Wetland Protection Summary in the Great Lakes Basin

C.P.R. for Wetlands:

Conserve, Protect, and Restore

Breathing new life into our sense of place

Great Lakes
Aquatic Habitat
Network & Fund

Wetlands Campaign 2004
Save Your Habitat!

C.P.R. for Wetlands: *Conserve, Protect, and Restore*

Breathing new life into our sense of place

TABLE of CONTENTS

Introduction 3

The Importance of Citizen Involvement 3

Distinguishing between exempted, regulated, and illegal activities 4

Responding to Permit Applications 5

Regulatory Summaries 8

- Wetland Regulation in Ontario 8
- Wetland Regulation in the United States 10
  - Illinois 13
  - Indiana 14
  - Michigan 16
  - Minnesota 17
  - New York 18
  - Ohio 19
  - Pennsylvania 19
  - Wisconsin 20

Prepared in February 2004 by Tip of the Mitt Watershed Council for the Great Lakes Aquatic Habitat Network and Fund, a project of the Tip of the Mitt Watershed Council. Funding provided by E.P.A. Great Lakes Grants Program, National Fish and Wildlife Foundation, and U.S. Environmental Protection Agency.

Wetland Protection Summary in the Great Lakes Basin

INTRODUCTION

This summary of Great Lakes state and province wetland laws, regulations, and tools for wetland protection is intended to provide a quick overview of the jurisdiction in which you live. You will find a general overview of wetland protection under the U.S. Clean Water Act, an overview of protections in the province of Ontario, Canada, and descriptions of wetland regulation in Illinois, Indiana, Michigan, Minnesota, New York, Ohio, Pennsylvania, and Wisconsin. These materials are presented as of January 2004, and will give you an idea of how your jurisdiction protects wetlands and the opportunities you may have as a citizen to become involved in protecting a wetland resource near you.

THE IMPORTANCE OF CITIZEN INVOLVEMENT

Because everyone in the community benefits from the functions performed by healthy wetlands, wetlands are community resources. Whether it is through water quality protection, wildlife habitat, or places to experience nature, healthy wetlands promote healthy communities. In order to ensure the protection and restoration of healthy wetlands, and therefore the maintenance of healthy communities, we must all be involved.

One measure of the success of our democracy is the quality of our shared environment. How we treat the environment is an indicator of how we treat each other. The ability to act on our desire to protect healthy wetlands so that we may have healthy communities is based on the bedrock values and processes of democracy Since protecting wetlands benefits everyone in the community, protecting wetlands is an act of civic service. Democracy is not something we just "have," it is something that we must "do." We must accept our responsibilities as citizens and stand up for the wetlands that provide our kids with places to play, protect us from floods, clean our water, and serve as homes for wildlife.

Thanks to the scientists, hunters, anglers, and citizen activists who have studied, used, and fought to protect wetlands over the last 100 years, our society has a better understanding of wetlands and their values. We know that each of us benefit from the water quality protection, flood storage, and wildlife habitat that wetlands provide. This recent understanding runs counter to our cultural heritage, however. Although the mountain of scientific evidence that documents the important wetland functions and values of wetlands is massive, the old conception of "wetlands as wastelands" is a current that still runs deep.

As citizens who appreciate the functions and values of wetlands, our task is not easy. The growing understanding over the last century and the last few decades of regulatory protection pale in comparison to the potency of thousands of years of western culture's imaginative understanding of wetlands and the hundreds of years of our efforts to convert wetlands on this continent. Words used to describe wetlands—Swamp, Bog, Muskeg, Mire—evoke images of mystery and intrigue. Movies like "The Swamp Thing" tap into deep-rooted fear of what might be hidden in a wetland. If nothing else, today these words convey annoyance—who among us has not been "mired," "bogged down," or "swamped?"

In addition to this historic aversion to wetlands, another major threat to wetlands is the concept of individual property rights taken to the extreme—that notion held by some property rights advocates that the individual's right to do whatever he or she chooses on their property supersedes any concern for how that activity might impact the health, safety, and general welfare of others.

It is with this backdrop that the campaign to protect wetlands in the Great Lakes Basin is waged. Despite this cultural context, advocates for wetland protection have made great strides forward. Wetland functions are widely acknowledged and appreciated. Wetland regulations at the federal and state levels, and in some local communities, provide a process to avoid and minimize impacts while creating a mechanism that affords an opportunity for citizen involvement. Citizens are involved in restoring formerly degraded wetlands across the state. The growth of the local land trust movement has created an opportunity for the preservation of many important wetlands. And, on the philosophical front, even the "negative" image of wetlands is being appreciated for its value as a metaphor for the unknown and unpleasant side of human existence.

But we still have a long way to go. Thousands of permits to degrade wetlands are applied for in the Great Lakes Basin each year, and the vast majority of them are permitted. Hundreds, perhaps thousands (nobody knows), of wetlands are lost or degraded each year outside of the regulatory process altogether. Some of these are due to loopholes in the law, others are flagrant violations of the law.

Everyone benefits from the multitude of functions and values that wetlands provide. Because everyone shares the benefits of clean water, flood protection, healthy fish, and abundant wildlife, everyone has a stake in how wetlands are protected and managed. As citizens who value and benefit from the functions that wetlands provide, we are responsible for their protection.

There are many different opportunities to get involved in wetland protection. Because the stated intent of wetland regulations is to protect the public interest in the functions and values that wetlands provide, citizens are provided with the opportunity to participate in the permit decisions that will impact wetlands. Participating in the wetland regulatory process, which is the focus of this publication, is but one example of meaningful involvement. For additional ways to become involved in wetland protection, please visit www.michiganwetlands.org to view a copy of the book *Michigan Wetlands – Yours to Protect: A Citizen's Guide to Wetland Protection (Third Edition)* 2003. Tip of the Mitt Watershed Council, Petoskey, MI 49770, from which this section has been excerpted.

It is essential that you do get involved. Wetlands are being degraded as you read this. There are millions of acres of drained wetlands waiting to be restored. The time to take action is now. If not you, then who?

DISTINGUISHING BETWEEN EXEMPTED, REGULATED, AND ILLEGAL ACTIVITIES

There are many types of activities that, while detrimental to wetlands, are exempted from regulation, either having been specifically permitted in some public code, such as filling a wetland in order to build a logging road [1], having been specifically exempted from regulation, or having not been mentioned at all in any law or regulation, such as mowing wetland vegetation [2]. In the case of an exempted activity, the situation is not hopeless for a citizen who wants to protect the wetland. Here are some recommended courses of action:

1) Educate the landowner or the party carrying out the destructive actions in the wetland. Persuade him that the wetland is worth protecting and work with him to find alternatives to the action.

2) See if the action is dependent upon some local zoning ordinance. If so, work through the local zoning process to protect the wetland.

Citizens who observe a questionable activity in a wetland can find out from their state's or province's regulatory agency whether the activity is exempted. See the section on your state or province for details and contact information.

At the other end of the spectrum, many activities are strictly illegal, meaning that people are not allowed to do them under any circumstances. One example of an illegal wetland activity is mowing a county road ditch that has purple loosestrife growing in it [3] or filling in a wetland for the sole purpose of creating an upland [4] (wetland permits to fill for other purposes can be issued however).

In between the activities that people may do and those that people simply are not allowed to do are a plethora of activities that people are allowed to do, provided they obtain a permit. These types of activities are called regulated activities. The purpose for regulating certain activities is to allow a governing body to ensure that the activities are done in such a way as to minimize their impacts on wetlands. At the state/provincial and federal levels, most permits are granted, but the government and, ostensibly, the people still have some oversight in order to protect wetlands by avoiding, minimizing, and mitigating wetland impacts.

[1] *Permitted in Wisconsin under the U.S. Army Corps of Engineers' General Permit for Wisconsin.*

[2] *With few exceptions, there is no prohibition in the United States on mowing wetland vegetation.*

[3] *Prohibited under Wisconsin law.*

[4] *Prohibited in Minnesota under the Public Waters Wetland Permit Program.*

RESPONDING TO PERMIT APPLICATIONS

Citizens have a very important role to play in permitted activities because the permitting process often involves gathering input from citizens on the proposed project. Citizens who are well-acquainted with the land on which a project is proposed can help regulatory staff to understand the potential impacts. The public input process also allows public priorities such as clean water, local recreation, historic preservation, etc. to be voiced so that they can be considered in the decision-making process.

An important element of all wetland regulations is a concept referred to as "sequencing." U.S. federal law, as well as the state laws implemented across the Great Lakes Basin, require project proponents to follow a sequence that involves first avoiding impacts to wetlands, then minimizing those that are deemed unavoidable, and then mitigating those that are eventually allowed.

Application of the "avoid, minimize, and mitigate" sequence is predicated on the assumption that unless a project is water or wetland dependent, then less damaging alternatives exist. Regulations require that a permit shall not be issued if a less damaging "practicable" alternative exists. The applicant has the burden of proof regarding analysis of less damaging alternatives. Other considerations include determinations on whether the project is in the public interest and whether the project will have unacceptable impacts to aquatic resources. There are many factors that must be weighed in making these determinations, including economics, aesthetics, historical values, fish and wildlife values, flood damage prevention, navigation, land use impacts, recreation, water quality, endangered species impacts, etc. Citizens can play an important role in providing information to determine impacts, the public interest, and possible alternatives. Following is a step-by-step procedure that can help you to make good use of permit notices.

1) Receive an announcement about the permit application.

It may be that you hear about a proposed project in your area through the word on the street or in the local news. A more reliable way to be made aware of potential wetland activities is to get your address added to a mailing list that is used to announce such permit applications. Certain types of permits require a public comment period, and both standard and electronic mail are used to announce these so that citizens can respond. The mailing lists that each state offers for this purpose and how to get added to them are provided at the bottom of each state regulatory summary.

The U.S. Army Corps of Engineers is divided into regulatory district offices, five of which have jurisdiction in the Great Lakes basin. For a list of the Corps' district offices and their contact information, see http://www.usace.army.mil/inet/functions/cw/cecwo/reg/district.htm or http://www.usace.army.mil.

2) Read and understand the public notice.

The public notices can appear cryptic to the untrained eye. Read these documents carefully, and you will likely find the information that you need. The basic information that will enable you to formulate your opinion on a proposed permit is the who, what, when, where, and why of a project:

a. Who is applying for the permit, and what is the application's file number? You may have questions for the applicant, and you will need to use the application file number when corresponding with the agency.
b. Why does the applicant want to impact wetlands, what is the project purpose? You will use this information to determine both whether the project has to be located in the wetland and whether the project is in the public interest.
c. What does the applicant want to do? The basic nature of the project is essential to determining whether the activity is acceptable.
d. When will the permitting agency stop receiving public comments?
e. Where is the project located? The location will enable you to visit the site, to speak with adjacent landowners, and to determine how the activity will impact wetlands.

3) Gather information.
The notice should state very clearly what is intended to be done in the wetland, how this will impact the wetland, and what the applicant has done in order to avoid, minimize, and replace lost wetland functions. If any of these or other important pieces of information is missing, contact either the applicant or the agency office that posted the notice.
After you have a complete understanding of the permit application, you need to use your own and other people's understanding of wetlands, their values, and the impacts of the proposed project. The more specific your knowledge of the site and its surroundings, the better. An often overlooked source of information is the agency staff member who will be processing the application. If you have questions about the permit application, or the regulatory standards, contact the agency itself.

4) Evaluate the proposed project in light of the regulatory standards.
The agency that has to review the permit application has very specific criteria that guide them in their decisions. Know what those criteria are and examine the proposed project with respect to them. In the case of 404 permits in the United States, the Corps has provided a very clear guidance to evaluators as to what questions they should consider regarding the permit, such as whether there is an alternative, non-wetland location for the project, how the project may impact the biological and hydrological characteristics of the site, whether the project will have a negative impact on the recreational and aesthetic values of the site, and whether the applicant will replace any lost wetland function. This guidance can be found in Appendix F of *Michigan Wetlands: Yours to Protect*, by the Tip of the Mitt Watershed Council, and on-line at www.michiganwetlands.org.

Apart from understanding the basic project criteria, remember to ask whether any aspect of the project will cause the project to fall under the jurisdiction of some other law or agency. For example, the presence of a threatened or endangered species on the site will cause a project in either Canada or the U.S. to require consideration under an endangered species law.

5) Provide your comments to the appropriate agency.
If your evaluation of the project leads you to believe that the project should not be permitted or that the permit should include certain modifications, then it is time to contact the agency that circulated the notice. The standard, and usually most appropriate, type of response is a letter to the agency.

Your letter should be concise and factual, focusing on the specifics pertaining to the project. List at the top of the letter the number that identifies the permit application. State very clearly your position regarding the permit, each separate element of the application that causes concern, and the criteria that are likely to be violated by the project. Before you submit your letter, have a colleague review it for clarity and accuracy. Typically, the agency will send a copy of your letter to the applicant.

If you are asking other individuals to comment on the same project, keep in mind these guidelines:

a. Written correspondence is more powerful than telephone calls, since it is, by default, recorded.
b. A customized letter is likely to be more effective than a form letter, since it (a) may provide more cumulative information and (b) will convey more urgency regarding the project.

If you find it important to bring the community together to discuss the project, then you may request in your letter a public hearing. Public hearings can serve to alert more people who will be affected or who will have an opinion on a project, to educate the community, and to provide a forum for explaining ideas that are difficult or complex. Remember, though, that a public hearing is an expense to the agency, whose resources are limited; avoid calling for a public hearing if the event will not serve any of these purposes.

Be well-prepared before attempting to speak at a public hearing. Write down your entire statement to be placed on public record, and summarize the statement during your allotted time.

It is important to understand that the problems that a community may have with a project may be unrelated to wetland regulations. In such a case, you may choose to call for and coordinate a public meeting. This provides an opportunity for the citizens to discuss all issues related to the project in addition to wetland impacts. In order for a public meeting to be effective, all stakeholders in the project should be invited and the meeting should be run by a competent and considerate facilitator.

6) Follow up on agency decisions.
Make sure that the agency staff know that you wish to be alerted as to the agency's decision on the permit. If, for some reason, the agency does not allow you to be notified, in the U.S. you can request a permit decision in writing under the Freedom of Information Act (FOIA).

If the final decision is to deny the permit, be aware that the applicant can always reapply. More importantly, however, be aware of what wetland activists call "post-denial negotiations." The applicant may suggest modifications to the denied permit that may make it suitable to approve. This type of negotiation may not involve any public input, and the only way to avoid this behind-the-scenes negotiation from overturning a good decision is to communicate frequently with the agency that evaluated the application.

If the permit is granted, then make sure you understand the conditions on the permit, if any. Noncompliance with the conditions of a permit constitutes a violation, and enforcement may depend on citizen notification to the appropriate agency. In addition, agency follow-up can provide useful background information on cumulative impacts in a watershed and provides helpful direction for future wetland protection efforts.

Overview
To review, here are some important guidelines to remember as you protect your community's wetlands:

1) Know what types of activities are exempted, illegal, and regulated in wetlands where you are, and know who is responsible for overseeing wetland activities.
2) Get on distribution lists to be alerted to proposed activities in your area.
3) When you hear of proposed activities, study the project, the site, and the potential impacts as they relate to the applicable laws and regulations.
4) Respond clearly and swiftly, and make sure you find out how the agency rules on the proposed permit.

Citizens are essential to making our laws work. Citizens have the tools to educate regulators, to persuade them of the importance of a particular wetland, and to hold them accountable to the requirements of the law. Wetland protection is in your hands. The section that follows provides an overview of wetland protection laws in each state and province in the Great Lakes Basin, including federal law. You will find contact information by state and province. For Basin-wide information we suggest:

Source of information: Great Lakes United
Type of information: Habitat Alerts
To get added to the list: Send request to glu@glu.org

Source of information: Great Lakes News
Type of information: Great Lakes News (electronic)
To get added to the list: Sign up to receive weekly news at http://www.GreatLakesDirectory.org

Source of Information: Great Lakes Aquatic Habitat Network and Fund
Type of information: Great Lakes Aquatic Habitat News
To get added to the list: Contact Alicia at (231)347-1181, ext 107 or alicia@watershedcouncil.org

REGULATORY SUMMARIES

Wetland Regulation in Ontario

The *Planning Act* and the *Provincial Policy Statement (PPS)*

Ontario's primary method of wetland protection comes via the *Provincial Policy Statement (PPS)* under the *Planning Act*. The *Planning Act* can be read on-line at www.e-laws.gov.on.ca ; and *PPS* can be read on-line at www.mah.gov.on.ca. The Act requires that planning authorities (municipalities and the Ontario Municipal Board [OMB]) "have regard to" the policies in the *PPS*, which *does not* mean that they must adhere to these policies. In December 2003, the provincial government tabled a bill in the Legislature to amend the *Planning Act* to state that planning authorities' decisions must "be consistent with" the *PPS*, which is a real improvement. The bill is expected to receive final approval in the spring of 2004.

For purposes of wetland protection under the *PPS*, Ontario is divided into two regions: (a) the area south and east of the Canadian Shield (the Precambrian Shield); and (b) the rest of Ontario, i.e, on the Canadian Shield. Zooming in on the Great Lakes Basin in Ontario, "south and east of the Shield" includes most of the Lake Ontario watershed, all of the Lake Erie watershed, a minority portion of the Lake Huron watershed (i.e., much of it in Ontario is on the Shield), and none of the Lake Superior watershed (which is all "Shield country").

In the *PPS*, **wetlands are defined** as follows:
"lands that are seasonally or permanently covered by shallow water, as well as lands where the water table is close to or at the surface. In either case the presence of abundant water has caused the formation of hydric soils and has favoured the dominance of either hydrophytic plants or water tolerant plants. The four major types of wetlands are swamps, marshes, bogs and fens. Periodically soaked or wet lands being used for agricultural purposes which no longer exhibit wetland characteristics are not considered to be wetlands for the purposes of this definition."

Wetlands south and east of the Canadian Shield are protected under the PPS as follows:
Development and site alteration will not be permitted in significant wetlands south and east of the Canadian Shield. "Significant" means, in regard to wetlands, "an area identified as provincially significant by the Ministry of Natural Resources using evaluation procedures established by the province, as amended from time to time." Hence the commonly used term *Provincially Significant Wetlands (PSWs)*. PSWs are identified and evaluated (in some cases) and approved (in all cases) by the Ontario Ministry of Natural Resources. "Development" means "the creation of a new lot, a change in land use, or the construction of buildings and structures, requiring approval under the *Planning Act*; but does not include activities that create or maintain infrastructure authorized under an environmental assessment process; or works subject to the *Drainage Act*." "Site alteration" means "activities, such as fill, grading and excavation that would change the landform and natural vegetative characteristics of a site."

Wetlands on the Canadian Shield are protected under the PPS as follows:
Development and site alteration may be permitted in significant wetlands on the Canadian Shield if it has been demonstrated that there will be no negative impacts on the natural features or the ecological functions for which the wetland is identified. "Negative impacts" means "the loss of the natural features or ecological functions for which an area is identified." "Ecological functions" means "the natural processes, products or services that living and non-living environments provide or perform within or between species, ecosystems and landscapes. These may include biological, physical or socio-economic interactions."

Comparing Wetlands Protection on and off the Canadian Shield
In short, Ontario wetlands that are on the Canadian Shield do not receive very good protection. It is the responsibility of municipalities to decide whether or not they wish to protect wetlands, and which ones they wish to protect, by means of the policies in their Official Plans (i.e., land use plans). Since (as noted above) development and site alteration may be permitted in a "significant" wetland on the Canadian Shield if it has been demonstrated (via an Environmental Impact Statement or EIS) that there will be no negative impacts on the natural features or the ecological functions for which the wetland has been identified, a developer may hire a consultant to produce an EIS that shows there will be no negative impacts. A citizens group may appeal to the Ontario Municipal Board a municipality's approval of a developer's plan to develop in a wetland on the Shield, but the language of the *PPS* and the *Planning Act* do not much favour Shield wetlands if they end up at an appeal hearing before the OMB.

The situation is better for wetlands that are south and east of the Shield. Municipalities south and east of the Shield are supposed to protect PSWs through the policies in their Official Plans. But (as noted above) the definition of "development" in the *PPS* excludes most infrastructure

projects, meaning (for example) that a road or highway could be rammed right through the middle of a *PSW*, thereby totally destroying or at least fragmenting the habitats and compromising the wetland's ecological functions.

Nowhere in Ontario, whether on the Shield or south and east of the Shield, are "regionally significant" and "locally significant" wetlands protected through the *PPS*. Municipalities can identify these wetlands as such and protect them in their Official Plans. However, the Implementation/Interpretation section of the *PPS* states that "nothing in this policy statement is intended to prevent planning authorities [i.e., municipalities and the Ontario Municipal Board] from going beyond the minimum standards established in specific policies, in developing official plan policies and when making decisions on planning matters, unless doing so would conflict with any other policy" In practice, developers try hard, and are often successful in persuading a municipal council – or a hearing officer at the Ontario Municipal Board, to which municipal decisions can be appealed by the developer, a citizens' group, etc. – to decide that protecting one or more of these regionally and locally significant wetlands would conflict with other policies in the *PPS*. (The *PPS* has policies relating to housing, infrastructure, agriculture, aggregate extraction, etc.) Equally, an OMB hearing officer may decide that a regionally or locally significant wetland is worth protection and therefore rule in its favour. (There are two avenues to appeal a decision of the OMB, but they are rarely successful.)

Buffer Zones (Adjacent Lands)

The *PPS* states that "development and site alteration may be permitted on adjacent lands [adjacent to significant wetlands south and east of the Canadian Shield; and adjacent to significant wetlands on the Canadian Shield] if it has been demonstrated that there will be no negative impacts on the natural features or on the ecological functions for which the area [wetland] is identified." "Adjacent lands" means "those lands contiguous to a specific natural heritage feature or area [i.e., wetland], where it is likely that development or site alteration would have a negative impact on the feature or area. The extent of the adjacent lands may be recommended by the Province or based on municipal approaches which achieve the same objectives."

The Ministry of Natural Resources (MNR), in 1999, published the *Natural Heritage Reference Manual for Policy 2.3 of the Provincial Policy Statement* to assist municipalities in interpreting, for example, the *PPS* wetlands policies. In it, MNR "recommends that adjacent lands are those lands within 120 metres [about 400 feet] of individual significant wetlands or, in the case of wetland complexes, within 120 metres of individual wetlands comprising the complex. This recommended adjacent land width was chosen because it is known that developments within 120 metres of wetlands have a reasonable probability of affecting the ecological functions of the wetlands which they surround, and because wetland species are often dependent on adjacent lands for activities such as nesting, resting, feeding or shelter. Site-specific evaluations based on the considerations noted above may demonstrate the need for greater or lesser distances for adjacent land widths." In practice, developers' wetland consultants may recommend an adjacent land or buffer width much less than 120 metres, such as 30 metres (= about 100 feet).

Evaluating Wetlands for Protection under the Planning Act and the PPS

Wetland evaluators use the Ontario Wetland Evaluation System (OWES) Manual in order to determine whether a particular wetland should be designated a Provincially Significant Wetland (PSW). A northern Ontario version and a southern Ontario version of this manual are in print and are available for $25 (Can.) from the Wetlands Research Centre, University of Waterloo, 200 University Avenue West, Waterloo, Ontario N2L 3G1, (519) 885-1211 ext. 5244 or 3607, or bwarner@uwaterloo.ca. The wetland evaluation ranks a wetland in four categories – biological, hydrological, special features, and social, each having a maximum score of 250 points. If a wetland scores above 600 points in total or more than 200 points in either the biological or special features categories, then the wetland is considered a PSW. Citizens can evaluate wetlands using this process, typically after taking a training course on wetland evaluation.

Municipal Protection of Wetlands

Ontario municipalities – local ("lower-tier") municipalities (towns, townships, cities) and "upper-tier" municipalities (counties and regional municipalities) – can designate locally and regionally significant wetlands in their Official Plans, in addition to Provincially Significant Wetlands. As noted above, locally and regionally significant wetland designations may or may not "survive" the test of a hearing before the Ontario Municipal Board if a developer argues that preserving the wetland conflicts with other policies in the *PPS*.

Indirect Protection of Ontario Wetlands

Other legislation that indirectly protects wetlands in Ontario includes the federal *Fisheries Act*, the federal *Migratory Birds Convention Act*, and the *Canadian Environmental Assessment Act*. The new federal *Species at Risk Act* should protect critical habitat areas of species at risk. Wetlands are protected via Ontario legislation indirectly through the *Fish and Wildlife Conservation Act*,

the *Endangered Species Act*, the *Lakes and Rivers Improvement Act*, the *Conservation Land Act*, the *Conservation Authorities Act*, the *Environmental Assessment Act*, the *Ontario Water Resources Act*, the *Niagara Escarpment Planning and Development Act*, and the *Oak Ridges Moraine Conservation Act*. One provincial statute that actually works against wetland protection is the *Drainage Act*. Historically in Ontario, wetlands were valued only in that they could be drained, primarily for agricultural purposes. Not only is land drainage permitted under the *Drainage Act*, but is encouraged by a system of grants. All Ontario statues (acts) are available on-line at www.e-laws.gov.on.ca

Concluding Information

Southern Ontario, where most of the farmland and most of the population of the province are based, has lost 70-80 percent of its wetlands since the time that European settlement began. Most of the loss has occurred due to draining for agriculture and other human uses of the land. Therefore, we have lost the vital ecological functions provided by wetlands and the increased biodiversity that wetlands provide. The remaining wetlands, both in the north and the south, are havens of biological richness, and include marshes, swamps, bogs and fens. The importance of protecting the remaining wetlands emerged in the 1970s, but it was not until 1992 that Ontario had wetland protection enshrined in provincial policy under the *Planning Act*.

Even though wetlands protection is in need of much improvement in Ontario, there have, indeed, been some great wins in recent years, in which Ontario Municipal Board hearing officers have ruled in favour of protecting PSWs both on and off the Shield – e.g., at Cloud Bay (on the Shield in the Lake Superior watershed, where a seasonal trailer park was proposed), at Marshfield Woods (in the Lake Erie watershed, where a golf course was proposed), and at Victoria Point on Lake Simcoe (in the Lake Huron watershed, where a major lagoon-based residential development was proposed).

A good feature of Ontario wetlands policy is that we do NOT have any "no net loss" policies or "mitigation banking." When the *Provincial Policy Statement* says you cannot develop in a Provincially Significant Wetland (PSW), that's it; i.e., it does not mean that you can trade development in the PSW for the creation or protection of a wetland somewhere else.

Contact:

Ontario Nature – Federation of Ontario Naturalists
www.ontarionature.org
info@ontarionature.org

Wetland Regulation in the United States

Section 404 of the Clean Water Act requires a permit from the Army Corps of Engineers (Corps) for the discharge of dredge and fill material into the waters of the United States. "Waters of the United States" includes wetlands areas as defined by federal regulation and further detailed in the Corps 1987 Wetlands Delineation Manual. Discharges include any addition or redeposition of fill materials or dredge materials from mechanized land clearing, ditching, channelization and other excavation. Section 404 permits are issued by the Corps and are subject to review by the Environmental Protection Agency (EPA).

Section 404 permits come in two basic forms – individual and general. General permits are permits generically written for certain pre-approved types of activities which have been determined to have insignificant impacts both individually and cumulatively and subject to little case-by-case scrutiny by the agencies. Activities that fall under general permits are not publicly noticed and are not open to public comment. However, the general permits themselves are open for public comment when they are periodically renewed and updated by the Corps.

Individual permits, on the other hand, undergo closer scrutiny by the Corps and are open to public comment and, if necessary, public hearing. The Corps' decision on a permit application may be to issue the permit, to deny the permit, or to issue the permit with modifications.

The general permits that affect the Great Lakes basin include several regional permits, which are applicable within particular states, and Nationwide Permits (NWPs). Activities covered by nationwide permits that generally have an impact on wetlands include minor discharges, minor dredging, stream and wetland restoration activities, single-family housing, moist soil management for wildlife, maintenance of existing flood control projects, residential, commercial and institutional developments, reshaping existing draining ditches, recreational facilities, storm water management facilities and mining activities. In 2002, the Corps re-issued its NWPs with some changes with an expiration date of March 19, 2007.

Regional permits typically allow the activities that a particular state is already regulating and reviewing. This simply prevents redundancy at the regulatory level.

Section 401 of the Clean Water Act requires that an applicant for a 404 permit obtain a certification from the state or a waiver of certification that the discharge will not violate state water quality standards. This requirement gives the state a form of veto power over federal 404 permits.

Due to a United States Supreme Court case limiting the jurisdiction of the Corps and EPA there has been a significant shift in the area of federal regulation of wetlands. On January 9, 2001 the U.S. Supreme Court issued a decision, Solid Waste Agency of Northern Cook County (SWANCC) v. United States Army Corps of Engineers (herein referred to as SWANCC) that limits the scope of the Corps' Clean Water Act regulatory permitting program as applied to isolated waters. SWANCC held that the Corps' assertion of jurisdiction over isolated waters exceeded its jurisdiction when the jurisdiction was based solely on the "migratory bird rule". The migratory bird rule is the Corps' administrative interpretation of federal jurisdiction finding that the presence of habitat, such as wetlands, used by migratory birds is sufficient to subject an aquatic area to federal jurisdiction. The SWANCC decision had the effect of transforming aquatic areas that were once protected by federal discharge permitting and regulatory review to aquatic areas where no federal discharge permits are now required. In addition, most states lost the authority to review discharge activities in these waters because their review is based solely on their authority to issue Clean Water Act section 401 water quality certifications on federal Clean Water Act section 404 permits. If no section 404 permit is required due to lack of Clean Water Act jurisdiction, then no section 401 water quality certification review by the state is required.

In January 2003, in response to the SWANCC decision, the Corps and the Environmental Protection Agency (EPA) issued an advance notice of proposed rulemaking (ANPRM) seeking early comment on restricting the scope of waters subject to the Clean Water Act. Approximately 133,000 comments, including both individual letters and form letters were received by April 2003 when the comment period closed. The vast majority of these comments opposed further restrictions on CWA jurisdiction. On December 16, 2003, the Corps and EPA announced they would abandon their rulemaking.

However, the Corps and EPA left in place as agency SWANCC guidance the joint legal memorandum they issued with the ANPRM in January 2003. The joint memorandum extends beyond the narrow SWANCC ruling, stating that the Corps and the EPA do not have jurisdiction over isolated waters that are both intrastate and non-navigable, where the sole basis available for asserting CWA jurisdiction rests on any of the factors listed in the Migratory Bird Rule, including the presence of threatened and endangered species. The joint memorandum further instructs agency staff to seek formal case-by-case approval from Headquarters before asserting jurisdiction over any isolated, intrastate, non-navigable water regardless of the interstate commerce basis for regulation. The joint memorandum states that field staff should generally continue to assert jurisdiction over traditional navigable waters and adjacent wetlands, and tributary systems and wetlands adjacent to these tributary systems.

As of February 4, 2004, the Clean Water Authority Restoration Act of 2003 is pending in both the U.S. House (H.R. 962) and Senate (S. 473). This bill would clarify the definitions of waters of the United States and the intended jurisdiction of the Corps and EPA under the Clean Water Act. The House bill has been referred to the Subcommittee on Water Resources and Environment and the bill in the Senate has been referred to the Committee on Environment and Public Works.

Wetland definition:
"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.

Exemptions: 1) normal farming, silviculture and ranching activities; 2) maintenance of structures such as dikes, dams or levees; 3) construction or maintenance of farm or stock ponds or irrigation ditches; 4) maintenance of drainage ditches; 5) construction of temporary sedimentation basins on a construction site; 6) approved state 404 programs; and 7) construction or maintenance of farm roads, forest roads, or temporary roads for moving mining equipment where constructed and maintained using best management practices. These activities are not exempt, however, if they have as their purpose bringing an area of waters of the U.S. into a use to which it was not previously subject, where the flow or circulation of waters is impaired or the reach of such waters is reduced. CWA section 404(f)(1) and (2).

Several of the Great Lakes states have additional exemptions related to their statewide wetland statues. For more information on these exemptions, see the contacts section for each state.

Indirect or local regulation:
Several other regulatory programs affect the activities that impact wetlands.

1) The **Endangered Species Act** may be implicated if there is a threatened or endangered species located in the impacted area.

2) **Section 404** permitting may be assumed by a state. Michigan and New Jersey are the only two states which have assumed this permitting authority.

3) The **Food Security Act** of 1985 includes a program called the Swampbuster program which is designed to enable farmers to mitigate the wetland impacts that their farming operations create. The Act, also called the Farm Bill, requires farmers to comply with certain conservation provisions in order to qualify to receive commodity subsidies.

4) The **National Environmental Policy Act** (NEPA) requires federal agencies to consider impacts of their proposed actions. To this end, agencies prepare an Environmental Assessment (EA) or an Environmental Impact Statement (EIS) when planning a project. The EA or EIS is designed to determine whether the agency should find some other alternative to their proposed action. When a government agency is planning a construction project or some other type of project that may have a considerable impact on wetlands, citizens can urge the EPA to require the agency planning the project to prepare and submit an EIS.

5) **Section 10 of the Rivers and Harbors Act** of 1899 regulates virtually all work in, over and under waters listed as "navigable waters of the United States." Some typical examples of projects requiring Section 10 permits include beach nourishment, boat ramps, breakwaters, bulkheads, dredging, filling or discharging material (such as sand, gravel or stone), groins and jetties, mooring buoys, piers (seasonal or permanent), placement of rock rip-rap for wave protection or streambank stabilization, boat hoists, pilings, and construction of marina facilities. Section 10 waters include the Great Lakes, connecting waters, and those inland waters that have been designated federally navigable (e.g., Lake Charlevoix, parts of the St. Joseph River, etc.)

Each state or province is different in the way it treats wetlands, and each government's statutes, regulations, and chains of command can be confusing. Following is a brief overview of the regulations pertaining to wetlands in the states and province surrounding the Great Lakes, including these basic elements:

- Name of the state statute
- Who is responsible for regulating wetlands and how to find more information
- The applicable government's definition of wetlands
- Its method of delineating wetlands
- The types of wetlands regulated
- Whether the U.S. state (Ontario not included) has in effect a policy that protects "isolated" wetlands from the lack of Clean Water Act protection, due to the SWANCC Decision
- Whether other areas of regulation or local ordinances protect wetlands
- Who to contact

Illinois

Name of State Statutes: Interagency Wetland Policy Act of 1989; Rivers, Lakes, and Streams Act

The Illinois EPA administers water quality certification under Section 401 of the Clean Water Act. State-funded projects that affect wetlands are regulated by the Illinois Department of Natural Resources (DNR) under the Interagency Wetlands Policy Act. The Act regulates state supported activities in wetlands such as state and state pass-through funded construction activities, state supported land management activities, state and state supported technical assistance programs and other state activities that result in adverse impacts to wetlands.

DNR also has two separate but similar floodplain regulatory programs established under the Rivers, Lakes, and Streams Act: one for the six metropolitan "collar" counties in northeastern Illinois (Cook, DuPage, Kane, Lake, McHenry, and Will), and another for the rest of Illinois. The purpose of both programs is to, "protect the rights, safety, and welfare of private and public landowners by the regulation of floodway development, [because] construction activities which restrict a stream's capacity to carry flood flows may result in channel instability and increased flood damages to neighboring properties." Flood control, not wetland protection, is the primary driver for this regulation. As wetlands help determine the flood prevention capacity of a given water body, the Act can be used peripherally to protect wetlands

Wetland definition and delineation: "Wetland" means land that has a predominance of hydric soils (soils which are usually wet and where there is little or no free oxygen) and that is inundated or saturated by surface or groundwater at a frequency and duration sufficient to support, and that under normal circumstances does support, a prevalence of hydrophytic vegetation (plants typically found in wet habitats) typically adapted for life in saturated soil conditions. Areas which are restored or created as the result of mitigation or planned construction projects and which function as a wetland are included within this definition even when all three wetland parameters are not present. Delineations on agricultural land are conducted using the National Food Securities Act Manual, and those on non-agricultural land use the Corps' 1987 Wetland Delineation Manual. "Flood plain" is defined as "that land adjacent to a body of water with ground surface elevations at or below the 100-year frequency flood elevation."

Wetlands regulated: The Corps generally requires mitigation for adverse impacts of more than .25 acre under its nationwide permits. The Interagency Wetland Protection Program requires mitigation on any amount of wetland adversely impacted through a state action, regardless of how small. The downstate floodplain regulatory program requires permits for construction in the floodway of any stream serving a tributary area of 640 acres in urban areas or 6,400 acres in rural areas. The northeastern Illinois program requires permits be issued for construction in any regulated floodway. It does not limit the tributary area, but does include an exemption for the city of Chicago.

The Chicago District of the Corps has developed a regional general permit for 13 types of activities including residential, commercial and institutional developments, recreation projects, transportation projects, minor discharges and dredging, wetland/stream restoration/enhancement, completed enforcement actions, temporary construction activities, utility line projects, maintenance, bank stabilization, marine structures and activities, bridge scour protection and cleanup of toxic and hazardous wastes. Illinois EPA has issued 401 Water Quality Certification for all except RP 13 (clean-up of toxic and hazardous materials) and RP's 4 (minor discharges and minor dredging) and 8 (utility line projects) for certain waterways. DNR has issued several comprehensive floodplain permits similar in nature to the Corps' NWPs. Twelve statewide permits have been issued that apply to downstate Illinois. There are also a number of very similar regional permits that apply only to activities in northeastern Illinois.

SWANCC Fix: House Bill 422, the Illinois Wetlands Protection Act, passed the state House in May 2003 and is expected to be voted on by the Senate in February 2004.

Indirect or local regulation: Counties may enact ordinances for the protection of wetlands under stormwater control legislation. Three counties (Lake, Kane, and DuPage) surrounding the Chicago area have enacted this type of wetland protection. Chicago area counties have implemented stormwater ordinances, typically following the same guidelines as the Corps. Lake County regulates wetlands that are not protected under the Clean Water Act.

Contacts:
Source of information: U.S. Army Corps of Engineers (http://www.lrc.usace.army.mil/co-r/)

Type of information: Public notices of 404 individual permit notices

To get added to the list: Send a request to Kathy Chernich, ATTN: Regulatory Branch, USACE

Source of information: Illinois Department of Natural Resource - Office of Water Resources (http://www.dnr.state.il.us/owr/OWR_index.htm)

Type of information: Public notice of floodplain permit applications. To get added to the list, call the Office of Water Resources at 312-793-3123 (Lake Michigan), 847-608-3100 (rest of northeastern Illinois), or 217-782-3863 (downstate).

Exemptions:
http://www.dnr.state.il.us/wetlands/ch6f.htm #section1090.30

For more information, see the following websites:

Summary of all state regulations - http://www.dnr.state.il.us/wetlands/ch4a.htm; http://www.dnr.state.il.us/owr/resman/permitprogs.htm

Lake County Unified Development Ordinance - http://www.co.lake.il.us/planning/pdfs/udotext/Complete_UDO.PDF

Indiana

Name of State Statute: Title 13 of the Indiana Code
The Indiana Department of Environment Management (IDEM) regulates wetlands through its implementation of the Section 401 Water Quality Certification Program. IDEM is given direct authority to implement this program by the Federal Water Pollution Control Act (Clean Water Act or CWA). IDEM draws its state authority to regulate wetlands and implement Section 401 of the Clean Water Act from Title 13 of the Indiana Code. The relevant provisions of Title 13 include: 1) the authority of IDEM to implement all aspects of the Clean Water Act, 2) a definition of waters of the state (shown below), 3) the authority of the Water Pollution Control Board to adopt rules to protect water quality, and 4) the requirement that IDEM implement those water quality rules. Water quality standards for the physical, chemical, and biological properties of Indiana's waters are established at 327 IAC 2.

Wetland definition and delineation: Wetlands are included in the definition of waters of the state (Indiana Code 13-11-2-265), which, until January 2004, defined waters, for purposes of water pollution control laws and environmental management laws, as:

(1) the accumulations of water, surface and underground, natural and artificial, public and private; or

(2) a part of the accumulations of water; that are wholly or partially within, flow through, or border upon Indiana.

(b) The term "waters" does not include a private pond or an off-stream pond, reservoir, or facility built for reduction or control of pollution or cooling of water before discharge unless the discharge from the pond, reservoir, or facility causes or threatens to cause water pollution.

Note: The definition was amended in January to exclude for the waters definition "exempt isolated wetlands" and to delete "unless the discharge from the pond, reservoir, or facility causes or threatens to cause water pollution" from the last two lines of the above definition. Legislation is currently pending (February 2004) that would further amend the waters definition and Title 13 to regulate some, but not all "isolated wetlands" not regulated by the Corps or EPA under the CWA.

The delineation of wetlands in Indiana is done using the 1987 Corps Wetlands Delineation Manual (http://www.wes.army.mil/el/wetlands/pdfs/wlman87.pdf).

Wetlands regulated: IDEM regulates activities in conjunction with the U.S. Army Corps of Engineers (the Corps). Any person or entity wishing to place fill materials, excavate or dredge, or mechanically clear (use heavy equipment) within a wetland, lake, river, or stream must first apply to the Corps for a section 404 permit. If the Corps decides a permit is needed, then the person must obtain a section 401 water quality certification from IDEM. IDEM reviews the proposed activity to determine if it will comply with Indiana's water quality standards.

In addition to individual permits, the Corps issues Regional General Permits (RGPs) and Nationwide Permits to streamline the permitting process for projects with minimal impacts. IDEM may grant automatic water quality certification for such permits or require that special conditions be met. IDEM currently applies section 401 special conditions to the Corps' RGP No. 1 and Nationwide Permits 3, 12, 27, and 37. Further information is available at: http://www.in.gov/idem/water/planbr/401/nwp401cond.html.

SWANCC Fix: Until the Legislature overrode last year's veto and passed HB 1789 in January 2004, IDEM was using its authority to implement the National Pollutant Discharge and Elimination System permitting program as an interim method of authorizing the discharge of fill material into wetlands that are not protected under the Clean Water Act. Any wetland fill that did not require a 404 permit and 401 certification required an NPDES permit from IDEM during this interim period. More information on this policy can be found at: http://www.in.gov/idem/water/planbr/401/wnpdes.html.

The Indiana General Assembly recently adopted wetlands legislation providing for the regulation of "isolated wetlands", defined as those wetlands not subject to regulation under CWA section 404. However, the legislation exempts many "isolated wetlands", and relegates many more to Class I status subject to minimal regulation. This legislation will likely also affect the regulation of all wetlands as well as other Indiana waterbodies. The General Assembly is considering (February 2004) further amendments to the new wetlands law and to Title 13.

Indirect or local regulation: The Indiana Department of Natural Resources coordinates the ongoing development and implementation of the Indiana Wetlands Conservation Plan (IWCP). This policy document, adopted by the Natural Resources Commission, is used to guide regulatory and conservation practices in Indiana.

While there are additional policies and regulations that may impact wetlands protection in Indiana, they have been unreliable and/or underutilized for promoting the protection of wetlands.

Indiana counties, cities, and towns may adopt ordinances to protect wetland resources so long as they are at least as restrictive as current state regulation requires. Porter County, the town of Beverly Shores, and the cities of Auburn and LaPorte are examples of localities that have adopted wetland ordinances. Unfortunately, these ordinances do not appear to be effective in strengthening wetland protection.

Contacts:

Source of information: U.S. Army Corps of Engineers, Detroit District (http://www.lre.usace.army.mil/index.cfm?chn_id=1931)
Type of information: Public notices of 404 individual permits

To get added to the list: Regulatory Office, ATTN: Eric Jones, P.O. Box 1027, Detroit, MI 48231, 313-226-2218 or http://www.lre.usace.army.mil/functions/rf/html/PNmailform.htm.

Source of information: IN Department of Environmental Management (IDEM) (http://www.in.gov/idem/water/planbr/401/wetlandinfo.html)
Type of information: Public notices of NPDES permits for isolated wetlands

To get added to the list: Dee Marquam, Phone: (317) 233-8488 email:dmarquam@dem.state.in.us

Michigan

Name of State Statute: Part 303, Wetlands Protection, of Natural Resources and Environmental Protection Act (NREPA); Part 301, Inland Lakes and Streams, of NREPA

Michigan is one of two U.S. states that have been authorized to administer section 404 of the Clean Water Act (CWA). The Michigan Department of Environmental Quality (DEQ) administers the program, which must be consistent with the requirements of the CWA. Whereas in other states an applicant must apply to the Corps of Engineers (Corps) and a state agency for a wetlands permit and section 401 water quality certification, applicants in Michigan generally submit only one wetlands permit application to the DEQ. The Corps of Engineers retains federal jurisdiction over traditionally navigable waters including the Great Lakes, connecting channels, other waters connected to the Great Lakes where navigational conditions are maintained, and wetlands directly adjacent to these waters. In addition to state regulation, a local unit of government can regulate wetlands by ordinance.

Wetland definition and delineation: Wetland means land characterized by the presence of water at a frequency and duration sufficient to support, and that under normal circumstances does support, wetland vegetation or aquatic life, and is commonly referred to as a bog, swamp, or marsh. DEQ uses the MDEQ Wetland Identification Manual, rather than the Corps' 1987 Wetland Delineation Manual, to delineate Michigan wetlands. However, the delineation methods and results are similar.

Wetlands regulated: Michigan regulates wetlands connected to one of the Great Lakes or Lake St. Clair; wetlands located within 1,000 feet of one of the Great Lakes or Lake St. Clair; wetlands connected to an inland lake, pond, river or stream; and wetlands located within 500 feet of an inland lake, pond, river or stream. Michigan generally regulates dredge and fill activity only in lakes or ponds with a total water surface area (including associated streams) of 5 acres or more. Michigan regulates dredge and fill activity in noncontiguous ("isolated") wetlands not listed above that are 5 acres or greater in size and are located in counties with population of more than 100,000; and in wetlands not listed above which the DEQ has determined are essential to the preservation of the state's natural resources and has notified the property owner.

SWANCC Fix: State law generally regulates lakes, ponds, and "isolated" wetlands with a surface area of 5 acres or more (except in counties with populations of less than 100,000). However, many smaller "isolated" wetlands, ponds, and lakes are not currently protected under state law. There is a provision in state law that allows the DEQ to claim jurisdiction over isolated wetlands if it determines that the wetland is "essential to the preservation of natural resources."

Local Ordinances: A number of communities in Michigan have enacted wetland protection ordinances. See, http://www.michigan.gov/deq/0,1607,7-135-3313_3687-10801--,00.html. For a list of these communities, visit: http://www.michiganwetlands.org/citguide/AppendixG.pdf

Contacts:

Source of information: MI Department of Environmental Quality (DEQ) (http://www.michigan.gov/deq/0,1607,7-135-3313_3687---,00.html)

Type of information: Public notices of state individual permits

To get added to list: Permit Consolidation Unit, Geological and Land Management Division, Michigan Department of Environmental Quality, P.O. Box 30204, Lansing, MI 48909-7704, or e-mail DEQ-LWM-PCU@michigan.gov.

Source of information: U.S. Army Corps of Engineers, Detroit District (http://www.lre.usace.army.mil/index.cfm?chn_id=1931)

Type of information: Public notices of 404 individual permits

To get added to list: Regulatory Office, ATTN: Eric Jones, P.O. Box 1027, Detroit, MI 48231, 313-226-2218 or http://www.lre.usace.army.mil/functions/rf/html/PNmailform.htm

Exemptions:

www.michiganlegislature.org/printDocument.asp?objName=mcl-324-30305&version=txt

Minnesota

Name of State Statute: Minnesota Public Waters Law and Wetland Conservation Act

In Minnesota, wetlands are regulated under the DNR's Public Waters Work Permit Program, the state Wetlands Conservation Act, and Section 404 of the Clean Water Act. The WCA requires persons to first avoid and minimize and then "replace any impacted area with another wetland of at least equal function and value." One of the purposes of the act is to "achieve no net loss in the quantity, quality, and biological diversity of Minnesota's existing wetlands."

Under the Wetlands Conservation Act, the Minnesota Board of Water and Soil Resources (BWSR), local government units (LGUs) and the Department of Natural Resources (DNR) have regulatory authority over wetlands. The BWSR has the statewide regulatory authority over permitting activities in wetlands where the LGUs implement the Act locally. In addition to administering the Act, local governments may enact their own ordinances regarding wetlands. The DNR requires a state public waters work permit for activities that impact "public waters" or "public water wetlands," typically types 3, 4, and 5 wetlands.

For regulation under the 404 Program, a statewide General Permit/ Letter of Permission/ (GP/LOP-MN) currently replaces all nationwide permits. The GP/LOP-MN can be viewed at http://www.mvp.usace.army.mil/docs/regulatory/PERMNfin2.pdf

Wetland definition and delineation: Two definitions of wetlands are used in Minnesota.

In its application of the Public Waters Work Permit Program, the DNR uses the definition of "Public Waters Wetlands." Public Waters Wetlands are defined as "all types 3, 4, and 5 wetlands, as defined in United State Fish and Wildlife Service Circular No. 39 (1971 Edition), not included within the definition of public waters, that are ten or more acres in size in unincorporated areas or 2_ acres or more in incorporated areas." Public Waters Wetlands are delineated using the ordinary high water level (OHWL), which is the level at which water has remained for a long enough period to leave evidence, such as a shift from upland vegetation to wetland vegetation.

Under the Wetland Conservation Act, wetlands are defined as lands transitional between terrestrial and aquatic systems where the water table is usually at or near the surface or the land is covered by shallow water. For purposes of this definition, wetlands must have the following three attributes: (1) have a predominance of hydric soils; (2) are inundated or saturated by surface or ground water at a frequency and duration sufficient to support a prevalence of hydrophytic vegetation typically adapted for life in saturated soil conditions; and (3) under normal circumstances support a prevalence of such vegetation. WCA wetlands do not include "public water wetlands." Wetland delineations for either Wetland Conservation Act determinations or 404 permits are conducted using the Corps' 1987 Wetland Delineation Manual (http://www.wes.army.mil/el/wetlands/pdfs/wlman87.pdf).

Wetlands regulated: WCA rules 8420.0105. Regulates excavation in the permanently and semi permanently flooded areas of type 3, 4, or 5 wetlands (as defined by U.S. Fish and Wildlife Service Circular 39), and in all wetland types if excavation includes filling or draining or results in conversion to non-wetland.

SWANCC Fix: While isolated wetlands are generally regulated under WCA, a number of activities, including agricultural activities, are exempted in some of the most at risk wetlands that no longer regulated by the corps after SWANCC. The needed SWANCC fix is to eliminate eligibility for these activity exemptions in wetlands that are no longer regulated by the corps under the CWA.

Indirect or local regulation: The Minnesota Environmental Policy Act (MEPA) and the Minnesota Environmental Rights Act (MERA) affect wetlands. At the local level, watershed district rules, shoreland and floodplain ordinances, and municipal wetlands ordinances regulate some wetland activities, and the DNR may grant a waiver of authority for projects on Public Waters Wetlands that are also regulated under the Wetland Conservation Act. In that case, the local government unit that is responsible for administering the Wetland Conservation Act has regulatory authority regarding that wetland. There are some situations in which the DNR is not permitted to grant a waiver of its authority.

Contacts:
Source of information: U.S. Army Corps of Engineers (http://www.mvp.usace.army.mil/regulatory/)

Type of information: Public notices of 404 individual permits

To be added to the list: For e-mail notification, which is faster and covers more projects, send a request to Mick Weberg at michael.m.weburg@mvp02.usace.army.mil. For written notices of standard individual permit notices, send a request to Brenda.d.miller@mvp02.usace.army.mil or 651-290-5375. Specify the state.

Exemptions:
http://www.revisor.leg.state.mn.us/stats/103G/2241.html; WCA rules, 8420.0115 and 8420.0120; and http://www.bwsr.state.mn.us/wetlands/wcamanual/wcamanual02.pdf.

For more information, see: http://www.bwsr.state.mn.us/wetlands/publications/MNRegulations.pdf AND http://www.bwsr.state.mn.us/wetlands/wcamanual/wcamanual02.pdf.

For information on DNR Public Waters: http://www.dnr.state.mn.us/permits/water/index.html AND http://www.dnr.state.mn.us/waters/law.html or contact Mr. Kent Lokkesmoe, Director, Division of Water, Minnesota Department of Natural Resources, 500 Lafayette Road, St. Paul, MN 55155, (651) 296-4800.

New York

Name of State Statute: Article 24, Freshwater Wetlands Act, of New York State Environmental Conservation Law
Wetlands in New York are regulated by the New York State Department of Environmental Conservation (DEC) under the authority granted by section 401 of the Clean Water Act (CWA) and the state Freshwater Wetlands Act. Local governments may assume the permitting authority under the Freshwater Wetlands Act and may regulate wetlands under local ordinances.

Wetland definition and delineation: "Freshwater wetlands" means lands and waters of the state as shown on the freshwater wetlands map which contain any or all of the following: (a) lands and submerged lands commonly called marshes, swamps, sloughs, bogs, and flats supporting aquatic or semi-aquatic vegetation; (b) lands and submerged lands containing remnants of any vegetation that is not aquatic or semi-aquatic that has died because of wet conditions over a sufficiently long period, provided that such wet conditions do not exceed a maximum seasonal water depth of six feet and provided further that such conditions can be expected to persist indefinitely, barring human intervention; (c) lands and waters substantially enclosed by aquatic or semi-aquatic vegetation or by dead vegetation, the regulation of which is necessary to protect and preserve the aquatic and semi-aquatic vegetation; and (d) the waters overlying the areas set forth in (a) and (b) and the lands underlying (c). Wetlands are delineated by the DEC mapping and classifying wetlands according to state regulations. DEC provides a manual to assist in performing field delineation of freshwater wetlands. It is similar to the 1987 Corps Wetlands Delineation Manual used by the federal agencies in regulating wetlands.

Wetlands regulated: New York law protects wetlands that are larger than 12.4 acres (5 hectares) and certain smaller wetlands of unusual local importance as well as a 100-foot buffer around wetlands. In Adirondack Park wetlands larger than one acre and smaller wetlands if they have a free interchange of flow with any surface water are regulated.

SWANCC Fix: There is no current fix to the SWANCC decision in New York. A bill is pending in the New York legislature that would extend protection to those wetlands that are one acre or more in size, adjacent to a water body or of significant local importance.

Contacts:
Source of information: U.S. Army Corps of Engineers, Buffalo District (http://www.lrb.usace.army.mil/orgs/reg/index.htm)

Type of information: Public notices of 404 individual permits

To get added to the list: For hard copy, send request to Tom Switala, USACE, Buffalo District, 1776 Niagara St., Buffalo, NY 14207-3199. For e-mail, send request to Susan.M.Polito@usace.army.mil. Specify state.

Source of information: Department of Environmental Conservation

Type of information: Environmental Notice Bulletin (http://www.decstate.ny.us/website/enb/)
To get added to the list: Send request to enb@gw.dec.state.ny.us

Source of information: Environmental Advocates of New York

Type of information: Action Alerts

To get added to the list: http://www.eany.org/join/index.html

Exemptions:
http://www.dec.state.ny.us/website/dfwmr/habitat/fwwprog4.htm#Regulations; http://assembly.state.ny.us/leg/?cl=37&a=110

Ohio

Name of State Statute: Ohio Revised Code Chapter 6111, Permits for Impacts to Isolated Wetlands

The primary agency for reviewing permit applications and corresponding with the public regarding wetlands is the Ohio Environmental Protection Agency (OEPA). OEPA implements both the CWA section 401 water quality certification program and the Ohio Isolated Wetlands permit program.

Wetland definition and delineation: "Wetlands" means those areas that are inundated or saturated by surface or ground water at a frequency and duration that are sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. "Wetlands" includes swamps, marshes, bogs, and similar areas that are delineated in accordance with the 1987 United States Army Corps of Engineers wetland delineation manual and any other procedures and requirements adopted by the United States Army Corps of Engineers for delineating wetlands. (Ohio Revised Code Section 6111.02 (P) and Ohio Administrative Code 3745-1-02(B)(90)). "Isolated wetland" is defined in ORC 6111 as "a wetland that is not subject to regulation under the Federal Water Pollution Control Act." The OEPA has adopted a field assessment method to assign wetlands into categories (low, medium, and high quality wetlands).

Wetlands regulated: All wetlands in Ohio are regulated regardless of size, either through general permits or individual permits. Where the Corps issues a nationwide permit authorization or an individual permit under CWA section 404, OEPA issues section 401 water quality certifications that apply conditions to many of the 404 permits. Where the Corps does not require a section 404 permit, OEPA requires a general or individual permit for discharges in these "isolated wetlands." Projects in isolated wetlands that are larger than .5 acre require an isolated wetland individual permit, and the level of scrutiny in the review depends upon the size and category. Projects in Category 1 wetlands that are smaller than .5 acre fall under a general permit. Projects in Category 1 wetlands that are larger than .5 acre or Category 2 wetlands that are larger than .5 acre but not larger than 3 acres receive level 2 (slightly higher) review, and larger Category 2 or any Category 3 wetlands receive level 3 review. Both level 2 and 3 reviews are open to a 20-day public comment period.

SWANCC Fix: Ohio enacted its Isolated Wetlands law in 2001 in direct response to SWANCC. The law specifically regulates those wetlands not subject to the Clean Water Act, though the level one general permit review is not considered as stringent as the pre-existing CWA review.

Contacts:

Source of information: U.S. Army Corps of Engineers, Buffalo District (http://www.lrb.usace.army.mil/orgs/reg/index.htm)

Type of information: Public notices of 404 individual permits

To get added to the list: For hard copy, send request to Tom Switala, USACA, Buffalo District, 1776 Niagara St., Buffalo, NY 14207-3199. For e-mail, send request to Susan.M.Polito@usace.army.mil. Specify state.

Source of information: Ohio Environmental Protection Agency

Type of information: Public notices of isolated wetland permits

To get added to the list: Patti Smith, Clerical Supervisor, Ohio EPA, DSW, Permits Processing Unit, P.O. Box 1049, Columbus, OH 43216-1049, (614)644-2156, pattismith@epa.state.oh.us. See, http://www.epa.state.oh.us/dsw/401/401.html.

Exemptions:

http://onlinedocs.andersonpublishing.com/oh/lpExt.dll?f=templates&eMail=Y&fn=mainh.htm&cp=PORC/459c0/4607c/46095/4613c

Pennsylvania

Name of State Statute: Pennsylvania Code Title 25 Chapter 105, Dam Safety and Water Management

Pennsylvania regulates activities in wetlands under its section 401 water quality certification program and its Dam Safety and Waterways Management Program. The activities are reviewed by the Pennsylvania Department of Environmental Protection (DEP). DEP review may be delegated to County Conservation Districts.

Wetland definition and delineation: Wetlands are "areas that are inundated or saturated by surface or groundwater 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, including swamps, marshes, bogs and similar areas." Pennsylvania delineates wetlands using the 1987 Corps Wetlands Delineation Manual.

Wetlands regulated: Pennsylvania regulates the same wetlands as those regulated under the federal law, as well as "isolated" wetlands and headwaters that may no longer be regulated by the Corps after SWANCC. The Corps has issued a state programmatic general permit (SPGP) for minimal impact activities affecting less than 1 acre of wetlands, relying upon the commonwealth's Chapter 105 permit review in most cases. The Corps continues to require a separate federal permit under section 404 and section 10 of the Rivers and Harbors Act for projects impacting wetlands on Lake Erie and other traditionally navigable waters. Permits for most projects regulated through the SPGP or separately by the Corps or DEP are open to public comment. The comment period for Chapter 105 permits is 30 days. DEP's "waiver 2" in the Dam Safety and Waterways regulations exempt stream encroachment activities in streams and floodways with a drainage area of 100 acres or less, leaving headwater streams unprotected in some cases.

SWANCC Fix: The staff interviewed at DEP report that SWANCC has not harmed wetland protection in Pennsylvania and that no fix has been needed.

Contacts:
Source of information: PA Department of Environmental Protection (DEP) (http://www.dep.state.pa.us/dep/deputate/watermgt/wc/subjects/wwec/general/wetlands/wetlands.htm) ;

For staff contact information: http://www.dep.state.pa.us/dep/deputate/watermgt/wc/subjectcontact.htm.

Type of information: Public notices of Chapter 105 permits
To get added to the list: Sign up for electronic alerts at http://www.dep.state.pa.us/efacts/

Source of information: U.S. Army Corps of Engineers, Buffalo District(http://www.lrb.usace.army.mil/or/orf/permits.htm)

Pittsburgh District: http://www.lrp.usace.army.mil/

Type of information: Public notices of 404 individual permits, 404/10 permits for projects on Lake Erie.

To get added to the list: Send letter with your address or e-mail address to Rm. 1834 Federal Building, Regulatory Branch, 1000 Liberty Ave, Pittsburgh, PA 15222.

Exemptions:
http://www.pacode.com/secure/data/025/chapter105/s105.12.html

Wisconsin

Name of State Statute: Chapter 281, Wis. Stats., NR 103 Wis. Adm. Code—Wetland Water Quality Standards, NR 350- Wetland Compensatory Mitigation, NR 299—Water Quality Certification
In Wisconsin, wetlands are regulated by the Wisconsin Department of Natural Resources (DNR) through authority granted by section 401 of the Clean Water Act (CWA) and Chapter 281, Wis. Stats., 2001 Wisconsin Act 6, which specifically regulates those wetlands that are not subject to federal regulation (i.e. isolated or "non-federal" wetlands as a result of the SWANCC decision) . Wetlands are further regulated by state-mandated local shoreland-wetland zoning provisions.

For Corps permitting, all nationwide permits have been replaced by a statewide general permit (GP/LOP- WI) that can be viewed at:http://www.mvp.usace.army.mil/docs/regulatory/WIperfin.PDF

Wetland definition and delineation: State statutes (s. 23.32) provide a definition of wetlands: "Wetlands are areas where water is at, near or above the land surface long enough to be capable of supporting aquatic or hydrophytic vegetation and which have soils indicative of wet conditions". The DNR uses the "Basic Guide to Wisconsin's Wetlands and their Boundaries" for the delineation of wetlands, which is based on the 1987 Corps of Engineers delineation manual. By rule, DNR has adopted the Corps' 1987 Manual to be used in delineating "non-federal wetlands".

Wetlands regulated: All wetlands are regulated either through CWA 401/404 or under the state non-federal wetlands statute, however there are some exemptions for certain "artificial wetlands".

SWANCC Fix: DNR specifically regulates those wetlands that are no longer federally regulated due to the SWANCC decision.

Contacts:
Source of information: U.S. Army Corps of Engineers, St. Paul District (http://www.mvp.usace.army.mil/regulatory/)
Type of information: Public notices of 404 individual permits and SPGP notices.

To get added to the list: For e-mail notification, which is faster and covers more projects, send a request to Mike Weberg at michael.m.weburg@mvp02.usace.army.mil.
For written notices of standard individual permit notices, send a request to Brenda.d.miller@mvp02.usace.army.mil or 651-290-5375. Specify the state.

Department of Natural Resources www.dnr.state.wi.us /org/water/fhp/wetlands/programs.shtml

Wetland Regulatory Programs Contact: Dale Simon, Chief Biologist, at (608) 267-9868 or simond@dnr.state.wi.us.