting permit, if the commissioner shall determine that the terms and conditions of the permit have been fully complied with, the certified or cashier's check deposited as security for the performance of the covenants of the permit as provided herein, shall be returned to the holder or his assigns. Otherwise, such check shall be deemed forfeited to the state of Minnesota for the failure of performance of the covenants and conditions of the permit. Any request for a lease by any permittee shall be denied if the permit is in default.

Subp. 6. **Removal of property after termination.** Upon termination of any lease, whether by expiration of the term thereof or by act of any party, the leaseholder shall have 90 days thereafter in which to remove all equipment, materials, railroad tracks, structures, and other property, placed or erected upon any land covered by any lease, and any such property not removed within said time shall become the property of the lessor. During the 90-day period, the leaseholder shall at its own expense properly and adequately fence all pits, level all banks, and refill all test pits and cave-ins that may be deemed dangerous or are likely to cause damage to persons or property; and the leaseholder shall do all other work which the commissioner of natural resources or his representatives deem necessary to leave the premises in a safe and orderly condition to protect against injury or damage to persons or property. The leaseholder, upon termination of any lease in any lawful manner, shall quietly and peaceably surrender possession of any land covered thereby to the lessor.

Statutory Authority: *MS s 93.08; 93.25*

6125.5700 COVENANTS RUNNING WITH THE LAND.

The covenants, terms, and conditions of any permit or lease issued hereunder shall run with the land and shall extend to and bind all assignees and other successors in interest thereto.

Statutory Authority: *MS s 93.08; 93.25*

PERMITS AND LEASES FOR SAND AND GRAVEL

6125.6000 AUTHORITY FOR RULES.

Pursuant to authority vested in me by law, I, Chester S. Wilson, commissioner of natural resources, do hereby prescribe the following rules for the issuance of permits to prospect for sand and gravel under the waters of public lakes or streams, and for the issuance of leases for the mining and removal thereof.

Statutory Authority: *MS s 93.08*

6125.6100 APPLICATION PROCESS.

Subpart 1. **Fee and area covered by permits.** The fee for each prospecting permit shall be $25. No permit shall be issued for a period to exceed one year, nor cover an area larger than 40 acres of contiguous underwater area, except where operating conditions shall be found by the director of the Division of Waters, Soils, and Minerals to require an increase in acreage, in which event 25 percent in additional acreage may be granted. Each permit shall authorize prospecting only within the area designated therein.

Subp. 2. **Plats.** All applications for prospecting permits shall be accompanied by plats in quadruplicate, showing the definite location of the area applied for, together with a metes and bounds description thereof. and shall be signed and acknowledged by all the parties interested therein.

Subp. 3. **Statements.** All applications shall be accompanied by quadruplicate signed statements reciting that the mining and removal of the materials for which it is proposed to prospect will not in their opinion violate the rules of or the statutes relating to the administration of the functions and duties of the following state agencies: Department of Natural Resources, Department of Health, Board of Animal Health. Such statements shall be signed by the head or the acting head of these agencies.

Subp. 4. **Method of mineral recovery.** Applications for permits and leases shall describe the means and methods of operation proposed to be used for the removal or recovery of the material covered by such permits and leases, and such proposed means and methods of operation shall be incorporated in and become a part of the terms and conditions of the permits and leases.

Subp. 5. **Hearing on the application.** No permit or lease shall be granted hereunder until after a public hearing on the application therefor. Notice of such hearing shall be given and such hearing shall be conducted as provided by Minnesota Statutes 1949, section 105.44. Notice of such hearing shall also be mailed by the applicant at least two weeks before the hearing to all persons listed on the last tax assessment records in the office of the county treasurer as owners of land riparian to the waters affected, or any interest therein, within such area as the commissioner may designate by order, which area shall be described in the notice. Except as otherwise hereinafter provided, prior to the issuance of any permit, the applicant shall obtain and file with the commissioner of natural resources an appropriate instrument, approved by the attorney general, from each owner of land, or any interest therein, within the area designated by the commissioner as hereinbefore provided, other than land owned or controlled by the applicant for the purposes of such operations, by which instrument the owner shall waive any and all claims for damages which may result from such operations, and shall release the applicant and the state of Minnesota and all officers, agents, and employees of the state from any and all such claims.

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Subp. 6. **Bonds.** In lieu of obtaining and filing such waiver and release of claims for damages, the commissioner may, in his discretion, permit the applicant to furnish a bond to the state of Minnesota in such amount as he may determine, to secure the state, its officers, agents, and employees, and all property owners affected within the area designated by the commissioner as hereinbefore provided, against any damages or loss which may result from such operations, and with such other terms and conditions as the commissioner may prescribe; provided that the furnishing of such bond in lieu of a waiver or release shall not be permitted in any case where the commissioner finds upon the evidence produced at the hearing that there is reason to believe that the property affected will be substantially damaged by the proposed operations, unless the owner of such property shall agree in writing to the furnishing of a bond as hereinbefore provided.

Such bond shall be subject to approval by the commissioner and as to form and execution by the attorney general, and shall be filed with the commissioner. The commissioner may require an additional bond at any time under the foregoing provisions if he deems it necessary for protection of the interests of the state or any property owner affected, upon 30 days' written notice to the permittee or lessee. Any person entitled to the protection of any bond furnished hereunder may bring action thereon in like manner and under like conditions and with like effect as provided by law in the case of a bond furnished by a contractor with the state; provided, that neither the state nor the commissioner of natural resources nor any other officer, agent, or employee of the state shall incur or be subject to any liability by reason of failure to require a bond in any case as herein provided.

Statutory Authority: *MS s 93.08*

6125.6200 LIABILITY FOR DAMAGES.

The permittee or lessee shall be liable for any loss, damage, or injury to person or property of others resulting from any operations under such permit or lease, and shall hold the state and its officers, agents, and employees harmless against any and all claims on account thereof. Nothing in any permit or lease issued or bond furnished hereunder shall impair or abridge any right of action of any owner of property affected by the operations under the permit or lease.

Statutory Authority: *MS s 93.08*

6125.6300 RIGHT OF PERMIT HOLDER TO A LEASE.

At any time prior to the expiration of any such prospecting permit, the holder thereof shall have the right to a lease giving him the exclusive right to mine and remove sand and gravel within the area specified therein provided the permittee has kept and performed in a substantial manner all the terms and covenants of the permit, a copy of which lease shall be attached to each permit. Such lease shall cover the same area of lake and stream bed as that described in the permit, unless the holder of the permit selects a smaller acreage within such area, in which case a lease for such smaller area may be issued in the discretion of the commissioner. No lease shall be made for a longer term than 25 years and may be made for any period less than that, in the discretion of the commissioner.

Statutory Authority: *MS s 93.08*

6125.6400 REMOVAL OF MATERIALS UNDER PERMIT.

None of the materials for which the permit to prospect is issued may be removed from the land until the formal execution of a lease therefor, except such as may be reasonably needed for assay, analysis, and record purposes.

Statutory Authority: *MS s 93.08*

6125.6500 PROSPECTING.

The work of prospecting shall be commenced in a substantial manner within 90 days from the date upon which the permit is executed, unless, in the opinion of the commissioner, either water, ice, or other conditions beyond control of permittee make such work hazardous or impracticable, and shall continue until the term of the permit expires, is surrendered, or a lease demanded. No prospecting work as herein required shall be postponed or suspended, except upon written authority of the commissioner or his duly authorized representative.

The commissioner or his representative shall have the right at all reasonable times to inspect the work done under the permit or the lease issued pursuant thereto, and carry on such engineering and sampling work as he may wish to do, not unnecessarily or unreasonably interfering with the work of the permittee or lessee.

Statutory Authority: *MS s 93.08*

6125.6600 TERMINATION OR CANCELLATION OF PERMITS OR LEASES.

Subpart 1. **Holder's default.** In the event the holder of such permit or lease shall fail to comply with all the provisions contained therein, or the laws and regulations governing the same to be by him performed and observed, and such default shall continue for 30 days, the commissioner, upon 30 days' notice to the holder of such permit or lease by registered mail to the address of such holder as shown by the records of the commissioner, may declare such permit or lease and all the rights acquired thereunder forfeited. The commissioner may when he deems it necessary to the best interest of the public, cancel such lease or permit at any time by 90 days' notice in writing mailed as hereinabove provided. Upon the filing of the order of forfeiture with the commissioner of natural resources, all rights under such lease or permit shall cease.

Subp. 2. **Cancellation of lease by lessee.** The lessee may cancel a lease issued hereunder by 30 days' notice in writing mailed to the commissioner by registered mail, provided that no such cancellation shall become effective until all sums due to the state are paid in full.

Subp. 3. **Yielding possession.** Upon cancellation of such lease for any cause, the lessee shall quietly and peaceably yield possession of the leased premises, and no such cancellation shall work a forfeiture on any rents, royalties, taxes, or other moneys due thereunder.

Statutory Authority: *MS s 93.08*

6125.6700 RECORDS OF MATERIALS REMOVED AND SOLD.

The lessee shall keep records of all sand and gravel removed and the sales thereof, which records shall be open for inspection by the agents of the commissioner of natural resources at all reasonable times. The lessee shall, on or before the 15th day of each month, make a report in writing to the commissioner, verified under oath, on forms provided by the commissioner, covering all usable or salable material removed or recovered during the preceding month, showing the quantity thereof in cubic yards, the royalty computed to be due thereon, and such other information pertaining thereto as the commissioner may require.

Statutory Authority: *MS s 93.08*

6125.6800 RENTALS, ROYALTIES, AND TAXES.

Subpart 1. **Amount of royalty.** Royalties to be paid to the state on all sand and gravel leases issued hereunder shall be based on cubic yards of usable materials removed and shall be ten cents per cubic yard, and shall be paid on or before the 15th day of each month for the sand and gravel removed during the preceding month.

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Subp. 2. **Annual rental fee.** Every lease shall provide for a minimum annual rental of $150 per calendar year, or fraction thereof, payable in advance. Such rental shall be payable annually on or before the 20th day of January each year during the term thereof. Any amount paid for rental accrued during any calendar year shall be credited on any royalty that may become due for sand and gravel removed under said lease during the same calendar year but no further.

Subp. 3. **Records of materials removed from demised premises.** All usable or salable sand and gravel taken from the demised premises shall be measured by the lessee as it is removed or stockpiled which measurements shall be recorded daily. Such sand and gravel when stockpiled shall be kept separate and not mixed with materials from other sources until measured as hereinabove provided. All operations shall be conducted in accordance with acceptable mining practices and so as not to cause any unnecessary or unusual permanent injury to the lands or to inconvenience or hinder subsequent operations in the same area. All waste materials shall be disposed of and all water returned to the stream or body of water. They shall be treated as directed by the commissioner or his agents in charge of such operations.

Subp. 4. **Payments to state treasurer.** All permit fees and all rents and royalties paid under leases shall be paid to the state treasurer, and shall be credited to the permanent school funds of the state.

Subp. 5. **Taxes.** All leases shall provide that the lessee shall pay, when due, all taxes levied against the premises, the personal property, and improvements thereon during the continuance of the lease.

Statutory Authority: *MS s 93.08*

6125.6900 OBSERVANCE OF NAVIGATION LAWS.

Lessee shall observe all federal, state, and municipal laws, rules, regulations, and ordinances regarding navigation on the waters from which sand or gravel is removed.

Statutory Authority: *MS s 93.08*

6125.7000 ASSIGNMENTS AND OTHER AGREEMENTS AFFECTING PERMITS AND LEASES.

No assignment, sublease, or any other instrument affecting any permit or lease issued hereunder shall be valid unless made in writing with the written approval of the commissioner endorsed thereon.

Statutory Authority: *MS s 93.08*

6125.7100 ADDITIONAL PERMITS REQUIRED.

Before any prospecting permit or lease shall be issued by the commissioner for the removal of sand or gravel hereunder, the applicant shall first secure a permit from the commissioner pursuant to Minnesota Statutes 1949, chapter 105, and acts amendatory thereof, which permit shall be deemed to be a part of the prospecting permit or lease issued hereunder, and no operations shall be conducted in violation thereof.

Statutory Authority: *MS s 93.08*

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CHAPTER 6135
DEPARTMENT OF NATURAL RESOURCES
MISCELLANEOUS

UTILITY CROSSING OF PUBLIC LANDS AND WATERS

6135.0100 POLICY.

Pursuant to Minnesota Statutes, section 84.415, as amended by Laws of Minnesota 1973, chapter 479, section 1, the commissioner of natural resources hereby establishes rules concerning utility crossings over public lands and waters under the control of the commissioner, setting forth fees, standards, and criteria for minimizing the environmental impact of such crossings.

Statutory Authority: *MS s 84.415*

6135.0200 DEFINITIONS.

Subpart 1. **Electric transmission.** "Electric transmission" means lines, cables, or conduits used to transport large blocks of power between two points, generally, 69 kilovolt-amperes or more. As distinguished from "distribution" which means lines, cables, or conduits used to distribute power to the utility company's customers, generally, less than 69 kilovolt-amperes.

Subp. 2. **Public waters.** "Public waters" means all waters of the state which serve a beneficial public purpose, as defined in Minnesota Statutes, section 105.38.

Subp. 3. **Utilities.** "Utilities" means lines, cables, and conduits for telephone, telegraph, or electric power, and pipelines for gases, liquids, or solids in suspension, and any other such item covered by the licensing requirements of Minnesota Statutes, section 84.415.

Statutory Authority: *MS s 84.415*

6135.0300 SEVERABILITY.

The provisions of these rules are severable, and the invalidity of any lettered or numbered paragraph, subparagraph, or subdivision thereof, shall not invalidate any other part.

Statutory Authority: *MS s 84.415*

6135.0400 FEE SCHEDULES.

Subpart 1. **Purpose.** The following fees defray administrative costs and provide a reasonable return for private use of public land or water.

Subp. 2. **Application fee.** The applicant shall include $15 with each application for a license to construct utility crossings over or under public lands. An application may contain more than one crossing.

The applicant shall include $15 with each application for a license to construct utility crossings over or under public waters. An application may contain more than one crossing. In the case of underwater crossings, the application fee charged hereunder shall satisfy the application fee requirements of parts 6115.0010 to 6115.0100 but such crossings shall be subject to all inspection and monitoring fees required by law or regulation.

The checks shall be made payable to the state treasurer. The commissioner will acknowledge the receipt of the application, indicating whether or not the correct application fee was included. The commissioner will take no other action on the application until he has received the correct fee. He will not return application fees, even if the application is withdrawn or denied.

Subp. 3. **Utility crossing fees.** One-time payment fees securing a 50-year license, made payable to the state treasurer, shall be established for two classes of utility crossings as follows:

A. Fees for crossing of public waters:

(1) for utility crossings under public waters involving a disturbance of less than ten feet in width at the water's edge, Rate Table I in part 6135.0500 shall apply;

(2) for utility crossings under public waters involving a disturbance of ten feet or more in width at the water's edge, Rate Table II in part 6135.0600 shall apply;

(3) for utility crossings over public waters, Rate Table III in part 6135.0700 shall apply.

B. Fees for crossing of public lands:

(1) for utility crossings over, under or across public lands, Rate Table IV in part 6135.0800 shall apply.

(2) the minimum utility crossing fee for any utility crossings of public lands shall be $10.

Subp. 4. **Option for 25-year license.** An applicant may request a 25-year license instead of a 50-year license. In such a case, a one-time payment fee securing a 25-year license shall be established based on 60 percent of the fee for a 50-year license as computed under subpart 3 and Rate Tables I to IV in parts 6135.0500 to 6135.0800.

Subp. 5. **Renewal of license.** At the end of the license period if both parties wish to renew, the renewal fee and time period will be determined by such methods as are developed by the commissioner or his successor.

Subp. 6. **Scope of application fees.** Application fees required under these parts shall be charged for all applications received after the effective date of these parts.

The license fees required under these rules shall apply to all licenses which have not been fully executed at the effective date of these parts.

Statutory Authority: *MS s 84.415*

6135.0500 RATE TA

Underwater Crossings Involving a disturbance of less than 10 feet in width at the water's edge.

Type of Utility Pipeline	TOTAL LENGTH IN FEET ALL CROSSINGS PER APPLICATION					
	0-100	101-200	201-300	301-400	401-500	500+
	BASE RATE					
Electric Transmission	$80.00	$100.00	$120.00	$140.00	$160.00	$160.00 plus $20.00 per 100 feet or fraction thereof
	60.00	75.00				

Statutory Authority: *M*

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Underwater Crossings involving a disturbance of less than 10 feet in width at the water's edge.

Type of Utility	TOTAL LENGTH IN FEET ALL CROSSINGS PER APPLICATION					
	0-100	101-200	201-300	301-400	401-500	500+
			BASE RATE			
Pipeline	$80.00	$100.00	$120.00	$140.00	$160.00	$160.00 plus $20.00 per 100 feet or fraction thereof additional
Electric Transmission	60.00	75.00	90.00	105.00	120.00	$120.00 plus $15.00 per 100 feet or fraction thereof additional
Electric Distribution Telephone and Telegraph	40.00	50.00	60.00	70.00	80.00	$80.00 plus $5.00 per 100 feet or fraction thereof additional

The length of an underwater crossing is measured by the number of feet of line between banks or shores.

The license fee is determined by adding the length of all such underwater crossings on the same application and, using this total distance, selecting the appropriate column to determine the base rate. The license fee is the base rate plus $10.00 for each crossing in excess of one listed in the application.

Example #1. Electric distribution line application. Five water crossings.

Crossing #1, length, 40 feet
Crossing #2, length, 10 feet
Crossing #3, length, 75 feet
Crossing #4, length, 22 feet
Crossing #5, length, 35 feet
Total 182 feet

Base rate . . . $50.00 (from 101-200 feet column)
Plus . . . . . $40.00 (4 crossings in excess of one)
License fee. . $90.00

Example #2. Pipeline application. One crossing.

Crossing #1, length, 650 feet

Base rate . . $200.00 (from the 500+ column)
Plus . . . . . 00.00 (no crossings in excess of one)
License fee. $200.00

Statutory Authority: *MS s 84.415*

Underwater Crossings involving a disturbance of more than 10 feet in width at the water's edge.

Type of Utility	TOTAL LENGTH IN FEET PER EACH CROSSING					
	0-100	101-200	201-300	301-400	401-500	500+
	RATE PER CROSSING					
Pipeline	$100.00	$125.00	$150.00	$175.00	$200.00	$200.00 plus $25.00 per 100 feet or fraction thereof additional
Electric Transmission	75.00	94.00	113.00	131.00	150.00	$150.00 plus $19.00 per 100 feet or fraction thereof additional
Electric Distribution Telephone and Telegraph	50.00	63.00	75.00	88.00	100.00	$100.00 plus $13.00 per 100 feet or fraction thereof additional

The length of an underwater crossing is measured by the number of feet of line between banks or shores.

The license fee is determined by calculating separately the length of each crossing, finding the rate for each crossing by referring to the appropriate column, and then adding together the resulting rate determinations.

Example: Pipeline application — 3 underwater crossings.

Crossing #1, length, 461 feet	Rate, Crossing #1 — $200.00
Crossing #2, length, 24 feet	Rate, Crossing #2 — $100.00
Crossing #3, length, 231 feet	Rate, Crossing #3 — $150.00
	License fee $450.00

Statutory Authority: *MS*

Overwater Crossings

Type of Utility	TOTAL LENGTH IN FEET ALL CROSSINGS PER APPLICATION					
	0-100	101-200	201-300	301-400	401-500	500+
	BASE RATE					
Pipeline	$125.00	$163.00	[illegible]			

Example: Pipeline application — 3 underwater crossings.

Crossing #1, length, 461 feet	Rate, Crossing #1 —	$200.00
Crossing #2, length, 24 feet	Rate, Crossing #2 —	$100.00
Crossing #3, length, 231 feet	Rate, Crossing #3 —	$150.00
	License fee	$450.00

Overwater Crossings

TOTAL LENGTH IN FEET ALL CROSSINGS PER APPLICATION

Type of Utility	0-100	101-200	201-300	301-400	401-500	500+
	BASE RATE					
Pipeline	$125.00	$163.00	$200.00	$238.00	$275.00	$275.00 plus $38.00 per 100 feet or fraction thereof additional
Electric Transmission	100.00	130.00	160.00	190.00	220.00	$220.00 plus $30.00 per 100 feet or fraction thereof additional
Electric Distribution Telephone and Telegraph	75.00	98.00	120.00	143.00	165.00	$165.00 plus $23.00 per 100 feet or fraction thereof additional

The length of an overwater crossing is measured by the number of feet of line between banks or shores.

The license fee is determined by adding the length of all such overwater crossings on the same application and using this total distance, selecting the appropriate column to determine the base rate. The license fee is the base rate plus $10.00 for each crossing in excess of one listed in the application.

Example: Telephone line application. Three overwater crossings.

Crossing #1, length, 27 feet	Base rate	$75.00	(from the 0-100 feet column)
Crossing #2, length, 31 feet	Plus	$20.00	(2 crossings in excess of one)
Crossing #3, length, 10 feet	License fee	$95.00	
Total 68 feet			

6135.0800 RATE TABLE IV.

Type of Utility	Public Land Crossings Width of Right-of-Way 0-66'	67'-99'	100'-132'	133'-165'	166'-198'	198'+
	RATE PER ROD OF LENGTH OF CROSSING					
Pipeline	$1.50	$2.25	$3.00	$3.75	$4.50	$5.25
Electric Transmission	1.00	1.50	2.00	2.50	3.00	3.50
Electric Distribution						
Telephone and Telegraph	.50	.75	1.00	1.25	1.50	1.75

Example #1. Electric transmission line request: 100 foot right-of-way, across two descriptions of public land, 1320 feet in length for each description.

Total length of public land crossing — 2640 feet
2640 feet = 160 rods
160 rods × $2 per rod = $320

Example #2. Pipeline request: 75 foot right-of-way, 400 feet across public land
400 feet = 24.24 rods
24.24 rods × $2.25 per rod = $54.54

If an additional crossing is to be placed in an existing right-of-way by the original licensee or any other licensee, the fee will be 50 per cent of the amount which would be charged if this crossing were the original crossing in the right-of-way.

If the appraised value of the land over which a utility will cross is over $100.00 per acre, a fee in addition to that contained in Rate Table IV will be charged. The additional fee shall not exceed fifteen percent (15%) of the appraised value in excess of $100.00 per acre of the actual acreage being taken by the right-of-way.

Statutory Authority: *MS s 84.415*

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Subp. 3. **Soil.** With

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If an additional crossing is to be placed in an existing right-of-way by the original licensee or any other licensee, the fee will be 50 per cent of the amount which would be charged if this crossing were the original crossing in the right-of-way.

If the appraised value of the land over which a utility will cross is over $100.00 per acre, a fee in addition to that contained in Rate Table IV will be charged. The additional fee shall not exceed fifteen percent (15%) of the appraised value in excess of $100.00 per acre of the actual acreage being taken by the right-of-way.

6135.1000 PROTECTING THE ENVIRONMENT.

Subpart 1. **Policy.** It is essential to regulate utility crossings of public lands and waters in order to provide maximum protection and preservation of the natural environment and to minimize any adverse effects which may result from utility crossings. These standards and criteria provide a basic framework of environmental considerations concerning such a proposed crossing. The standards deal with route design, structure design, construction methods, safety considerations, and right-of-way maintenance.

Subp. 2. **Application content.** For each environmental standard listed in these parts, the applicant shall indicate whether he is satisfying the standard, where applicable, or if he is not, why not. In dealing with route design standards, the application must, where applicable, also supply data on relevant site conditions. Except when the commissioner determines that it is not feasible and prudent, or not in the best interests of the environment, the applicant shall comply with the following standards in designing, constructing, and maintaining utility crossings.

Statutory Authority: *MS s 84.415*

6135.1100 STANDARDS FOR ROUTE DESIGN.

Subpart 1. **Topography.** With regard to topography:

A. avoid steep slopes;

B. avoid scenic intrusions into stream valleys and open exposures of water;

C. avoid scenic intrusions by avoiding ridge crests and high points; and

D. avoid creating tunnel vistas by, for example, building deflections into the route or using acceptable screening techniques.

Subp. 2. **Vegetation.** With regard to vegetation:

A. avoid wetlands; and

B. run along fringe of forests rather than through them, but if it is necessary to route through forests, then utilize open areas in order to minimize destruction of commercial forest resources.

Subp. 3. **Soil.** With regard to soil characteristics:

A. avoid soils whose high susceptibility to erosion would create sedimentation and pollution problems during and after construction;

B. avoid areas of plastic soils which would be subject to extensive slippage; and

C. avoid areas with high water tables, especially if construction requires excavation.

Subp. 4. **Crossing public waters.** With regard to crossing of public waters:

A. avoid streams, but if that is not feasible and prudent, cross at the narrowest places wherever feasible and prudent, or at existing crossings of roads, bridges, or utilities; and

B. avoid lakes, but where there is no feasible and prudent alternative route, minimize the extent of encroachment by crossing under the water.

Crossings on or under the beds of streams designated by the commissioner as trout waters shall be avoided unless there is no feasible alternative. When unavoidable, maximum efforts shall be taken to minimize damage to trout habitat.

Subp. 5. **Special use areas.** With regard to special use areas, which are those areas designated under Minnesota Statutes, section 84.033 as scientific and natural areas; those areas designated pursuant to Minnesota Statutes, section 104.35 as units of the Minnesota Wild and Scenic River System; and those areas subject to special regulation for recreational, scenic, natural, scientific, or environmental purposes:

A. avoid them, but if there is no feasible alternative route, then utilities shall be placed underground; and

B. locate such crossings with existing public facilities such as roads and utilities.

Statutory Authority: *MS s 84.415*

6135.1200 STANDARDS FOR STRUCTURE DESIGN.

Subpart 1. **Location of utility.** With regard to locating the utility overhead or under the ground or water:

A. Primary consideration shall be given to underground and underwater placement in order to minimize visual impact. If the proposal is for overhead placement, the applicant shall explain the economic, technological, or land characteristic factors, which make underground placement infeasible. Economic considerations alone shall not be the major determinant.

B. If overhead placement is necessary, the crossing shall be hidden from view as much as practicable.

Subp. 2. **Appearance.** With regard to the appearance of the structures, they shall be made as compatible as practicable with the natural area with regard to: height and width, materials used, and color.

Subp. 3. **Right-of-way.** The right-of-way width shall be kept to a minimum.

Statutory Authority: *MS s 84.415*

6135.1300 CONSTRUCTION METHODS.

When crossing roads or rivers, leave a screen of vegetation between the structures and the road or river.

When crossing under public waters, take steps to prevent excessive erosion of lake or stream banks and construct temporary sediment traps to reduce sedimentation.

Construct across wetlands in the winter in order to minimize damage to vegetation and in order to prevent erosion and sedimentation.

Construct at times when local fish and wildlife are not spawning or nesting.

Statutory Authority: *MS s 84.415*

6135.1400 SAFETY CONSIDERATIONS.

Applicants for crossings of electrical transmission lines and pipelines shall adhere to federal and state safety regulations, both with regard to prevention (such as safety valves and circuit breakers) and with regard to emergency procedures in the event of failure (fire suppression, oil spill cleanup).

In order to ensure adequate safety for commercial or recreational navigational uses of waterways, overhead crossings shall be constructed at adequate heights to provide maximum safety compatible with existing or potential navigational uses.

Statutory Authority: *MS s 84.415*

6135.1500 RIGHT-OF-WAY MAINTENANCE.

Natural vegetation of value to fish or wildlife, which does not pose a hazard to or restrict reasonable use of the utility, shall be allowed to grow in the right-of-way.

Where vegetation has been removed, new vegetation consisting of native grasses, herbs, shrubs, and trees, recommended by the commissioner shall be planted and maintained on the right-of-way.

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6135.2500 PURPOSE.

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6135.2600 SCOPE.

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6135.2800 DEFINITIONS.

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Subp. 2. **Captive.** "C
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Chemical control of vegetation shall be in accordance with rules, regulations, and other requirements of all state and federal agencies with authority over the use.

Statutory Authority: *MS s 84.415*

6135.1600 RELATIONSHIP TO OTHER LAWS.

There are other Minnesota and federal laws and rules and regulations concerned with utility crossings and the environment. In case of conflict with other environmental regulations, the parts included herein will be subordinated to any law, rule, or regulation which is stricter in its protection of the environment. Other related environmental laws and rules and regulations include but are not limited to those associated with:

A. federal and state wild, scenic, and recreational rivers;
B. the Minnesota Environmental Protection Act; and
C. natural and scientific areas.

Statutory Authority: *MS s 84.415*

6135.1700 LICENSE CONDITIONS.

In granting a license, the commissioner may include therein any terms, conditions, or reservations which may be necessary to minimize the adverse effect on the environment or to carry out the policies of these parts.

Statutory Authority: *MS s 84.415*

6135.1800 CANCELLATION OF LICENSE.

Upon violation of any of the terms, conditions, or reservations contained in a license, the commissioner may cancel any license granted under these parts.

Statutory Authority: *MS s 84.415*

WILDLIFE EXHIBITS

6135.2500 PURPOSE.

The purpose of parts 6135.2500 to 6135.3700 is to establish reasonable standards for the care and treatment of captive wildlife for public exhibition purposes, and a permit system for such display, pursuant to the legislative mandate contained in Minnesota Statutes, section 97.611.

Statutory Authority: *MS s 97.611*

6135.2600 SCOPE.

Parts 6135.2500 to 6135.3700 shall apply to the care and treatment of all living captive wildlife for public exhibition in connection with any commercial enterprise, excluding displays owned by any municipality, county, or the state of Minnesota, any publicly owned zoo or wildlife exhibit, any privately owned traveling zoo or circus, or any pet shop.

Statutory Authority: *MS s 97.611*

6135.2700 SEVERABILITY.

The provisions of parts 6135.2500 to 6135.3700 shall be severable, and the invalidity of any paragraph, subparagraph, or subdivision thereof shall not make void any other paragraph, subparagraph, subdivision, or any other part.

Statutory Authority: *MS s 97.611*

6135.2800 DEFINITIONS.

Subpart 1. **Scope.** For the purpose of parts 6135.2500 to 6135.3700, the terms defined in this part have the meaning given in this part:

Subp. 2. **Captive.** "Captive" means all forms of human control including but not limited to confinement within physical barriers, limitation of movement through the use of any manner of attachment physically affixed to any wildlife,

MICHIGAN'S GREAT LAKES SUBMERGED LANDS ACT

1955 Public Act 247
as amended,
Administrative Rules
and
Information on
the Ordinary High
Water Mark
(incl. 1982 Amendment)

DIVISION OF
LAND RESOURCE PROGRAMS
DEPARTMENT OF NATURAL RESOURCES

4/84

SHORE LINES AND POLITICAL BOUNDARIES
IN THE
WESTERN AND CENTRAL GREAT LAKES REGION

JMC 64

Act 247
Public Acts of 1955, as amended

TITLE

AN ACT to authorize the department of conservation of the state of Michigan to grant, convey or lease certain unpatented lake bottomlands and unpatented made lands in the Great Lakes, including the bays and harbors thereof, belonging to the state of Michigan or held in trust by it; to permit the private and public use of waters over submerged patented lands and the making of agreements limiting and regulating the use thereof; to provide for the disposition of revenue derived therefrom; and to provide penalties for violation of this act.

The People of the State of Michigan enact:

322.701 Great Lakes submerged lands act; short title.

Sec. 1. This act shall be known as the "great lakes submerged lands act."

HISTORY: New 1955, p. 404, Act 247, Eff. Oct. 14.

322.702 Unpatented lake bottomlands and unpatented made lands in Great Lakes; construction of act.

Sec. 2. The lands covered and affected by this act are all of the unpatented lake bottomlands and unpatented made lands in the Great Lakes, including the bays and harbors thereof, belonging to the state or held in trust by it, including those lands which have heretofore been artificially filled in. The waters covered and affected by this act are all of the waters of the Great Lakes within the boundaries of the state. This act shall be construed so as to preserve and protect the interests of the general public in the aforesaid lands and waters and to provide for the sale, lease, exchange or other disposition of unpatented lands and the private or public use of waters over patented and unpatented lands and to permit the filling in of patented submerged lands whenever it is determined by the department of conservation that the private or public use of such lands and waters will not substantially affect the public use thereof for hunting, fishing, swimming, pleasure boating or navigation or that the public trust in the state will not be impaired by such agreements for use, sales, lease or other disposition. The word "land" or "lands" whenever used in this act shall refer to the aforesaid described unpatented lake bottomlands and unpatented made lands and patented lands in the Great Lakes and the bays and harbors thereof lying below and lakeward of the natural ordinary high-water mark, but the act shall not be construed as affecting property rights secured by virtue of a swamp land grant or such rights as may be acquired by accretions occurring through natural means or reliction. For purposes of this act the ordinary high-water mark shall be deemed to be at the following elevations above sea level, international Great Lakes datum of 1955; Lake Superior, 601.5 feet; Lakes Michigan and Huron, 579.8 feet; Lake St. Clair, 574.7 feet; and Lake Erie, 571.6 feet.

HISTORY: New 1955, p. 404, Act 247, Eff. Oct. 14; — Am. 1958, p. 100, Act 94, Eff. July 1; — Am. 1965, p. 563, Act 293, Imd. Eff. Jul. 22; — Am. 1968, p. 96, Act 57, Imd. Eff. May 28.

322.703 Unpatented lake bottomlands and unpatented made lands; conveyances, leases and agreements; reservation of mineral rights; oil and gas prohibiiton.

Sec. 3. (1) The department of conservation, hereinafter referred to as the "department", after finding that the public trust in the waters will not be

impaired or substantially affected, is hereby authorized to enter into agreements pertaining to waters over and the filling in of submerged patented lands, or to lease or deed unpatented lands, after approval of the state administrative board. Quit claim deeds, leases or agreements may be issued or entered into by the department with any person, firm, or corporation, public or private, or the United States of America covering unpatented lands, and shall contain such terms and conditions and requirements which shall be deemed just and equitable and in conformity with the public trust as determined by the department. The department shall reserve to the state of Michigan all mineral rights, including but not limited to coal, oil, gas, sand, gravel, stone and other materials or products located or found in said lands, except where lands are occupied or to be occupied for residential purposes at the time of conveyance.

(2) After July 22, 1965, a riparian owner shall obtain a permit from the department, for which no charge shall be made, before dredging or placing spoil or other materials on bottomland.

(3) The department shall not enter into a lease or deed of unpatented lands which permits drilling operations for the taking of oil or gas, unless all drilling operations originate from locations above and inland of the ordinary high-water mark. The department shall not enter into a lease or deed of unpatented lands which permits drilling for exploration purposes unless the drilling operations originate from locations above and inland of the ordinary high-water mark.

HISTORY: New 1955, p. 405, Act 247, Eff. Oct. 14; — Am. 1958, p. 101, Act 94, eff. Jul. 1; — Am. 1965, p. 564, Act 293, Imd. Eff. Jul. 22; — Am. 1982, p. 162, Act 68, eff. Apr. 14.

322.704 Unpatented lake bottomlands and unpatented made lands; application for conveyance, contents, qualifications of applicant, consent.

Sec. 4. (a) Application for a deed or lease to unpatented lands or agreement for use of water areas over patented lands shall be on forms provided by the department. Such application shall *include* a surveyed description of the lands or water area applied for, together with a surveyed description of the riparian or littoral property lying adjacent and contiguous to the lands or water area, certified to by a registered land surveyor. The description shall show the location of the water's edge at the time it was prepared and such other information that shall be required by the department. The applicant shall be a riparian or littoral owner or owners of property touching or situated opposite the unpatented land or water area over patented lands applied for or an occupant of said land. The application shall include the names and mailing addresses of all persons in possession or occupancy or having any interest in the adjacent or contiguous riparian or littoral property or having riparian or littoral rights or interests in the lands or water areas applied for and such application shall be accompanied by the written consent of all persons having an interest in the lands or water areas applied for in the application.

Approvals required; abstract of title and tax history of riparian land.

(b) Before an application can be acted upon by the department, the applicant shall secure approval of or permission for his proposed use of such lands or water area from any federal agency as provided by law, the Michigan waterways commission and the legislative body of the local unit or units of government within which such land or water area is or will be included, or to which it is contiguous or adjacent. No deed, lease or agreement shall be issued or entered into by the department without such approvals or permission. The department may also require the applicant to furnish an abstract of title and ownership, and a 20-year tax history on the riparian or littoral property which is contiguous or

agreement be approved by the department, the applicant shall be entitled to credit for the fee against the consideration which shall be paid for such deed, lease or other agreement.

HISTORY: New 1955, p. 405, Act 247, Eff. Oct. 14; — Am. 1958, p. 101, Act 94, Eff. Jul. 1; — Am. 1965, p. 564, Act 293, Imd. Eff. Jul. 22.

322.705 Unpatented lake bottomlands and unpatented made lands; consideration for conveyances or lease.

Sec. 5. Should the department determine that it is in the public interest to grant an applicant a deed or lease to such lands or enter into an agreement to permit use and improvements in the waters or to enter into any other agreement in regard thereto, the department shall determine the amount of consideration to be paid to the state by such applicant for the conveyance or lease of unpatented lands.

Lease or agreement to fill submerged lands; permanent improvements; artificial changes in land; consideration; cash market value.

(a) The department may permit, by lease or agreement, the filling in of patented and unpatented submerged lands and permit permanent improvements and structures after finding that the public trust will not be impaired or substantially injured.

The department may issue deeds or may enter into leases if the unpatented lands applied for have been artifically filled in or are proposed to be changed from the condition that exists on the effective date of this act by filling, sheet piling, shoring, or by any other means, and such lands are used or to be used or occupied in whole or in part for uses other than existing, lawful riparian or littoral purposes. The consideration to be paid to the state for the conveyance or lease of unpatented lands by such applicant shall be not less than the fair, cash market value of the lands determined as of the date of the filing of such application, minus any improvements placed thereon but in no case shall the sale price be less than 30% of the value of the land. In determining the fair, cash market value of the lands applied for, the department may give due consideration to the fact that such lands are connected with the riparian or littoral property belonging to the applicant, if such is the case, and to the uses, including residential and commercial, being made or which can be made of said lands.

Agreements for lands or water areas with local units.

(b) Agreements for the lands or water area described in section 2 may be granted to or entered into with local units of government for public purposes and containing such terms and conditions which may be deemed just and equitable in view of the public trust involved and may include the granting of permission to make such fills as may be necessary.

Flood control, shore erosion control, drainage and sanitation control.

(c) If the unpatented lands applied for have not been filled in, nor in any way substantially changed from their natural character at the time the application is filed with the department, and the application is filed for the purpose of flood control, shore erosion control, drainage and sanitation control or to straighten irregular shore lines, the consideration to be paid to the state by the applicant shall be the fair, cash value of such land, giving due consideration to its being adjacent to and connected with the riparian or littoral property owned by the applicant.

Leases or agreements for marina purposes; definition.

(d) Leases or agreements covering unpatented lands may be granted or

entered into with riparian or littoral proprietors for commercial marina purposes or for marinas operated by persons, corporations, clubs or associations for such consideration and containing such terms and conditions which are deemed by the conservation department to be just and equitable. Such leases may include either filled or unfilled lake bottomlands, or both. Rental shall commence as of the date of use of such unpatented lands for the marina operations. Dockage and other uses by marinas in waters over patented lands on the effective date of this act shall be deemed to be lawful riparian use.

The term "marina purposes" as used in this act shall be construed as an operation making use of Great Lakes submerged bottomlands or filled bottom lands for the purpose of service to boat owners or operators which may restrict or prevent the free public use of the affected bottomlands or filled in lands.

Fraud, consideration; hearing on determination.

(e) If the department after investigation determines that an applicant has wilfully and knowingly filled in or in anyway substantially changed the lands applied for with an intent to defraud, or if the applicant has acquired such lands with knowledge of such fraudulent intent and is not an innocent purchaser, the sale price shall be the fair cash market value of the land. An applicant may request a hearing of any determination made hereunder. The department shall grant a hearing if requested.

HISTORY: New 1955, p. 406, Act 247, Eff. Oct. 14; — Am. 1958, p. 102, Act 94, Eff. Jul. 1; — Am. 1965, p. 565, Act 293, Imd. Eff. Jul. 22.

322.706 Unpatented lake bottomlands and unpatented made lands; evaluation by department of conservation; appraisal, court appointed.

Sec. 6. The fair, cash market value of lands approved for sale under the provisions of this act shall be determined by the department. In no instance shall the consideration paid to the state be less than $50.00. If the applicant is not satisfied with the value determined by the department, within 30 days after the receipt of such determination he may submit a petition in writing to the circuit court of the county in which such lands are located and the court shall appoint an appraiser or appraisers as the court shall determine for an appraisal of said lands. Decision of the court shall be final.

HISTORY: New 1955, p. 406, Act 247, Eff. Oct. 14; — Am. 1958, p. 103, Act 94, Eff. Jul. 1; — Am. 1965, p. 566, Act 293, Imd. Eff. Jul. 22.

322.707 Receipts; disposition, accounting, employees.

Sec. 7. All moneys received by the department from the sale, leasing or other disposition of lands and water areas under this act shall be paid to the state treasurer and be credited to the state's general fund. The department shall comply with the accounting laws of this state and the requirements with respect to submission of budgets. The department is hereby authorized to hire such employees, assistants and services that may be necessary within the appropriation made therefor by the legislature and to delegate such authority as may be necessary to carry out the terms of this act.

HISTORY: New 1955, p. 406, Act 247, Eff. Oct. 14; — Am. 1965, p. 566, Act 293, Imd. Eff. Jul. 22.

322.708 Lands conveyed; taxation.

Sec. 8. All lands conveyed or leased under this act shall be subject to taxation and the general property tax laws and other laws as other real estate used and taxed by the governmental unit or units within which the land is or may be included.

HISTORY: New 1955, p. 406, Act 247, Eff. Oct. 14.

322.709 Rules and regulations.

Sec. 9. The department is hereby authorized and empowered to promulgate and adopt such rules and regulations, in accordance with the requirements of law, consistent with this act, that may be necessary to carry out its provisions. Such rules and regulations shall be adopted and promulgated in accordance with Act No. 88 of the Public Acts of 1943, as amended, being sections 24.71 to 24.82, inclusive, of the Compiled Laws of 1948, and Act No. 197 of the Public Acts of 1952, as amended, being sections 24.101 to 24.110, inclusive, of the Compiled Laws of 1948.

HISTORY: New 1955, p. 406, Act 247, Eff. Oct. 14.

322.710 Land filled, excavated or modified without approval; penalty.

Sec. 10. Any person who excavates or fills, or in any manner alters or modifies any of the land or waters subject to the provisions of this act without the approval of the department shall be guilty of a misdemeanor, and upon conviction shall be fined not more than $1,000.00 or imprisoned not more than 1 year, or both such fine and imprisonment. Lands, the use of which are so changed, shall not be sold to any person convicted under this section at less than fair, cash market value.

HISTORY: Add. 1958, p. 103, Act 94, Eff. Jul. 1; — Am. 1965, p. 566, Act 293, Imd. Eff. Jul. 22.

322.711 Certificate of location of lakeward boundary; application, riparian owner; fee.

Sec. 11. A riparian owner may apply to the department for a certificate suitable for recording indicating the location of his lakeward boundary or indicating that the land involved has accreted to his property as a result of natural accretions or placement of a lawful, permanent structure. The application shall be accompanied by a fee of $200.00 and proof of upland ownership.

HISTORY: Add. 1965, p. 566, Act 293, Imd. Eff. Jul. 22.

322.712 Acts prohibited; exceptions.

Sec. 12. Unless a permit has been granted by the department or authorization has been granted by the legislature, or except as to boat wells and slips facilitating private, noncommercial, recreational boat use, not exceeding 50 feet in length where the spoil is not disposed of below the ordinary high-water mark of the body of water to which it is connected, it is unlawful:

(a) To construct, dredge, commence or do any work with respect to artificial canal, channel, ditch, lagoon, pond, lake or similar waterway where the purpose is ultimate connection thereof with any of the Great Lakes, including Lake St. Clair.

(b) To connect any natural or artifically constructed waterway, canal, channel, ditch, lagoon, pond, lake or similar waterway with any of the Great Lakes, including Lake St. Clair, for navigation or any other purpose.

HISTORY: Add. 1968, p. 11, Act 3, Imd. Eff. Feb. 27.

322.713 Application for permits; contents; fees.

Sec. 13. (1) Before any work or connection specified in section 12 is undertaken a person shall file an application with the department setting forth the following:

(a) The name and address of the applicant.

(b) The legal description of the lands included in the project.

impaired or substantially affected, is hereby authorized to enter into agreements pertaining to waters over and the filling in of submerged patented lands, or to lease or deed unpatented lands, after approval of the state administrative board. Quit claim deeds, leases or agreements may be issued or entered into by the department with any person, firm, or corporation, public or private, or the United States of America covering unpatented lands, and shall contain such terms and conditions and requirements which shall be deemed just and equitable and in conformity with the public trust as determined by the department. The department shall reserve to the state of Michigan all mineral rights, including but not limited to coal, oil, gas, sand, gravel, stone and other materials or products located or found in said lands, except where lands are occupied or to be occupied for residential purposes at the time of conveyance.

(2) After July 22, 1965, a riparian owner shall obtain a permit from the department, for which no charge shall be made, before dredging or placing spoil or other materials on bottomland.

(3) The department shall not enter into a lease or deed of unpatented lands which permits drilling operations for the taking of oil or gas, unless all drilling operations originate from locations above and inland of the ordinary high-water mark. The department shall not enter into a lease or deed of unpatented lands which permits drilling for exploration purposes unless the drilling operations originate from locations above and inland of the ordinary high-water mark.

HISTORY: New 1955, p. 405, Act 247, Eff. Oct. 14; — Am. 1958, p. 101, Act 94, eff. Jul. 1; — Am. 1965, p. 564, Act 293, Imd. Eff. Jul. 22; — Am. 1982, p. 162, Act 68, eff. Apr. 14.

322.704 Unpatented lake bottomlands and unpatented made lands; application for conveyance, contents, qualifications of applicant, consent.

Sec. 4. (a) Application for a deed or lease to unpatented lands or agreement for use of water areas over patented lands shall be on forms provided by the department. Such application shall *include* a surveyed description of the lands or water area applied for, together with a surveyed description of the riparian or littoral property lying adjacent and contiguous to the lands or water area, certified to by a registered land surveyor. The description shall show the location of the water's edge at the time it was prepared and such other information that shall be required by the department. The applicant shall be a riparian or littoral owner or owners of property touching or situated opposite the unpatented land or water area over patented lands applied for or an occupant of said land. The application shall include the names and mailing addresses of all persons in possession or occupancy or having any interest in the adjacent or contiguous riparian or littoral property or having riparian or littoral rights or interests in the lands or water areas applied for and such application shall be accompanied by the written consent of all persons having an interest in the lands or water areas applied for in the application.

Approvals required; abstract of title and tax history of riparian land.

(b) Before an application can be acted upon by the department, the applicant shall secure approval of or permission for his proposed use of such lands or water area from any federal agency as provided by law, the Michigan waterways commission and the legislative body of the local unit or units of government within which such land or water area is or will be included, or to which it is contiguous or adjacent. No deed, lease or agreement shall be issued or entered into by the department without such approvals or permission. The department may also require the applicant to furnish an abstract of title and ownership, and a 20-year tax history on the riparian or littoral property which is contiguous or

agreement be approved by the department, the applicant shall be entitled to credit for the fee against the consideration which shall be paid for such deed, lease or other agreement.

HISTORY: New 1955, p. 405, Act 247, Eff. Oct. 14; — Am. 1958, p. 101, Act 94, Eff. Jul. 1; — Am. 1965, p. 564, Act 293, Imd. Eff. Jul. 22.

322.705 Unpatented lake bottomlands and unpatented made lands; consideration for conveyances or lease.

Sec. 5. Should the department determine that it is in the public interest to grant an applicant a deed or lease to such lands or enter into an agreement to permit use and improvements in the waters or to enter into any other agreement in regard thereto, the department shall determine the amount of consideration to be paid to the state by such applicant for the conveyance or lease of unpatented lands.

Lease or agreement to fill submerged lands; permanent improvements; artificial changes in land; consideration; cash market value.

(a) The department may permit, by lease or agreement, the filling in of patented and unpatented submerged lands and permit permanent improvements and structures after finding that the public trust will not be impaired or substantially injured.

The department may issue deeds or may enter into leases if the unpatented lands applied for have been artifically filled in or are proposed to be changed from the condition that exists on the effective date of this act by filling, sheet piling, shoring, or by any other means, and such lands are used or to be used or occupied in whole or in part for uses other than existing, lawful riparian or littoral purposes. The consideration to be paid to the state for the conveyance or lease of unpatented lands by such applicant shall be not less than the fair, cash market value of the lands determined as of the date of the filing of such application, minus any improvements placed thereon but in no case shall the sale price be less than 30% of the value of the land. In determining the fair, cash market value of the lands applied for, the department may give due consideration to the fact that such lands are connected with the riparian or littoral property belonging to the applicant, if such is the case, and to the uses, including residential and commercial, being made or which can be made of said lands.

Agreements for lands or water areas with local units.

(b) Agreements for the lands or water area described in section 2 may be granted to or entered into with local units of government for public purposes and containing such terms and conditions which may be deemed just and equitable in view of the public trust involved and may include the granting of permission to make such fills as may be necessary.

Flood control, shore erosion control, drainage and sanitation control.

(c) If the unpatented lands applied for have not been filled in, nor in any way substantially changed from their natural character at the time the application is filed with the department, and the application is filed for the purpose of flood control, shore erosion control, drainage and sanitation control or to straighten irregular shore lines, the consideration to be paid to the state by the applicant shall be the fair, cash value of such land, giving due consideration to its being adjacent to and connected with the riparian or littoral property owned by the applicant.

Leases or agreements for marina purposes; definition.

(d) Leases or agreements covering unpatented lands may be granted or

(c) A summary statement of the purpose of the project.

(d) A map or diagram showing the proposal on an adequate scale with contours and cross-section profiles of the waterway to be constructed.

(e) Other information required by the department.

(2) A fee of not less than $50.00 shall accompany the application which fee shall be transmitted to the state treasurer for credit to the state's general fund.

HISTORY: Add. 1968, p. 11, Act 3, Imd. Eff. Feb. 27.

322.714 Application for permit; copies, local units, adjacent riparian owners; objections; hearing, time, notice.

Sec. 14. Upon receipt of the application, the department shall mail copies to the state department of public health, clerks of the county, city, village and township, and drain commissioner of the county or if none the road commissioner of the county, in which the project or body of water affected is located, and to the adjacent riparian owners, accompanied by a statement that unless a written objection is filed with the department within 20 days after the mailing of the copies, the department may take action to grant the application. the department may set the application for public hearing. At least 10 days' notice of the hearing shall be given by publication in a newspaper circulated in the county and by mailing copies of the notice to the persons named in this section.

HISTORY: Add. 1968, p. 11, Act 3, Imd. Eff. Feb. 27.

322.715. Permit; issuance; conditions; waterways, maintenance.

Sec. 15. If the department finds that the project will not injure the public trust or interest including fish and game habitat, that the project conforms to the requirements of law for sanitation, and that no material injury to the rights of any riparian owners on any body of water affected will result, the department shall issue a permit authorizing enlargement of the waterway affected. The permit shall provide that the artificial waterway shall be a public waterway, except intake or discharge canals or channels on property owned, controlled, and used by a public utility. The department may impose further conditions in the permit that it finds reasonably necessary to protect the public health, safety, welfare, trust and interest, and private rights and property. The existing and future owners of land fronting on the artificial waterway are liable for maintenance of the waterway in accordance with the conditions of the permit.

HISTORY: Add. 1968, p. 11, Act 3, Imd. Eff. Feb. 27.

Great Lakes Submerged Lands Administrative Rules

Filed with the Secretary of State on October 14, 1982.
These rules take effect 15 days after filing with the Secretary of State.

(By authority conferred on the department of natural resources by section 9 of Act No. 247 of the Public Acts of 1955, as amended, and section 252 of Act No. 380 of the Public Acts of 1965, as amended, being §§322.709 and 16.352 of the Michigan Compiled Laws)

R 281.901 — R 281.915. Rescinded by R 322.1018.

R 322.1001 Definitions.

Rule 1. (1) As used in these rules:

(a) "Accretion" means land created as a result of natural depositions or placement of a lawful, permanent structure.

(b) "Act" means Act No. 247 of the Public Acts of 1955, as amended, being §322.701 et seq. of the Michigan Compiled Laws, and known as the Great Lakes submerged lands act.

(c) "Agreement" means a binding contract between the state and another person concerning the private use of patented or unpatented bottomlands except use for "marina purposes" as defined in the act.

(d) "Applicant" means a person applying for a deed, lease, agreement, or permit to use or alter unpatented lands or an agreement or permit for use of water areas over patented lands.

(e) "Bottomland" means lands in the Great Lakes, and bays and harbors thereof, lying below and lakeward of the ordinary high-water mark.

(f) "Conveyance" means a deed, lease, agreement, or certificate as referred to in the act.

(g) "Department" means the department of natural resources.

(h) "Dredging" means removal of any mineral, organic or other material from or within the bottomland or waters of the Great Lakes by any means.

(i) "Filling" means placement of any mineral, organic or other material on the bottomlands or into the waters of the Great Lakes.

(j) "Ordinary high-water mark" means the elevations set by the act. When the soil, configuration of the surface, or vegetation has been altered by man's activity, the ordinary high-water mark shall be located where it would have been if this alteration had not occurred.

(k) "Other materials" means any man-made structure or installed device or facility extending over or placed on bottomlands below the ordinary high-water mark, including, but not limited to, all of the following:

(i) Bulkheads.

(ii) Groins.

(iii) Riprap.

(iv) Jettys.

(v) Breakwaters.

(vi) Piers and pipelines.

(vii) Pilings.

The term also means a man-made structure or installed device or facility attached to or administered by a marina. The term does not include temporary docks, boat hoists, or other devices for private use which are removed annually.

(l) "Person" means any individual, partnership, corporation, association, political subdivision, the state, the department, an instrumentality or agency of the state, a political subdivision of an instrumentality or agency of the state, a department or other instrumentality or agency of the federal government, or other legal entity.

(m) "Public trust" means the perpetual duty of the state to secure to its people the prevention of pollution, impairment or destruction of its natural resources, and rights of navigation, fishing, hunting, and use of its lands and

waters for other public purposes.

(n) "Riparian owner" means one who owns upland bordering the bottomland or water area.

(o) "Riparian rights" means all those rights accruing to ownership of riparian property, including the following, subject to the public trust:

(i) Access to the navigable waters.

(ii) Dockage to boatable waters; wharfage.

(iii) Use of water for general purposes, such as bathing and domestic use.

(iv) Title to natural accretions as determined by the department.

(p) "Submerged patented lands" means any bottomlands lying within a specific government grant area, including a private claim patent, federal patent, or state swampland patent.

(q) "Unpatented lands" means all bottomlands except submerged patented lands.

(2) The terms defined in the act have the same meanings when used in these rules.

R 322.1002 Applications for deeds, leases, agreements, and certificates; forms; content.

Rule 2. (1) Application forms for deeds, leases, or agreements to use or alter unpatented lands, for certificates of lakeward boundary and accretion, or for agreements for use of water areas over patented or unpatented bottomlands may be obtained from the department. The applicant shall file separately for each parcel of bottomland, unless the parcels of bottomland front a single upland ownership. If the parcels front a single upland ownership, one application may be submitted.

(2) An application for deeds, leases, agreements, or certificates shall not be considered administratively complete by the department until all information requested on the application form, the application fee, and any other information requested by the department have been received by the department. After receipt of an otherwise complete application, the department may request such additional information, environmental assessments, appraisals, records, or documents as are determined to be necessary to make a decision to grant or deny such a conveyance. The department shall notify the applicant in writing when the application is administratively complete.

(3) If an applicant fails to respond to any written inquiry or request from the department within 30 days, the application shall be denied without prejudice and the file shall be closed.

(4) Application fees shall be submitted to the department with the initial submittal of an application form. The fee shall be paid by check, money order, or draft made payable to: "State of Michigan."

R 322.1003 Marina lease application; criteria and procedures.

Rule 3. (1) When an application is made for filled or unfilled bottomland or water area for marina purposes, the protection and enhancement of the public trust in the bottomlands and waters of the Great Lakes shall be of primary concern. The department shall consider the character and current uses of the adjacent upland. An applicant may be required to furnish supporting evidence, satisfactory to the department, that marina services in the locality are necessary and feasible.

(2) In addition to the application requirements of R 322.1002, a survey shall be provided which specifies the location of all fills, pilings, structures, and improvements, including:

(a) The existing and planned mooring area.

(b) Boat storage.

(c) Turning basins.

(d) Traffic lanes.

(e) The location, number, and size of all boat wells, slips, and pump-out facilities.

(3) The department may require the design and survey of projects costing $50,000.00 or more, to be certified and sealed by a registered professional engineer as authorized in Act No. 299 of the Public Acts of 1980, as amended, being §339.101 et seq. of the Michigan Compiled Laws.

(4) The applicant shall file a surety bond or other assurance satisfactory to the department immediately after final approval by the state administrative board and before execution of the lease by the department. The surety bond or other assurance shall ensure that the applicant will truly and faithfully perform the covenants, conditions, and agreements specified in the lease, and shall further ensure that all pilings or other structures be removed upon cancellation or termination of the lease. The amount of the bond shall be determined by the department and shall be commensurate with the cost of restoring bottomlands to pre-lease condition. The bond shall be in effect for the period of the lease term, or until all lease conditions have been fulfilled to the department's satisfaction.

(5) The department shall issue a statement releasing the lessee and the bond company upon termination of the marina lease and upon satisfactory restoration of the bottomlands.

R 322.1004 Marina lease conditions.

Rule 4. A lease shall provide for all of the following conditions to be maintained by both the lessee and the department:

(a) A term of not more than 50 years. A lease may provide for its renewal or extension upon satisfactory performance during the prior term.

(b) An advance annual rental fee to be determined by the department. The annual rental fee shall not be less than $50.00. The department shall review the annual rental fee once every 5 years and adjust the annual rental fee to reflect changes in the general economic conditions. The changes shall be based on the percentage change of the U.S. bureau of labor statistics 'all-items' index, and other economic indicators.

(c) That the assignment or other agreement modifying the lease is not binding on the department unless approved in writing by the department. An executed copy of the assignment or agreement shall be furnished to the department for approval.

(d) That the marina construction shall be completed within a specified term, normally not more than 2 years from the date of issuance of the lease. An extension of time may be granted by the department for just cause. The lease shall be forfeited if the lessee does not complete the marina within the specified time set forth in the lease, or the extension authorized by the department.

(e) That the construction and operation of the facility will not adversely impair the use of or destroy the waters or natural resources of the state.

(f) That the facility shall be maintained in an aesthetically pleasing manner.

(g) That the structures do not constitute a safety or navigation hazard and shall be maintained in good repair.

(h) That the lessee shall have sole maintenance responsibility of the facility and shall remove structures and improvements on the leased premises after nonuse or abandonment. Nonuse or abandonment shall occur when the facility is not used for commercial purposes for two successive seasons following completion of construction or execution of a lease.

(i) That upon nonuse or abandonment of the leased premises for marina purposes, or failure to construct or operate the marina facility in accordance with the lease conditions, the lessee shall execute and deliver to the department a release in recordable form of all his or her rights and interests in the lease premises. The release shall not relieve the lessee of the lease and surety bond requirements until all obligations have been met and the bond is duly discharged.

R 322.1005 Agreements; department authorization; conditions.

Rule 5. Persons shall secure an agreement from the department to use patented and unpatented bottomlands for industrial and commercial wharfage and other private waterfront development. At a minimum, the following conditions shall be in all agreements:

(a) Occupancy shall be governed by the terms of the act.

(b) Maintenance operations and improvements shall be approved by the department and shall not interfere with the public trust in adjacent waters and rights of adjacent riparian owners.

(c) At the time the agreement is terminated, all facilities and installations, including fills, shall be removed by the occupant to the satisfaction of the department.

(d) Assignment of an agreement shall not be binding on the department, unless approved in writing by the department.

R 322.1006 Conveyance applications; approval criteria; provision for public access to Great Lakes waters required.

Rule 6. (1) Review of an application for a deed, lease, agreement, certificate of boundary determination, or certificate of accretion shall be based on the following criteria:

(a) Whether the deed, lease, or agreement has a clear and present necessity beyond mere convenience or economy.

(b) Whether the conveyance of unfilled submerged lands is necessary to accomplish the purposes and activities stated in the act.

(c) Whether the project conforms to required sanitation laws and does not injure the material rights of adjoining riparian owners or any riparian owners of the water affected.

(d) A determination by the department that the private or public use of such lands and waters will neither substantially affect the public use thereof nor impair the public trust, or interest of the state.

(2) Conveyance to local units of government shall contain a provision for public access to and along Great Lakes waters.

R 322.1007 Conveyance of real estate rights; determination of fair, cash market value.

Rule 7. (1) The consideration to be paid to the state for each bottomland parcel to be conveyed shall be determined by the department, but at no time shall the consideration be less than $50.00.

(2) The consideration to be paid as fair, cash market value for a deed to filled unpatented bottomlands shall be determined as follows:

(a) Fills placed before the effective date of the act or before state permit authority, except those processed in accordance with (2)(d), shall be charged 30% of the value of the filled bottomland or full market value of the unfilled bottomlands, whichever is greater, giving due consideration to riparian rights.

(b) Fills placed after proper permits were obtained shall be charged a minimum of 30% of the value of the filled bottomland or full market value of the unfilled bottomlands, which ever is greater, giving due consideration to riparian rights.

(c) Fills placed in violation of the permitting authority of the act, if conveyed, shall be charged a minimum of 100% of the value of the filled bottom lands based on their highest and best use. Due consideration may be given to riparian rights.

(d) Fills which were placed before the effective date of the act, which are used for residential purposes, which are part of a recorded subdivision, which are less than ¼ acre, and which do not adversely affect the public trust may be charged a fee of $500.00 as the full market value. The fee stated herein shall be adjusted every 5 years according to the bureau of labor statistics 'all-items' index and other economic indicators.

(3) The consideration to be paid as fair, cash value for deeds to unpatented lands which are not filled or substantially changed from their natural character and which are to be used or are being used for flood control, shore erosion control, drainage and sanitation control shall be 30% of the value of the filled bottom land, based on its highest and best use, giving due consideration to riparian rights.

(4) The consideration for leases to unpatented bottomland for marina purposes shall be not less than 5% of the typical gross dockage and mooring rent in the area. A lease period may be a period of up to 50 years, but rental rates shall be adjusted at least every 5 years. Adjustments shall be in all years ending in "0" or "5". The rental fee adjustment shall be directly proportional to the bureau of labor statistics 'all-items' index and other economic indicators. Typical gross dockage and mooring rent shall be based on the most efficient use of the area involved.

(5) Upon approval of any deed, lease, or other agreement, the application fee shall be credited against the consideration to be paid to the state.

R 322.1008. Permits.

Rule 8. (1) A riparian owner shall obtain a permit from the department before dredging, filling, or placing spoil or other materials on bottomlands, or dredging, altering, or maintaining an existing upland channel, or constructing a new upland channel.

(2) Permits for upland channelling, as required in section 12 of the act, will not be required for the following:

(a) Construction of boat wells and slips which are not more than 50 feet in

length, as measured inland from the ordinary high-water mark, to facilitate private, noncommercial recreational boat use, if dredging, or placement of spoil does not extend lakeward of the ordinary high-water mark.

(3) Placing spoil or other material on bottomlands shall not include:

(a) Seasonal, private, noncommercial docks and boat hoists.

(b) Maintenance of a structure constructed under a permit issued pursuant to the act, if the maintenance is in place and in kind with no design or materials modification.

R 322.1009 Permit application procedures.

Rule 9. (1) An application for permits shall be made on a form as prescribed and provided by the department. Application forms may be obtained from the department or from any designated field office of the department.

(2) An application for a permit shall not be considered administratively complete until all information requested on the application form, the application fee, and any other information requested by the department have been received by the department. After receipt of an otherwise complete application, the department may request such additional information, environmental assessments, records, or documents as are determined to be necessary to make a decision to grant or deny a permit. The department shall notify the applicant in writing when the application is administratively complete.

(3) If an applicant fails to respond to any written inquiry or request from the department within 30 days, the application shall be denied without prejudice and the file shall be closed.

(4) For upland channels, a fee of not less than $50.00, payable to: "State of Michigan," shall accompany the application.

R 322.1010 Notification of pending applications; determination of applications; copies.

Rule 10. (1) Upon receiving an application for a permit or conveyance, except for applications for those projects stated in R 322.1013, the department shall submit copies for review to all of the following:

(a) The director of public health or the local health department designated by the director.

(b) The county, city, village, or township clerk.

(c) The county drain and/or road commissioners.

(d) The local port commission, if any.

(e) The 2 adjacent riparian property owners.

(2) To be considered in the department's review of an application, a response to a public notice or request for a public comment meeting must be received by the department within 20 days of the mailing of such public notice.

(3) Upon request, the department shall provide any person with a copy of a conveyance, permit, or application and supporting documents, pursuant to Act No. 442 of the Public Acts of 1976, as amended, being §15.231 et seq. of the Michigan Compiled Laws.

R 322.1011 Permit issuance; conditions and requirements.

Rule 11. (1) The department may require such permit conditions as it deems reasonable and necessary to protect the public trust and private riparian interests including the following:

(a) A surety bond or other acceptable guarantee before issuing a permit, for projects with the potential for signficant environmental impact and the ability of the applicant to complete the project satisfactorily during the period of the permit.

(b) That dredged materials be deposited in a manner which will cause the least damage to the public trust, benefit public interests, or mitigate damage done through navigation projects.

(c) That filling, dredging and placing spoil and other materials on bottomlands shall be conducted in a manner which will cause the least damage to the public trust, and least disruption to the littoral drift and longshore processes, enhance the public trust or interests, or mitigate damages.

(d) Monitoring to assure that no injury to the natural resources or to the riparian interests of adjacent property owners occurs, including specifically monitoring the littoral drift in the project area.

(e) That the project be in compliance with local zoning ordiannces. If the facility is not in compliance, and the local unit of government having proper jurisdiction notifies the department at the time of public notice objecting to the issuance of a permit, the department shall withhold permit issuance for 30 days from the date of expiration of public notice. If the local unit of government does not file an action to restrain operation of the facility in a public forum within the specified 30-day time frame, the department may issue a permit for marina operation if all other criteria are met.

(f) That the work specified therein shall be completed within a specified term, normally not more than 1 year from the date of issuance, or as otherwise determined by the department. An extension of time may be granted by the department for just cause.

(2) Maintenance dredging permits may be granted for a period of 5 years, provided the area to be dredged and the disposal area remain the same.

(3) The department shall, upon request, provide advice to the applicant for the consideration and protection of the public trust and private riparian interests.

(4) A permit does not obviate the necessity of receiving approval from the United States army corps of engineers, and other federal, state or local units of government, where applicable.

R 322.1012 Upland channelling; requirements.

Rule 12. (1) The department shall not issue a permit for upland channelling, unless the project conforms to all of the following:

(a) The channel will not significantly impair the public trust or interest, including fish and wildlife habitat, in the adjacent land and water area.

(b) The channel and adjacent commercial or residential development will conform to the requirements for platting land, local zoning, and sanitation laws.

(c) The channel will not cause material injury to the rights of adjoining riparian owners or any riparian owners of the water affected.

(d) The channel will be maintained pursuant to the conditions of the permit by existing and future owners of the land fronting the channel.

(e) Channelling will not be in conflict with other state statutes.

(f) Channels in multi-residential or commercial developments will be of sufficient width to accommodate prospective traffic, watercraft dockage, and maintenance dredging.

(g) Channels will be constructed to a sufficient depth to minimize weed growth.

(h) Stabilization of channel banks will be required to control bank slumping and siltation.

(i) Channels for multi-residential or commercial projects will be constructed so the channel banks are a minimum of 100 feet from each adjacent riparian property line, except where an adjacent riparian owner's approval has been obtained.

(j) All dredged materials will be handled pursuant to R 322.1011.

(2) The channel shall be a public waterway, unless it is an intake or discharge canal as determined by the department.

R 322.1013 Minor project permit; eligibility.

Rule 13. (1) The department may process applications in accordance with R 322.1014 for those projects of a minor nature which are not controversial, which have minimal adverse environmental impact, which will be constructed of clean, nonpolluting materials, which do not impair the use of the adjacent bottomlands by the public, and which do not adversely affect riparian interests of adjacent owners.

(2) The following projects are eligible for a minor project permit:

(a) Noncommercial single piers, docks, and boat hoists which meet the following design criteria:

(i) Are of a length or size not greater than the length or size of similar structures in the vicinity and on the watercourse involved.

(ii) Provide for the free littoral flow of water and drift material.

(b) Spring piles and pile clusters when their design and purpose is usual for such projects in the vicinity and watercourse involved.

(c) Seawalls, bulkheads, and other permanent revetment structures which meet all of the following purpose and design criteria:

(i) The proposed structure fulfills an identifiable need for erosion protection, bank stabilization, protection of uplands, or improvements on uplands.

(ii) The structure will be constructed of suitable materials free from pollutants, waste metal products, debris, or organic materials.

(iii) The structure is not more than 100 feet in length and is located in an area on the body of water where other similar structures already exist.

(iv) The placement of backfill or other fill associated with the construction does not exceed an average of 1 cubic yard per running foot along the shoreline and a maximum of 100 cubic yards.

(v) The structure or any associated fill will not be placed in a wetland area or placed in any manner that impairs surface water flow into or out of any wetland area.

(d) Groins 25 feet or less in length which are placed at least twice their length from adjacent property lines.

(e) Filling for restoration of existing permitted fills, fills placed incidental to construction of other structures, and fills that do not exceed 100 cubic yards as a single and complete project, where the fill is of suitable material free from pollutants, waste metal products, debris, or organic materials.

(f) Dredging for the maintenance of previously dredged areas or dredging of

not more than 100 cubic yards as a single and complete project when both of the following criteria are met:

(i) No reasonable expectation exists that the materials to be dredged are polluted.

(ii) All dredging materials will be removed to an upland site exclusive of wetland areas.

(g) Structural repair of man-made structures, except as exempted by R 322.1008(3), when their design and purpose meet both of the following criteria:

(i) The repair does not alter the original use of a currently serviceable structure.

(ii) The repair will not adversely affect public trust values or interests, including navigation and water quality.

(h) Fish habitat structures which meet both of the following criteria:

(i) Are placed so the structures do not impede or create a navigational hazard.

(ii) Are permanently anchored to the bottomlands.

(i) Scientific structures such as staff gauges, water monitoring devices, water quality testing devices, survey devices, and core sampling devices, if the structures do not impede or create a navigational hazard.

(j) Navigational aids which meet both of the following criteria:

(i) Are approved by the United States coast guard.

(ii) Are approved under Act No. 303 of the Public Acts of 1967, as amended, being §281.1001 et seq. of the Michigan Compiled Laws, and known as the marine safety act.

(k) Extension of a project where work is being performed under a current permit and which will result in no damage to natural resources.

R 322.1014 Minor project permit; application procedures.

Rule 14. (1) The department may issue a permit for a minor project as stated in R 322.1013, after an administratively complete application has been filed pursuant to R 322.1009.

(2) Permit applications filed for minor projects shall be field inspected by the department before issuance.

(3) Public notice procedures set forth in R 322.1010 may be waived for those applications meeting minor project permit requirements.

(4) Projects applied for under the minor project permit authority which are controversial or which will have a significant environmental impact shall be processed as described in R 322.1010.

R 322.1015 Environmental assessment.

Rule 15. In each application for a permit, lease, deed, or agreement for bottomland, existing and potential adverse environmental effects shall be determined. Approval shall not be granted unless the department has determined all of the following:

(a) That the adverse effects to the environment, public trust, and riparian interests of adjacent owners are minimal and will be mitigated to the extent possible.

(b) That there is no feasible and prudent alternative to the applicant's

proposed activity, consistent with the reasonable requirements of the public health, safety and welfare.

R 322.1016 Inspection and certification of completed projects.

Rule 16. (1) The department may issue a certification for a project after final inspection, provided that the project was satisfactorily performed according to state permit.

(2) Where notice of certification is required as a permit condition, the permittee shall notify the department within 10 days of completion of the project to schedule a final inspection for certification. The department shall schedule its field inspection of a completed project when weather conditions will permit a thorough inspection.

(3) When any permit conditions are not complied with, enforcement action may be brought against the permit holder.

R 322.1017 Hearings.

Rule 17. (1) The department may hold a public comment hearing when a proposed project appears to be controversial, where additional information is desired before action by the department, or upon request, if such request is made within the public notice period.

(2) Persons aggrieved by an action or inaction of the department may request a formal hearing on the matter, pursuant to the provisions of Act No. 306 of the Public Acts of 1969, as amended, being §24.201 et seq. of the Michigan Compiled Laws, within 60 days of the notice of the department's decision.

R 322.1018 Rescission.

Rule 18. R 281.901 to 281.915 of the Michigan Administrative Code, appearing on pages 973 to 977 of the 1979 Michigan Administrative Code, are rescinded.

WHAT YOU NEED TO KNOW ABOUT

The Great Lakes Submerged Lands Act and the ordinary high-water mark

Act 247, P.A. 1955, As Amended

Seasons bring changes in water levels to the Great Lakes. These changes periodically expose or cover up the shore frontage leaving many shoreline riparian owners in doubt as to where their property ends and state controlled bottomlands begins. The ordinary high-water mark is the legal boundary separating state controlled bottomlands from private property. This mark means the line between upland and bottomland which persists through successive changes of water levels, below which the presence and action of water is common or recurrent so that the character of the land is marked distinctly from the upland and is apparent in the soil, the configuration of the surface of the soil, and the vegetation. The ordinary high-water mark is permanently fixed by statute in the Great Lakes Submerged Lands Act, Act 247, P.A. 1955, as amended, for all Great Lakes. This boundary cannot be trespassed when considering construction, dredging or filling activity without a proper permit under Act 247.

A permit and/or lease, deed or agreement is required from the Department of Natural Resources for:

1. Dredging and/or filling bottomland below the ordinary high-water mark.
2. Placement or alteration of a structure on bottomland below the ordinary high-water mark (this includes permanent docks and boathouses).
3. Development, construction and operation of a marina.
4. Interference with the natural littoral flow of the Great Lakes.
5. Construction, alteration or connection of any artificial waterway (i.e. upland channel, lagoon, artificial harbor, etc.) extending landward of the ordinary high-water mark.
6. Any artificially made lands below the ordinary high-water mark filled prior to 1955 to present.*
7. Any artificially made lands below the ordinary high-water mark filled since 1955 to present.*

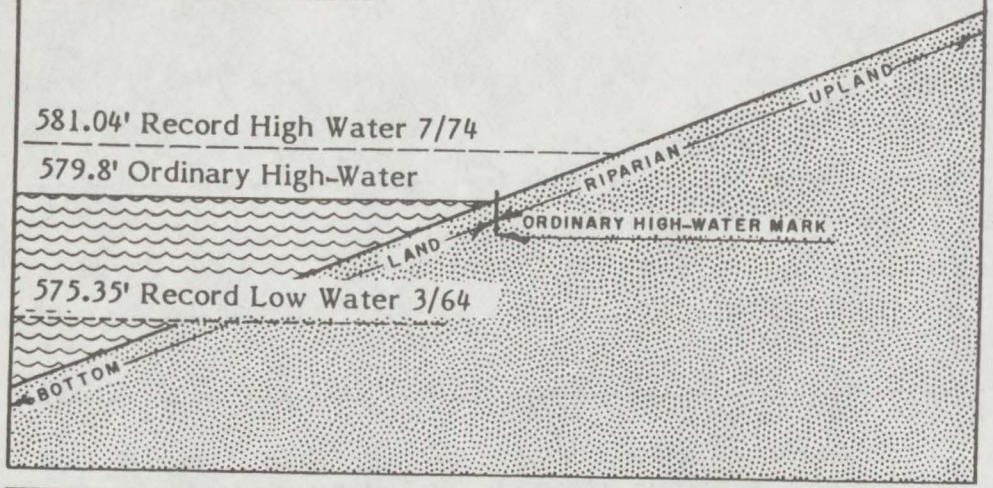
* Swampland patents, private claims and government issued patents are exempt from deed requirements (items 6 and 7). Items 1 — 5 require permits regardless of title patent status.

Other laws administered by the Department may also affect any proposed work, i.e. Shorelands Protection and Management Act of 1970, as amended, Wetland Protection Act of 1979.

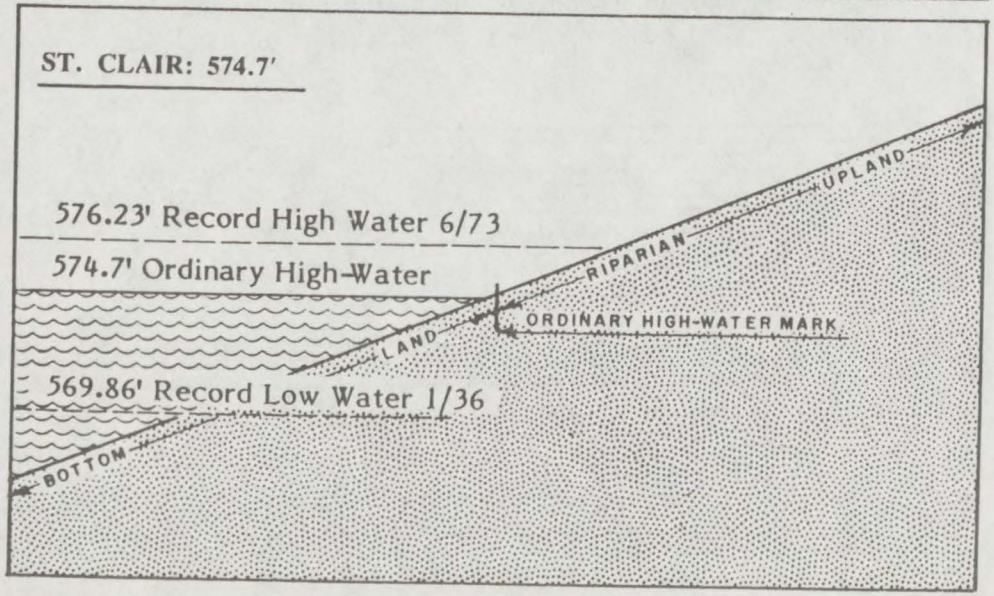
ORDINARY HIGH-WATER MARK
AS SET BY ACT 247 P.A. 1955
ON THE GREAT LAKES

Elevations above sea level:
International Great Lakes Datum
High & Low Levels

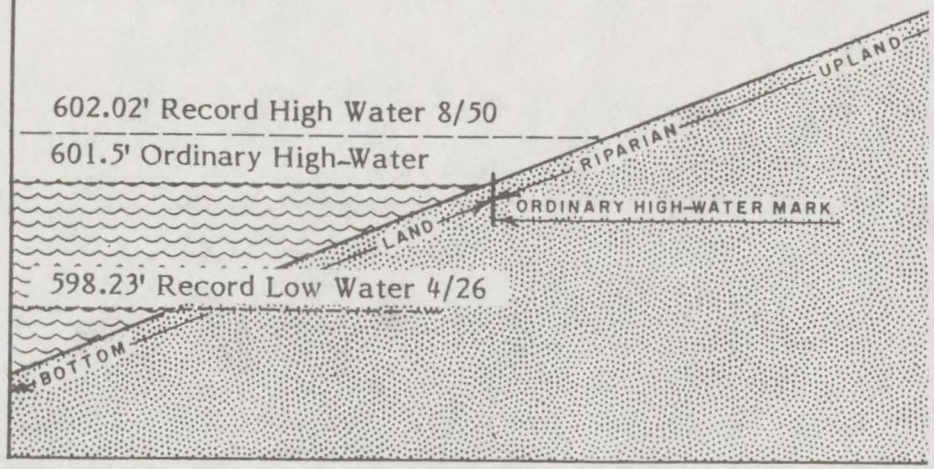
MICHIGAN — HURON: 579.8'



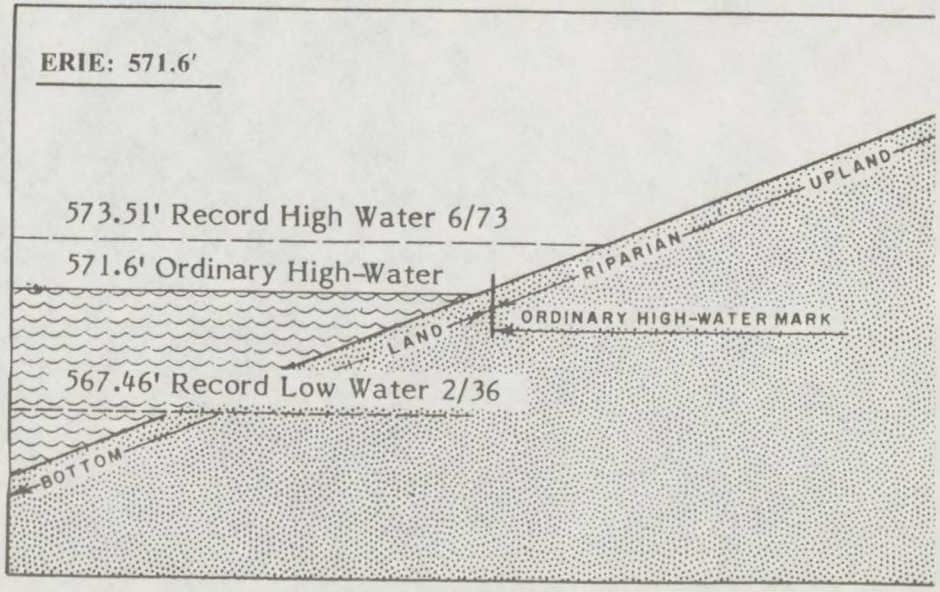
ST. CLAIR: 574.7'



SUPERIOR: 601.5'

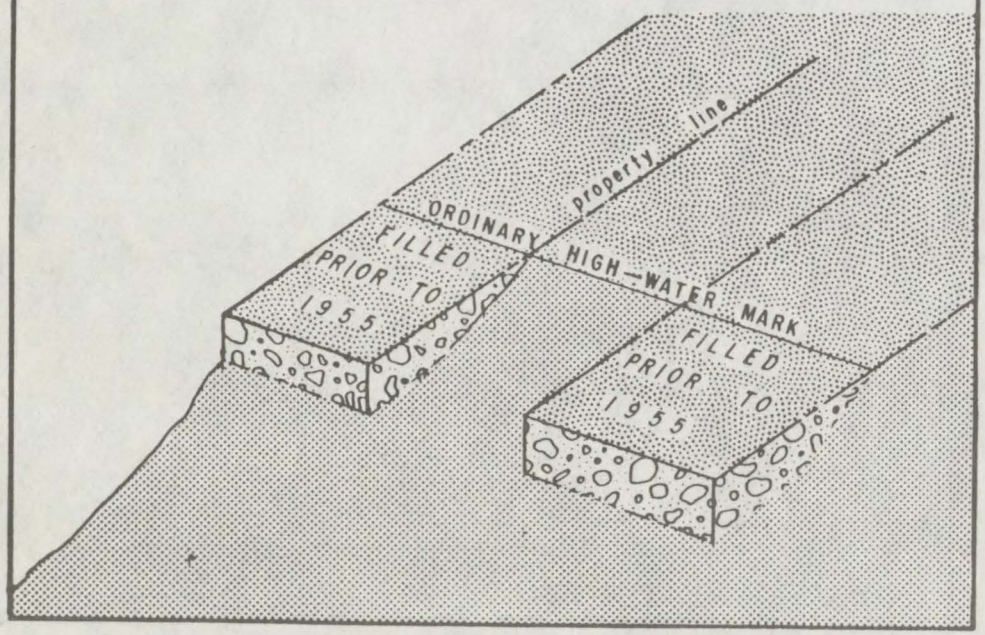


ERIE: 571.6'

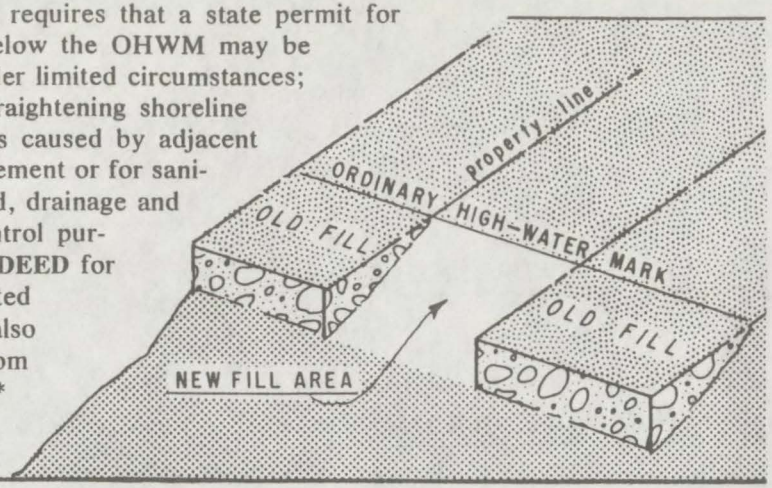


MAJOR STATUTORY REQUIREMENTS REGARDING FILLING UNDER THE GREAT LAKES SUBMERGED LANDS ACT ACT 247, PUBLIC ACTS OF 1955

The statute requires that a lease or deed **MUST** be obtained from the State of Michigan for any unpatented Great Lakes bottomland filled/occupied below the ordinary high-water mark prior to 1955.

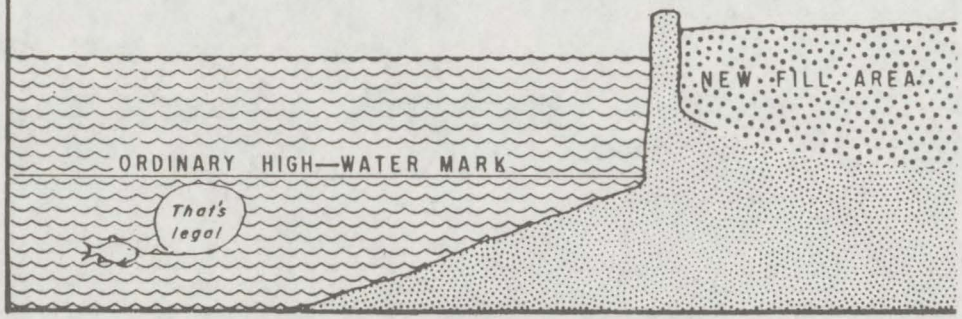


The statute requires that a state permit for new fills below the OHWM may be granted under limited circumstances; such as: straightening shoreline irregularities caused by adjacent old fill placement or for sanitation, flood, drainage and erosion control purposes. "**A DEED** for newly created property is also required from the state."*



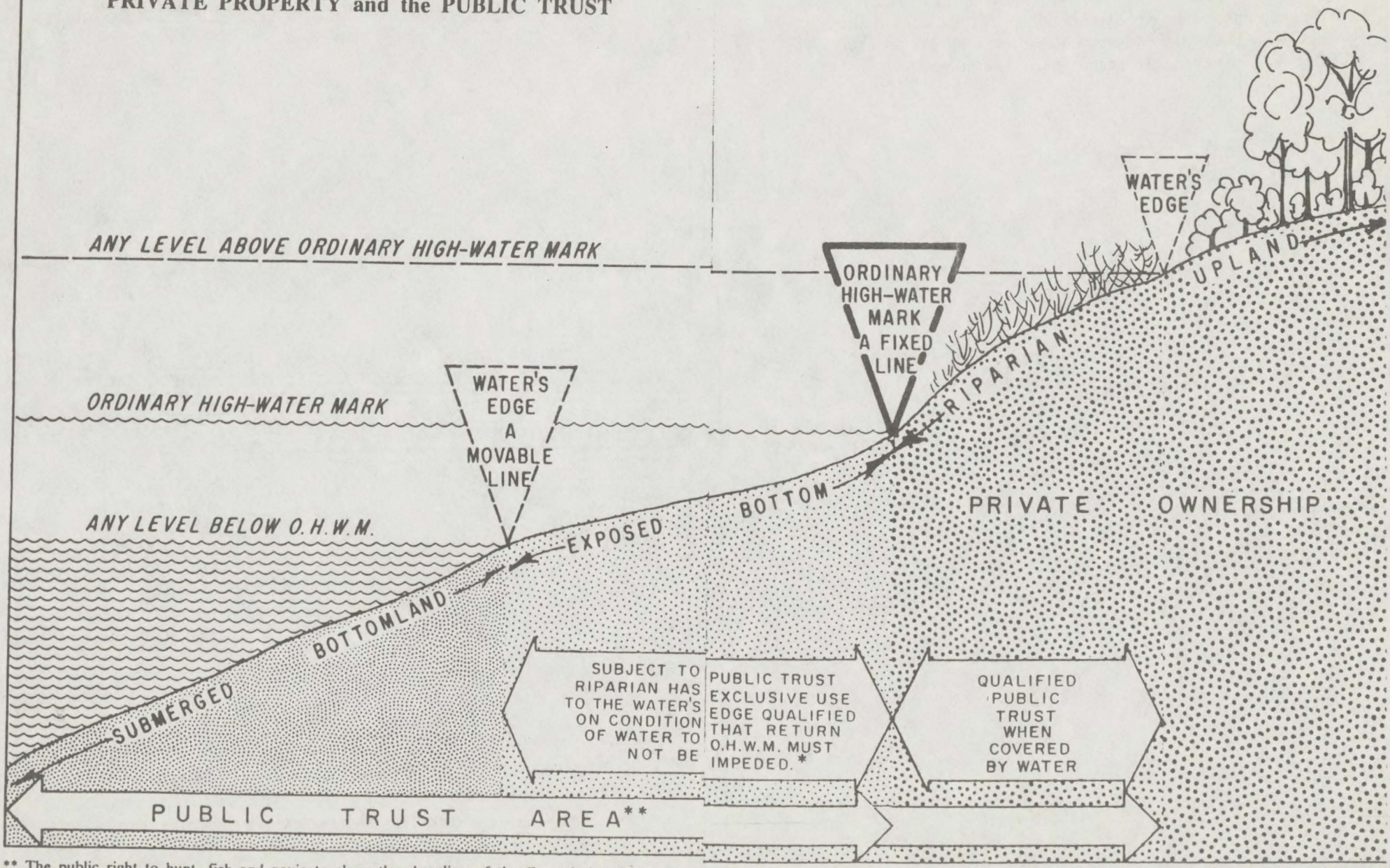
* Post 1955 to present.

State permits are not required for fill activity above the ordinary high-water mark under this statute.* However, permits are required to fill land above the OHWM when submerged.



* But may be subject to provisions of Act 245, PA 1970, and Act 203, PA 1979.

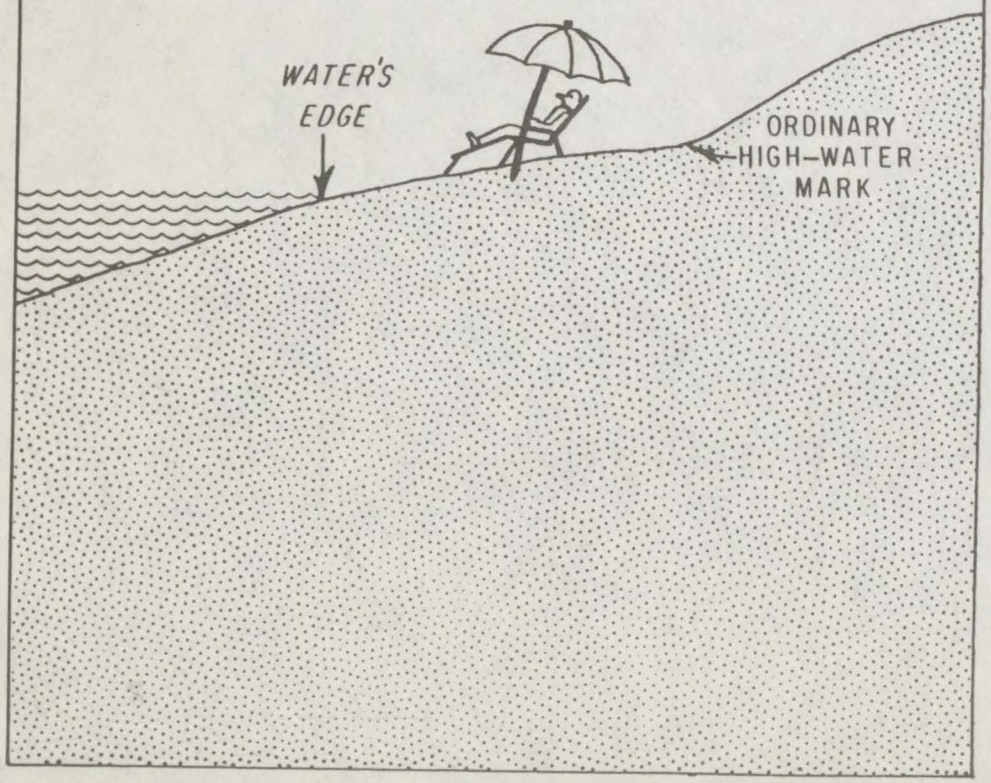
"WATER'S EDGE" and "ORDINARY HIGH" on the GREAT LAKES as related to PRIVATE PROPERTY and the PUBLIC TRUST



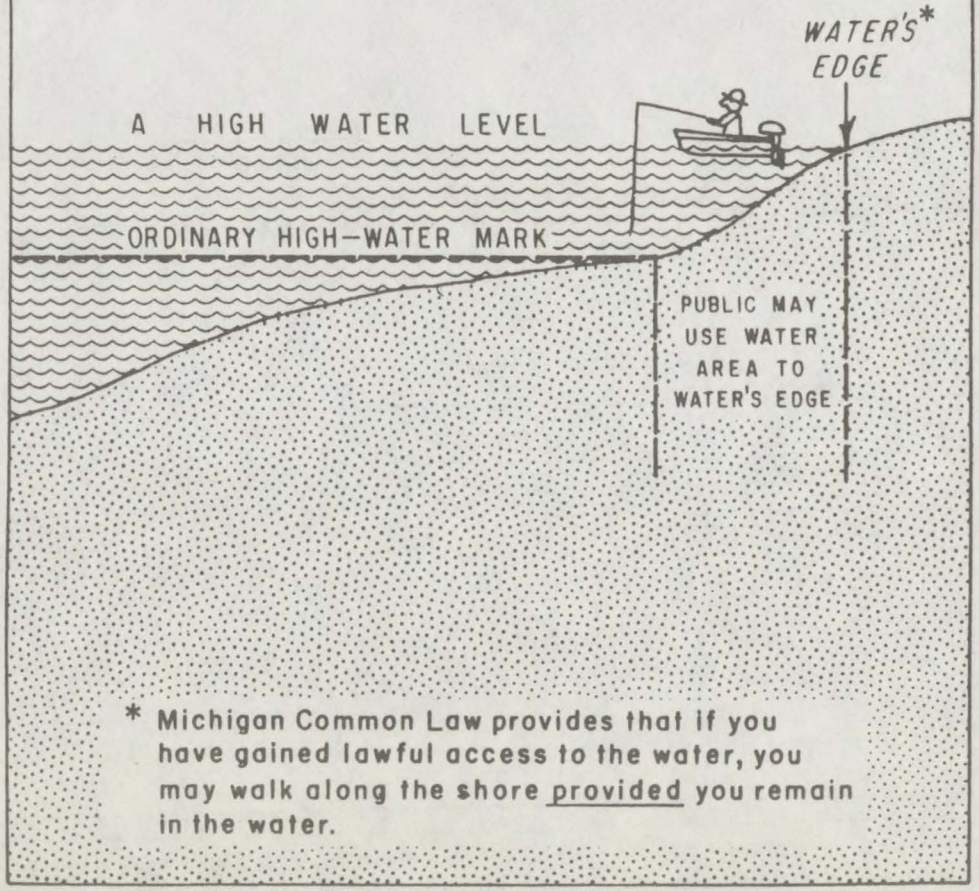
** The public right to hunt, fish and navigate along the shoreline of the Great Lakes is contingent upon the water's edge, regardless of the ordinary high-water mark (O.H.W.M.)

*Except as provided in Act 247, 1955

In other words, the ordinary high-water mark is the important dividing line, when the water is below this mark the riparian has exclusive use of the exposed bottomland and may post this area. Permits, however, are required for alterations.



When the water's edge is above the ordinary high-water mark, the public is free to navigate, fish and hunt on the entire water area.



* Michigan Common Law provides that if you have gained lawful access to the water, you may walk along the shore provided you remain in the water.