A Forum on
The Wetlands Conservation Act of 1991

Issues and Implementation

Research Department
Minnesota House of Representatives
March 1992

Introduction

With the blessing of Representative Willard Munger, Chair of the House Environment and Natural Resources Committee, a wetland forum was convened in late January of 1992. The forum was composed of eight persons with varying degrees of expertise on wetland issues (see page 1). It was moderated by John Helland of the House Research Department.

The purpose of the wetland forum was to discuss the "Wetland Conservation Act of 1991" and some unresolved issues stemming from the law. The main issues discussed were:

- Interim program of regulation versus the permanent one
- Exemptions in the law
- Wetland replacement and mitigation banking

The eight people invited to the forum intentionally were not people who had spent hours of time at the Legislature testifying on the 1991 law. It was hoped that this might allow different perspectives to be shared with legislators.

What follows is a transcription of the taped remarks at the forum. At the lefthand margins, along with the names of the speakers, are the discussion topics, which are indented in italics.*

The discussion topics appear on the following pages:

*The full two-hour tape of the forum in cassette format is available for listening by legislators. Call 296-6753.

Helland

Introductions

We're going to talk about three main issues today as time permits. They're on the easel in a very general format. The interim program of regulation versus the permanent one, the exemptions in the law and wetland replacement, including mitigation banking. We'll start by introducing yourself and giving your work that you do involving wetlands.

Peterson

My name is ***Ron Peterson. I'm with an environmental consulting firm called Summit Environmental Engineering and Consulting in Minneapolis***, and I practice quite heavily in the wetland area representing all different kinds of clients -- cities, counties, metropolitan airports commission. on occasion. I do highway projects and also private developments. Most of my work is wetland delineation, negotiating and processing permits, and doing wetland mitigation design.

Ray

My name is ***Diane Ray and I'm an attorney with Briggs & Morgan.*** I practice in the wetlands area. Primarily in the past we have represented developers who are attempting to obtain permits from the necessary authorities to proceed with a development of some sort or another.

Hanna

My name is ***Rick Hanna. I'm the water resource coordinator in Blue Earth County***. I'm past president of the Minnesota Association of County Planning and Zoning Administrators and presently Executive Director of AMWRAP, Association of Minnesota Water Resource Administrators and Planners.

Weirens

I'm ***Dave Weirens with the Association of Minnesota Counties*** and my role in the development of wetlands legislation is to work with the legislature and agencies on development of the law and rules, and that's part of the reason I'm here today.

Jamnik

My name is ***Joel Jamnik. I'm legislative counsel at the League of Minnesota Cities*** and, like Dave, work both sides as far as dealing with the legislature and regulatory agencies, as well as informing the member cities of the League of Cities, which currently number about 800 of 855 cities in the state.

Wopat

I'm ***Ben Wopat with the St. Paul District, U.S. Army Corps of Engineers***. I'm chief of the regulatory branch and responsible for administering the Clean Water Act program in the states of Minnesota and Wisconsin.

Nordstrom

I'm ***Gary Nordstrom. I'm the state conservationist for the Soil Conservation Service, U.S. Department of Agriculture***, and our primary responsibility is the administration of the food and security act and now the conservation reserve act of 1990 in terms of wetland considerations.

Svoboda

My name is ***Frank Svoboda and I'm with Frank Svoboda and Associates as a wetlands scientist*** and work primarily in the area of wetland classification, identification and delineation, working with private developers, municipalities, transportation agencies, assisting them in permitting and wetland mitigation and replacement.

Helland

Interim Replacement

Thank you. Let's begin with the interim regulation period. One of the provisions in the interim guidelines is that wetland replacement may be done after the permanent rules depending on when somebody applies to drain or fill a wetland. There isn't any requirement that it be done before or concurrently with the wetland alteration like that requirement will be in the permanent rules. Will this pose a problem in getting adequate wetland restoration or creation accomplished? I'll open it up for somebody to jump in and if nobody does, I'll call on somebody. Ron, what do you think about that?

Peterson

Well, certainly there should be some kind of reasonable time frame for any kind of mitigation project. Typically the wetland restoration or creation projects I've been involved with have taken place concurrently almost by necessity. Usually the restoration or creation project is part and parcel to an overall project and a lot of times the fill material that's obtained for a project for instance may come from a restoration area so in most cases I don't think it's going to be a problem. From an economic standpoint it's to the advantage of the proposer to do it at the same time. However, I think some type of reasonable time frame should be set in those instances where that's not the case.

Helland

Do the local units of government have a concern about that at all?

Jamnik

Replacement Timing

Not really John. I think Ron's point is well made that most of the time the local unit of government--prior to allowing the development to occur--are either going to want to have the replacement or mitigation plan completed or sufficient security to guarantee that it will be completed by a specified date. Consequently, the local unit of government probably will require a letter of credit, or the security that probably exceeds the estimated value of the replacement or mitigation plan. From the developer's perspective, if you have to provide 125 percent letter of credit, you may as well go ahead and do it as fast as you can and free up your cash for additional development rather than let it sit there for a year and a half. Even though there's an option in the interim program for a delay in a mitigation plan, all the players in the system are probably benefited by a concurrent mitigation replacement. I don't see the economics working to anybody's advantage to delay the process. Of course we haven't really hit the heavy construction season either, where mobilization of folks may cause a problem, so it's hard to predict. If I were forced to predict, I would say it's not going to be much of a problem.

Helland Diane.

Ray I would concur with that assessment. Generally in the situations I've been involved in, prior to enactment of this act, where you're dealing with a city that has some sort of ordinance, they do either require that you go ahead and do it now, or provide some sort of security. In those circumstances, it is in the developers best interests just to get it done and so I think developers are usually anxious to get it done so that they can move on with other projects as well. So that's not seen from my perspective as one of the problems with the interim program.

Helland Anybody else who has a perspective to share on that.

Hanna I would concur with those comments except I think that it's in the public interest to require that it be done concurrently as a safeguard.

Wopat

Small Projects

I guess I would offer a cautionary note in that we have had some experience with the large corporations, large developers, there's not as much problem, but with the "ma and pa" projects, there often is. The most recent issue of the national Wetlands Newsletter indicated that the Florida program found 40 percent of people who never did any of the mitigation work at all, and probably another 50 or 60 percent that did it inadequately. So I think that there is a concern, and as a district we have been chastised for sometimes not taking a strong enough stance in requiring that mitigation be done promptly and adequately. It does bring up the point that you need to have a very strong compliance program. You almost need to be on the site at the time the work is being done, because once the equipment is moved off site it's very difficult to get them back.

Svoboda I would just echo what Ben is saying. I think when we get to that later item in the agenda you might want to make a note that we should talk about timing and adequacy and mitigation and what constitutes good mitigation, just to assure to the maximum extent possible that mitigation as completed is satisfactory and in fact does replace the functions and values that were lost.

Helland Gary, do you want to say something?

Nordstrom In terms of our involvement, our mitigation replacement plans need to be approved up front before the project can continue. It's contingent on them being able to do what they want to do and if it's not done concurrently or pre-project, then the lever we have is the USDA program benefits. Therefore, it's important to landowners that they get done and approved, otherwise they're still liable for the benefits that they're looking for.

Helland OK. The technical evaluation panel in the law is a method to delineate

Wetland Delineation

and define wetlands. It's required after the permanent rules are in place, but it's not required in the interim period. How difficult will it be for the local units of government to decide what is and what is not a wetland. Either Dave or Joel, do you want to start off?

Jamnik

Right now I'd say that's probably the second biggest problem. The first one is just initially an interim program, getting the designation and jurisdictional responsibility straightened out, but once that process is well under way, I still think we're going to be seeing that sort of sift out over the next six to eight months through this development cycle. Is it the county, is it the city, is it the WMO, is it soil and water conservation district role that's up in the air? Once that's resolved, the next biggest issue I think will be the wetland delineation and to the extent that the county surveyors and county and city planners have all the affected wetlands on maps prior to the development proposal, it will work a lot better than if a developer is all of a sudden told at an initial meeting or public hearing that, oh, by the way, we think this is a wetland because then Ron and the folks will be called in to arbitrate or Diane will be called in to litigate the situation, whether you have properly delineated the wetland. So I think that will be at least for the foreseeable future probably one of the most significant problems. That's what I think right now is causing most concern in cities--trying to figure out what are we trying to protect. Unlike the public waters situation--a shoreline where the concept of ordinary high water marks and dealing with DNR hydrologists is relatively commonplace now and more accepted--this is new ground for a lot of those folks and it's a little bit tougher.

Weirens

I'd have to agree with what Joel's saying. This is going to be a tremendous problem. It's one thing to know or work with a landowner or developer how to mitigate a wetland, but the key is, is it a wetland or is it not. This legislation doesn't do a great job of clarifying what is and is not a wetland, and I think the key is going to be to get the information out there to the counties and SWCs and who else is involved so they know how to delineate a wetland, how it's going to be done. It's those issues that really are going to make or break the entire program. There is so little support from the state side both on the financial and technical side that the locals are out there by themselves doing this job and there's such scrutiny on wetlands as a whole that any mistake the local government makes, someone's going to know about it and is going to make some noise about that, so it's going to be very crucial that local units are provided with the necessary information and expertise to properly delineate what wetlands are.

Jamnik

Many of our larger jurisdictions are preparing wetland overlay maps for their communities but that, given the four or five various sources that they're using to pull that information together, will take some time and the accuracy will be continually called into question. That's going to

be a rough one.

Helland

Will either of the federal agencies that are here today be willing to help the local units of government in this determination, or what's your policy on that?

Nordstrom

Federal Delineation Assistance

Well right now we haven't set a clear policy on that. If the decision falls to have the locals form water conservation districts (and that's the first issue you addressed) who is going to be in charge for this interim period, but if it goes to the soil and water conservation districts, they do have a fair assortment of resources available. They are co-located with my agency in almost every county of the state. They also are co-located with our sister agency, the U.S. Agricultural Stabilization Conservation Service, which is our official record keeper, so in terms of proximity to records and information, we have a pretty complete set of all the fish and wildlife inventory maps that are currently identified in the law available in our offices for them to use, but still you've got to get down to the job of really making the call, making the decisions and providing the information to those that request it.

Wopat

With the Corps of Engineers answering your last question first, John, we do cooperate with the local government in those counties and provide staff to go out and assist them to the degree that we have staff available. There are serious concerns about the interim program and in fact the permanent program also, since it references the 1989 federal delineation manual and since the revisions proposed to it are very substantial, there's a question as to whether we will be using different standards between the state and federal government and local units of government. So until that's resolved, I think that's a klinker in the entire scheme and it doesn't look like it's going to be resolved probably for 18 months, maybe two years.

Svoboda

Wetland Classification

I might add something regarding this whole process of delineation versus classification and that is, I think over the past year or year and a half, with all the debate that's been going on about the delineation process, some confusion resulted and I think that confusion is that delineation, as the manual was constructed, was intended to identify what is the edge of the actual wetland. Its intent in its drafting was: OK, where does the vegetation change from predominantly aquatic to predominantly terrestrial and that was the purpose of this procedure. Well I think what's happened is that the process got somewhat misdirected and now the delineation manual is actually somehow intended to serve as a classification or a guide to what should and shouldn't be a wetland and if we go back to the history of the fish and wildlife service, they've been classifying wetlands since the mid-1950s through U.S. Circular 39, and then later in 1979 through the Cowardin system, and that system has been widely accepted by wetland scientists as being fairly reliable for what it's intended to do. And the way I

would suggest that this process be approached is to first classify wetlands based on the technology that the fish and wildlife service has had in practice, and which has been tested by wetland scientists for many years, and then from there once an area is slated for development, it's at that point where you want to determine whether or not you're going to be impacting all of the wetland or part of a wetland, and it's at that point where you need to know where the exact edge of a wetland is located. Prior to then I think we're wasting our energy and effort by debating this whole issue of the delineation procedure. I think we need to step back and say, OK, what are we trying to accomplish here. I think in terms of the reference in the statute to the delineation manual it might be more appropriate to change that language to reference something such that the procedure that would be used would be one that's accepted at large by the wetland scientific community rather than citing a specific process like the 1989 manual. So that as the technology changes, as it has with the use of Circular 39, for example, in the Minnesota statute, Minnesota still types wetlands according to types 1 through 8 whereas that process has now been replaced by the more recent Cowardin procedure but it's still part of the statute. So I think if we want to maintain flexibility within our process it might be more appropriate to make the reference to what is the acceptable scientific technique that's in common use by the wetland scientists and that way the statute becomes a living document and continues to progress with the state of the art, so to speak.

Helland But which group of wetland scientists do we consult with and are they always in agreement with one another?

Wopat I think that as an observation Frank mentioned the accepted wetland science and that's what the 1989 manual represented. It was the accepted wetland science and to many people still is, and we don't know how much it'll change. I think with 80,000 comments that Gary mentioned have been received, it's got to change some even if its cosmetic. But as long as the basic parameters of soils, hydrology and vegetation remain fairly constant maybe it's not going to be that much of a problem. We don't know. I think that one of the major concerns in my mind would be tying the state's program of attempting to define the values and functions of wetlands and replacement and mitigation banking all need to be put in the context of a state wetlands management plan. It almost seems like you need to do the wetlands management plan first so you can define which are the wetlands that are of value in that particular ecological region, what are you striving to save, what sort of environment are you trying to create? Once you do that, then your mitigation banking and your mitigation planning has some rationale; otherwise it's kind of hit and miss and you get sort of a patchwork effect.

Management Plan

Svoboda That's a good point that Ben brings up about a wetland management

plan because one thing that's missing is that I think the environmentalists have said, OK, enough is enough. We've lost enough wetlands. And so there's been a decision to hold the line at no net loss but I think we need to look beyond that and to look at, OK, what are our long term goals and objectives here. Do we want to restore 10,000 acres of wetlands a year? Do we want to restore 50,000? And then once we decide what our goals and objectives are, then we can structure a plan that not only preserves the existing wetland base, but as other wetlands become available to restore, we can allocate our financial resources to accomplishing that.

Peterson

Statutory Methodology

I guess I have a couple comments. First of all, with regard to citing some delineation manual or some type of reference in the statute, I think it's critical that we continue to have a specific methodology that's cited in the statute. I think that in the long haul we're going to have, there's going to be litigation in future years on what's wetland and what's not, and I think it's real important that we have a specific method cited in there for the courts to fall back on. The discussion about long-term planning I think is very well taken. I've been seeing more and more, hearing more and more from the regulatory agencies that I deal with that when I come in with a permit application for a specific development in a portion of the city. Quite often the comment is, well what's going to happen in this whole general neighborhood? What's the city got planned for that whole area? And we're actually undertaking some projects now on behalf of some cities to put together limited area comprehensive plans for an entire area of a city to not just look at the wetland impacts on a project-by-project basis but to do it on an areawide basis and then develop mitigation strategies to offset the impacts for an entire area. When we're dealing with these permits and we're trying to show the public benefit served by an individual project, it's quite difficult to do that. What's the public benefit of one retail store? The benefit tends to look like it's not to the private party that's proposing the development but I think it's clear that when a municipality is doing a plan for an entire area of a city, they're trying to serve the public benefit in doing that, and it's the complex of all of the activities that are taking place within that area that is what we should be looking at in terms of benefits and detriments.

Helland

Rick, did you have something?

Hanna

I was going to say that I agree with Ben. We need a plan and I also agree with Ron in that I think if I'm going to court I want something in a manual, something technical to hang my hat on and not the latest technology. And I'm very comfortable with the delineation manual in the three levels. I can see doing the one level, possibly two level, with the three or four man team that you have. When you do level three you'll have to call in some experts. But that can be attributed back to the cost of the developer. So I'm very comfortable with it the way it

is. From the county point of view,

Svoboda

Standard Delineation

The problem I have with not having a standard delineation approach is, and say, for example, I'm representing a city and in fact it does go to court, then it's like, well is it my wetland based on the city's wetland, based on the 1989 manual, or is it the Corps' wetland based on the 1987 version or whatever modification comes out in 1992, or is it the DNR version which is protected by an entirely different statute. So to me I think the object of the process should be simplification not confusion, and we as experts have trouble agreeing on what's going on here. You can imagine what's going on in the minds of the lay public that doesn't follow this as closely as we do, just the 1989 version of the manual baffles them. So when I suggest that there's some unification of delineation, it's with the idea that I think we need to simplify this process and try and make it more streamlined than more complex.

Jamnik

Mapping

One thing I would like to stress though from a city perspective as well as a county perspective is that I'd say about 80 percent of the time if you have something delineated on a map, you never have a problem with the property owner because they never go beyond what the marking is on the map. Often times it's just accepted as being the right line. You have a whole different dynamic if the debate occurs after the development is proposed than if it's raw land and the individual owns it, and you've got a mark down there on the overlay district or whatever, and it works a whole heck of a lot better to have it done up front. So to the extent that we can encourage or help finance the advance designation or delineation within boundary areas, cities and counties, I think it'll make the process work a lot more smoothly than if we wait on a case-by-case basis. I've seen, as far as elevations or ordinary high water lines that are inherently suspect never get questioned if everybody sort of says, it's been that way for ten, fifteen years or it's on the map for the last six months, that's fine. People tend to adapt and can make the decision whether there's an economic return on the project without having to play around the margins if they have some advance notice on it. If it comes in after the individual has the architect lay out the site and stuff, then it becomes an economic incentive to fight it rather than accept it. I think that from our perspective is what most of our planners are trying to get done.

Svoboda

I think that process works when you're dealing with an obvious wetland where there's water there most of the year. But what happens in these areas, and this is where all the debate about the delineation process is going on, what happens in these areas that are marginal and questionable. We've heard the argument about preserving the existing process, if we go to a new procedure we're going to lose 40-60 million acres, whatever the number happens to be. And if those lines are on a map. all of a sudden next year or five years from now they're not on the map, then it's OK if they're on the map now because somebody

knows ahead of time, well OK, I have a wetland. Then if it's gone it's to their advantage, but the reverse might be true as well.

Wopat

Simplification

There's a lot of appeal to that idea and I know that it's been voiced many times why don't we have maps that everyone can go to and see exactly what their property is. The problem is that preparing such a map would be a huge task, we're talking about 8.7 million acres of wetlands in the state of Minnesota according to the last Fish and Wildlife Service survey and they're dynamic in nature. They change over time. So the line will shift and a lot of the schemes that I've seen proposed legislation to federal level. We're talking about categorizing, trying to simplify, so that everyone can tell what a wetland is and Frank's right, if there's standing water there, they can probably tell it's a wetland. I had a former boss who wanted everything to be a Joe 6-pack test, where the common man can go out and say, yup, that's a wetland. It's got a lot of surface appeal but we have to recognize wetlands delineations in determining what wetland values and functions are, is a very tough call. It requires a lot of expertise and we shouldn't expect every man to be able to do that. I don't expect my barber to be my plumber and I wouldn't want my electrician to be my dentist. And I may not expect my neighbor either to go out and make that wetland call. So I think we just have to accept the fact that it is a tough call and you have to come up with some accepted science. If you can draw the lines by doing a wetland management plan and everybody can accept that, even if it shifts slightly, they can accept the base as something we can work with and we can get some predictability.

Helland

Those are good points. Was that wetland identification before or after the 6-pack though? For wetland mapping, for updating the maps, can't that be an expensive proposition?

Ray

That's usually what we find when we get into a development is the maps are taken as what maps exist are taken as a baseline, a guideline and then you have somebody go out and redelineate from there. And the lines as they're finally drawn are rarely what is out there on some map today. There is some value to having maps to having landowners know, yes I have some wetlands on my property, then that can flag the issue for them, gee, maybe I'd better get a precise delineation before I plan my project. So I think there is some value to the notion of having some maps and having some advance notice to landowners so that they can plan their developments and not get into situations where they plan something that simply can't be done under existing law, so the advance notice is important but it also is important at the onset of a project to get the delineation going and I think that developers have real concerns about the way it's currently set up with local evaluations of those feelings that there may be real inconsistencies from local government unit to local government unit on how those delineations and evaluations are done if there isn't more technical assistance or assistance from

agencies who can help these entities do them consistently with one another.

Weirens

Map Funding

Well I know John maybe, and Joel, might remember during the same process there was a lot of interest in doing upfront mapping so everybody knows exactly what's going on. Certainly compared to the public waters inventory that occurred back in the late 70s. Sure, it was very contentious back then but it made the program work much better after that trouble was taken of. The primary reason why we had that, from what I remember hearing, is a financial one. It was very expensive. The money is not there to do it, so in effect what they have done is they have forced the expense off at the low end of the entire process--down at the local governments. That is, that further increases the cost of local units of government. It makes it that much more difficult for the locals to be real positive in this program as a whole, and that's the biggest thing I'm hearing out there is the cost and seeing the entire big picture. Yet I guess I do understand the reason why from a practical perspective it's unrealistic to expect these maps to be the end-all that they'd like them to be. It would be some way to provide some greater guidance out there to simplify the process at the low end that would be very welcome.

Helland

I believe the law says that the national wetland inventory maps have to be sent out to all affected local units of government by February of 1992. Ron, did you want to comment?

Weirens

'93 I believe it was.

Peterson

I was going to say that I agree that the cost factor is probably the greatest constraint to getting that mapping done up front. A lot of the baseline work has already been done for us. You know the national wetland inventory maps, while not perfect, do provide quite a bit of information and another often overlooked resource by people that don't deal with wetlands a lot is the SCS county soil surveys. If there's a hydric soil shown on your site, if there isn't a wetland there now, there was at one time and it gives you a real good clue right off the bat. Again those aren't perfect either, but those give you some good clues. But we've been doing a lot of front end mapping for cities using the 1" = 200 half section air photos that a lot of, at least in the metropolitan area, cities and counties have available to them. And the expertise is available. It's really just a matter of cost and that work can be done with, you know, fairly quickly. I mapped a thousand acres in the last two days and it doesn't necessarily take that long. It just costs money. Obviously though things do change over time and what's critical in updating those maps as time goes on is to get new aerial photo resources to go back and look and see if things have changed. And usually changes can be picked up in that manner.

Nordstrom

Onsite Delineation

I'd like to follow up on what Ben said based on our experience all through the last six years. There are certain wetlands that are very cut and dried -- black and white type of issues. But there are others as he said that indeed do change depending on the year and a series of climatic conditions and what have you. For example, we've got a ten year slide history racked up for all of our lands out there right now and you can flash those slides up there and you can see just what you were talking about that the indicators that you look for in making those determinations and that do change in shape, size and a whole bunch of other things. What's really crucial here is in terms of the people that you're trying to serve, and that is at some point in time you've got to be able to tell them where that line is so that they can proceed with whatever activity; you know, it's either here or there. And that's where it gets labor intensive, because in many cases that means somebody's got to go on-site and clearly establish that, get some benchmark measurements, etc. so if it ever comes up in either litigation or some other dispute resolution that you have a very clear indication, well this is where we all agreed it was and on this side you can do this, and on this side you can't. It's an issue I think that whatever the local unit of government with the responsibility is going to have face as a part of this process.

Helland

Joint Noticing

We'll move on. There's a provision in the interim regulations for a joint notice process for permit applications so that the local unit of government is only responsible for their permit requirement or their replacement plan, but not for a Corps permit or a DNR permit or some other agency permit. Do you see that as something that can work well and be a big help in this process, or can there be some confusion surrounding that? Rick.

Hanna

I can see some confusion surrounding it. We've had confusion now with the process.

Helland

In what sense?

Hanna

Well, the joint notice is good but if they don't respond in a certain period of time it could be a problem. I would like to see the DNR take over the 404 program.

Wopat

Notice Form

Can I take a crack at this? Pushing joint notification forms for at least two years, I'm finally glad to find fruitful ears here. We have a joint notification form proposal right now which I sent out to a number of the agencies. It would be a six-part form and the idea is that all agencies are notified at the same time. The applicant fills out one application form and then the agencies have an opportunity to review that and make a determination whether or not they would require a permit at their level. If they do not, they could simply ignore it, and there will be a default provision in it that would say that if you don't

respond or don't get an agency response within 30, 45, whatever the selected time is, that you can view that as being a default and that you need no permit from that agency. That also is a benefit to the agency that they don't have to spend the time in responding, or the postage if they feel it's not within their jurisdiction. At this point I'm doing the conducting sort of an evaluation to see if we're touching all the bases or getting all the information we need. We don't want to make it more than a one page form, rather simple. If another agency needs additional information, they can simply request that at the time they notify the applicant that in fact they do need a permit from that agency. The other factor that is unknown at this point is we haven't explored that with the local government unit and we're not quite sure who to talk to in the local government unit. I think I talked to Dave originally and certainly will touch base with him again. I haven't had many comments back on it yet. It hasn't been out long enough. The agencies have probably only had it for three or four days, but the initial response from PCA anyway is that they would like to get a copy also, which may add another copy, and they're also concerned now about the fifth and sixth copy being illegible. That may be a problem. It may require some greater cooperation or one agency will agree to receive a single application form and reproduce it and send it to the other agencies, and maybe we'd trade off that responsibility. I'm not sure but I definitely think the idea of a joint application form is the simplest way to get concurrent notification to all parties. The only other way to do it that I can think of is a clearinghouse, and I don't know who would staff or fund the clearinghouse and where we'd find the people who are so steeped in knowledge that they can cover all of the various programs. So my preference is a notification form and each agency makes its own determination.

Weirens I think it makes a great lot of sense. I remember when I first started couple years ago by former Senator Boschwitz's staff to try and do this and DNR held up that particular activity. I think the idea is whatever confusion that we're referring to that might occur out there to find some way to resolve that. It's a great assurance to each proposal to have notified everybody who might have an interest and now they have a requirement to respond within a certain number of days so they know who they will have to worry about out there in terms of getting permits and regulatory oversight. I see it as a tremendously positive way of dealing with the confusion that's out there in wetlands, and a point is made also that the wetlands conservation act does not simplify the process. It does make it worse, but this is the one thing it does that will work towards improving the entire process of regulating wetlands.

Helland Joel, do you have anything to add?

Jamnik Just that we agree. It works practically. We've supported it for a long time. I know DNR proposed, or DNR reaction initially I think was

because they thought regardless of who else got it, they'd be the primary point of contact--including on the 404 stuff--so that was one of the reasons for their hesitancy. But, from our perspective, if we can make it work practically it's a wonderful idea.

Wopat It's amazing to see what a change in office will do to a person's perspective. When Ron Harnack was with DNR, he was the strongest opponent of it. I had to use Senator Boschwitz's office to try and get some political pressure on him. Unfortunately he didn't get reelected, so I lost my advocate there but now that Ron has a new job, he seems to see some real benefits to this.

Helland Funny how that works. Added responsibilities. Diane or Ron, is there a developers' perspective on this that you know about?

Ray I think a joint notification process has real advantages. That way you can assure every other agency that, yes, we have contacted the other agencies and we're pursuing a permit there. I think it provides a way of showing that you've notified everybody that you need to notify and, you know, experienced developers generally know who they have to contact and can do it on their own. I think that this does simplify the process somewhat in that you have a one time deal that you get notice out to everybody, and then I think the notion of a time limit would be very good too so that if you haven't heard back from them in a certain time you know you can proceed with your project. I think there are some real advantages. As someone has said, the wetland conservation act did not simplify the program, it complicated it. And anything that can be done at this point to streamline the process of coordinating the many, many layers of wetland jurisdiction is useful to developers.

Svoboda What kind of time limit are you thinking of, Ben? 60? 90?

Wopat I would like to shorten it because all it does is it requires a preliminary review. We already do that for about 7,000 pieces of paper and you can probably do a five or ten minute review and maybe make one phone call to make the determination whether or not you need a permit. So I would like to see not longer than a 45 day period.

Notice Timeframe

Hanna This is about the closest we can get to a one stop shop.

Jamnik You know what you're really talking about at that point too again is that if the agency determines that a permit may be required, they can hold or expand that period on the default. It wouldn't be that you'd have to take final action on the review within that 30 or 45 day period, it would be just that you'd have to respond somehow to say, we think we have jurisdiction. We think we'll want to look at it and might require a formal hearing at the thing and that would freeze the process there. That's the way it would work. Then from our perspective, you

could go with a 30 - 45 day limit quite easily.

Ray I think developers would like to see a shorter period so that they have more certainty. Generally, Minnesota has a very limited construction season and you don't want to see something sitting out there, or somebody having 90 days to respond to you. That can really eat up the substantial amount of the time you have allotted for the project.

Wopat I think there would have to be some fail-safe in there if there was any adequate information that you would be able to gather the additional information to make a determination whether or not a permit would be required.

Ray But then again you could make the determination that there's inadequate information within that 30 to 40 day period, and at that point by sending some sort of letter, you've gotten yourself out of the default. I think that's the way you need to strengthen it.

Wopat Agencies can set up their own rules for implementing that also. I have a rule in my office that if additional information is required to make the determination, you have to request that within five days so it doesn't sit on someone's desk or get buried in a pile of paper. We've got substantial piles of paper.

Helland That was a concern that just entered my mind with the constraining federal and state budgets. Is there a chance that within the bureaucracy there wouldn't be a timely response and somebody who's proposing a project wouldn't hear about it and may run into trouble later?

Wopat I don't think so. Our track record on doing initial reviews is normal. We see everything within two weeks and if it goes beyond that, we normally work overtime. The simpler projects are under the general permit, which is basically our case, where we say if the state government is reviewing it and they're applying our standards, we're not going to redo that process. We generally confirm those within 7 to 10 days. And nationwide permits, if it comes within one of the nationwide permits, those are generally in under two weeks also. It's the individual permits, once you do decide that a permit is required, you're probably looking at a six month process and maybe a year for a complex project.

Nordstrom The question I have though is, how long is the permit good for? And the reason I raise that question, if you do it once, five years from now

Permit Length the conditions on that site may have changed dramatically. It does change out there and I guess, when we give that to the landowner, the landowner or the developer, whoever needs to know how good is it, how long is it good for, what does it cover, and when is it appropriate to come back and re-request additional permitting authorities. I think

we need to look, it isn't a one time thing I don't believe. And I think we need to, if you're going to develop rules and regulations to cover that, look through the whole gamut of things.

Wopat

I can tell you what the federal rule is, Gary, under the Clean Water Act. The permit that's issued has three years to complete the construction. Once you complete the construction, it's good forever -- I mean the permit remains. But the three years is the time within which you have to do the construction. If you fail to do it within that time period, then you have to come back and request an extension and it's then reviewed to see if there has been a change in circumstances, or the new factors that should be considered. If it is, then he has to go back through the whole permit process. If there has been no significant change, a district engineer has the authority to just go ahead and extend it.

Peterson

All the permit processes I'm aware of, when you get your permit, it usually spells out in pretty good detail what you're permitted to do and when it expires. However, it's still a common problem even for very sophisticated applicants to let a permit expire and I don't know how you get around that if you don't read your permit.

Wopat

It is and there have been some experiences here in the Twin Cities where developers got permits several years ago at the time that they could get them before the mitigation philosophy changed. And for financial reasons, or whatever, they didn't do the work within that time period and then they tried to transfer the land and have another person come and do the development. Well, the scene has changed substantially so we would deny the permit these days. So there's a penalty to be paid if you don't do it within that time period. Highway departments typically can get theirs extended without much problem, but the average developer you definitely want to do it within the time period stated in the permit.

Peterson

I've had occasion to resurrect or attempt to resurrect permits that have expired and it's very difficult to do.

Helland

On your proposed joint notice process, is the information about how long a permit lasts one of the informational points on it?

Wopat

No, but that would be conveyed to the applicant if a permit were required. When they get it, the permit states it right in the permit that it's good for three years.

Ray

Permit Jurisdiction

But there might need to be some sort of a provision notifying that if you determine not to proceed with the project at this time, further notice may be required when you do decide to proceed with it. Because say you decide to proceed with it now, and the Corps is

working under 1989 now, or 1987, and the state is working under 1989, things might be different two years down the road even. So I think there might need to be some sort of a provision so that people know that just doing a notice once in your lifetime to find out who has jurisdiction over your wetlands won't work.

Wopat That might be covered by some boilerplate language by each agency. Right now we have that sort of language in our nationwide permit saying that the determination is only good for two years and that if you don't do the project within that time, you need to come back and check to see if there has been a change.

Ray I'm just stating that the determination that you don't need a permit may not even be good two years from now. So you may not hear back from or get any sort of letter from an agency, and yet, two years down the road, you may need a permit from the agency. I'm thinking of the circumstances where no permit is issued, or no correspondence between the applicant and a given agency takes place, there might need to be something on the form indicating that you may need to give notice again if you decide to proceed with an application at a later time, or something along those lines.

Peterson I think this joint notice idea is really important, and I agree with Diane that some language of that type probably should be in the correspondence, so that later on down the line when you end up in litigation over whether or not some determination of no jurisdiction is still valid or not, that you've got it in writing what actually is the case. I think that in line with that, I think it would be a good idea for there to be actual correspondence from each of the agencies that get notice, rather than just having a default where if you don't hear anything you're OK. I could really see some problems down the line where you get into litigation and it turns out that somebody did slip up somewhere, that a piece of correspondence fell through a crack, and somebody proceeded on the assumption they didn't need something that they did. Even in this day and age, well in the metropolitan area I don't see it very often. In some of the outstate areas, I still find some of the agency field people will tell somebody to go ahead and do something, and never say a word about the fact that they need a permit from the Corps or from the DNR and so on. I have dealt with enforcement actions in outstate areas where a local agency official has known about an activity for over a period of years and said go ahead and do it. No problem. They didn't even have jurisdiction over that activity and somebody else did.

Jamnik It's happened in the metro too.

Ray The other concern along those lines in terms of getting a piece of correspondence back frequently when we deal with cities who have

ordinances and increasingly, as the act is implemented, city officials want some comfort that you're out there getting the rest of the permits that you need so somebody else in the application process may want to see a piece of paper that says "The Corps is not exercising jurisdiction; the DNR is not exercising jurisdiction."

Jamnik

Permit Complication

Or the certified copy that the notice has been submitted to the agency. That'll work fairly well too because then in the development agreements, as you know, you'll have that provision that all required permits have been provided, and, if at a later date, the Corps or anybody comes in there, no further building permits or occupancy permits are issued, so you usually catch it on the large scale one. I'm wondering a little bit what we're going to do on the preexisting plat situation where you might just have a building permit issued and the time frames for local permits vary widely and the construction period by which you have to act varies significantly as well. On subdivision plats you can have different phases that have different completion times and development agreements that stretch out three years, and then our land use planning act provisions of one and two years as far as your safe harbor rules click in too. So to try to get all those that are complicated, if then but not then type logic statements in a notice form is probably more confusing than it's worth. To put some sort of default language in there that no action, a letter type situation or no action determination, may not be good for any of these jurisdictions if beyond their own specific rules would be good.

Peterson

Starting to sound like a clearinghouse. Maybe what's actually needed.

Jamnik

Clearinghouse

I don't think that works either though because then whoever runs that clearinghouse just gets caught in the middle. And say at the city level that you know a lot of times it's that one-on-one negotiation between the jurisdiction and the applicant and the development agreement, there's a lot of latitude for flexible provisions in there. But what role would that clearinghouse serve in that situation? I don't know.

Peterson

I think the only role I can see a clearinghouse really being able to serve is just confirming that all the necessary permits have been obtained. That all the "I"s have been dotted, and as to the specific provisions of permits and things, that would be business they ought to stay out of.

Wopat

Notice Simplification

I think the notification form still can serve its purpose and stay simple. The idea was that the agencies would have preprinted forms with the cautions that you've been speaking about for the postcard type of response with a check-the-box yes we do, or no we don't, and here's all the additional information and some other cautions that you should be aware of. The Corps would respond to all of those because we want a record also, but the reason that the default provision was in was to allow agencies such as Gary's, who may only be interested in

agricultural tracts but would be receiving thousands of these applications potentially, not to have to incur the cost of responding.

Nordstrom For us, we don't even have a permit. We don't even operate in a permit system which further complicates this a little bit.

Jamnik From the same perspective, we're probably in the unique situation of having the least amount of problem in this area because of the ability to catch things anyway, either through the building permit process, occupancy permit, drive by inspections, neighborhood conversations, or complaints and the rest. So that on the notification, if it doesn't work, if the official notification or the one stop shopping notification form doesn't work for cities, it's probably the least level of government for a problem.

Wopat It's important, Joel, we get it down to the cities, and the counties, and the watershed districts and the idea would be that this form would be in absolutely every office where an applicant might potentially walk in and describe their project. And that takes us out of the situation that Ron was talking about where they may have gotten seven permits, and lo they forgot the one, and all of a sudden they're in an enforcement posture which none of us want to be in. We probably would have rubber stamped that also if it's that good a project. But then we have to stop everything and go through an enforcement proceeding to come back to the conclusion that a permit ultimately will be granted after the fact. So this notification form would prevent that and those are always hostile situations which I like to avoid.

Peterson Then if the cities got a checklist that they go through when they issue a building permit, you know we've gotten no response. It probably isn't even that much trouble to make a phone call if you're approving a building permit for an individual project.

Jamnik Yes I agree. I think it probably is a very minor problem from the city perspective.

Peterson Maybe this joint notice system could include assigning a common file number to each application that all agencies would use. Then when you call whatever agency and say, "Hey I haven't got a postcard from you guys yet. Here's the project number." It's the same file for everybody. Punch it up on the computer.

Helland Let's move on to the exemption category if we can. One of the provisions that the board of soil and water resources is trying to recommend is a certificate of exemption. When a farmer or someone else is exempted by the state law, should there be a certificate of exemption sent in to the local unit of government so they know about it. If there are adjacent landowners wondering why this person is

Exemption Certification

draining or filling a wetland, they'll know that that person is exempt from the law. Is that something that you've been talking about? Either Dave or Joel.

Jamnik You mean with BOWSR?

Helland Not only with BOWSR, but has there been concern about it expressed by either the cities or counties on whether it's a good idea and if it can work?

Jamnik We've talked about it. I don't know if I can say what I said to Greg and Ron about it. It is a difficult situation and you don't want to have too much paper floating around. On larger scale developments where most sophisticated jurisdictions will use a development agreement. That will generally be filed with the county and recorded with the plat. The plat can also indicate that, so the question, do you have to use a specific type of certification or form and how good is that certification, how long is that certification good for, what are the limitations on it, cause me a lot of concern. I don't believe we should put a great deal of reliance in that process. My feeling is, if the local unit of government goes through and approves a mitigation replacement form, puts it in the development agreement and that gets recorded, has the plans and specifications also attached which is common practice, and has the on-site engineering inspection through the course of the development, if it's not being done right, you can catch it all during that process. If you don't catch it during that process, whether you've had a certification or not doesn't make any difference because the perspective landowner or purchaser two, three years down the line is not going to have any greater comfort or less comfort because of that additional piece of paper. So I'm not a big fan of it.

Helland I'm talking more about a notice to the local unit of government from the landowner, the affected landowner, that they're exempt from the law, that's certified by the local unit of government also, so that people know that that person is exempt from the act when they're actually doing something out in the field.

Jamnik If someone comes in for a building permit and you issue them the building permit and they go out and construct it, and whether you're certified or not, probably won't help you one way or the other in litigation, either as the landowner or the jurisdiction, because if the building permit was erroneously issued, then the acknowledgment or certification of the certification may be erroneously executed or notarized or what have you. And so other than fighting over two pieces of paper, rather than one, I'm not sure we really gain anything in that area.

Peterson If I was representing a developer in litigation, I sure would rather have

that certification in the file. Make it a lot easier to drag the city into the lawsuit.

Jamnik

That may be one of the reasons why I said I don't want to share these things. It does become a trap. I mean if some property owner blows smoke successfully and that certification is just signed by someone who doesn't have the expertise happens to be the first point of contact, you sign that, the person's not there, say the expert is out of the office that day and you don't sign. The person comes back later, hold a building permit, comes back with the preliminary plat and said, we've looked at it, we talked to you folks about it, we had this certification signed, you think any reasonable planning commission or zoning administrator is going to say, "Well I guess that wetland should be filled or altered. We're just going to let it go. It's not going to happen. You'll have the litigation up front. I guess I'm just not a big fan of that process.

Weirens

I think another thing needs to be brought into play here is the way the entire program is structured in the wetland conservation act in that it's not intended to be some complete regulation but to fill the gaps in some other regulations. That ties in very directly with the notification process he's talking about also which takes in the certification of exemption. Because what the exemption is going to mean in most cases is not exempt from regulation, but that it's exempt from the wetlands conservation act. And it's that sort of process of notification that does not work right, it's going to affect how this certification exemption works also. It's something that I'm sure provides a great deal of comfort to landowners but I also have concerns along lines that Joel has about how it's going to work and how it's going to affect local governments. There have already been plenty litigation regarding this and this is another way to drag locals into it.

Nordstrom

Farm Exemptions

One of the things that I'm still not sure how it's all going to work out, but one of your exemptions is that if it's covered by the federal programs, it's exempted. And I went on record both before the House and Senate committees suggesting very strongly they not do that and some of the reasons I had for that were that people flowed in and out of the programs. They may be in one year, out the next, etc. or they may be out and then they get captured in an emergency disaster relief program, then they get caught back up in it again. There's going to be a paperwork nightmare trying to maintain a current record of who's in and who's out, who is exempted under this one, or is not, and I would have preferred to see the state legislature just decide. These are the wetlands we want to protect in the state of Minnesota exclusive of whoever else has certain types of jurisdiction. I think it would have been much cleaner in my mind. Now they're going to have to come whether it's the county or the soil and water district, or whoever is going to have to touch base with us and ASCS, which keeps the master records, and it's an issue that has not been worked out yet.

Jamnik I think, Frank and John, that with Gary's point, it's how it's likely to work is someone's going to come in and claim, the property owner or their representative, they're exempted and the local unit of government will say, prove it. You do the leg work. And no matter how many other places that person has to go, until they come back with the certification or whatever, the local governments are fairly adept in making sure that the person that caused the problem incurs the expense. So it will be pushed back up, and I think in many of these cases the very people that thought they were going to be benefited by the certification process are going to be changing their opinion a little bit in the future, because they may be better off with the notification with the default and say, Yes, go ahead type-approach, then actually going to get some local, state or federal bureaucracy to execute a document. Local government officials are fairly careful about certifying that, Yes, go ahead, no problem. This doesn't work real well.

Helland Gary, one of the exemptions talks about farming six out of the last ten years. Do you know if ASCS has good crop history for that type of exemption?

Nordstrom Basically they have fairly good records, and even folks that aren't in the program do maintain their records in case they want to come in because people do float in and out of the program depending on what's to their best benefit in any given year and the way the program's been designed. For the most part, I think there are very good documentation records out there on the part of ASCS. We don't have, we're not permitted to use a cropping history exemption in our federal law and so that is a major difference. You have a six out of ten, we're not permitted to deal with that.

Jamnik John, I should mention that some of our communities in dealing with the exemptions have seriously contemplated saying to hell with the 24 exemptions. The easiest way to do this is, and also the reason the League of Cities and so many of our communities are concerned on the size issue, the two and one acre debate, and the typing and classification debate. A couple of the communities thought that the easiest way to approach it is just throw your arms around everything and then let stuff out, rather than trying to figure out what was covered or not. So some of our government approaches are such that you just say, if it meets your general accepted definition of a wetland, you aren't touching it until we get to review it. The burden of proof then is on the property owner, so that some of these difficult questions posed by the legislation won't be quite so difficult at the local level because they won't exist. A lot of the farm or agricultural exemptions will have minimal application anyway in the urbanized areas so this, when it gets back to the legislators, will say in the real world what's happening with it. I think in many cases that's what will happen to it. The local units of government rather than trying to get up to speed on the current

exemptions or future exemptions or modifications to them, will say, OK go get a planning commission and engineers and whatever and work backwards.

Peterson

I'm sure that in most cases, at least the clients I work with, I can't imagine any of them wanting to go to a local unit of government for certification without first having me make the case. Here are what exemptions I think apply, but perhaps if the certification process was brought into the notice and review idea that Ben was talking about, you could have somewhat of a safety net. You're thinking, we're going to certify this as exempt if any of the other agencies that may have more expertise, they should jump up and say, wait a second, they're pulling a fast one on you. Might catch some of those fast ones.

Helland

Ben, there are new Corps regulations for nationwide permits. Is that correct? Can you tell me how that's proceeding and how it's supposed to work?

Peterson

Nationwide Corps Permits

There's one thing that kind of struck me about the exemptions for projects that are covered by nationwide Corps permits. Any idea why projects that already have an individual section 404 permit issued for them should not be exempt? Generally those projects if you haven't gone through the sequencing process and provided adequate compensation, you wouldn't have a Corps permit. Any thoughts on why that shouldn't be an exemption as well?

Weirens

Probably forgot about it in the late Sunday evening and early Monday morning. That would be my best guess.

Helland

I can't answer that. Corps exemptions were always in the Senate bill but they weren't in the House bill and we didn't really get into all the differences between the Corps permits so, and I think Dave is right, it got so late at the end. I mean there so many issues that just were barely touched on.

Peterson

My sense was though, the general permits that were tossed out, exceptions to the exemption, were ones where there was potential for impacts to occur without compensation taking place. One acre nationwide, 26 type of thing. It seems like an individual permit. Most of those, if not all of them, are replacing wetlands one-to-one or better.

Jamnik

Plat Filing

The one thing I'm not sure of how it's going to sift out yet is one of the exemptions on the preliminary final plat approval, that came out substantially different in many peoples opinions than the way it was going in. And I'm not sure it's going to be formally recognized by a majority of the jurisdictions as what they do locally, just because the workability with it is somewhat questionable, I think. It may be another one of those exemptions that is not going to get recognized

locally as much as people intended it to be at the state level.

Helland Is there any problem with recordkeeping for that exemption, at all?

Jamnik Not so much. The plat filing date is easy to track when the thing was filed or approved for the most part, but the real question will be, I think, locally. The equity aspect of it, if something should be recognized or not. It's like what Ben was saying earlier. Things have changed markedly within two years, much less when you start looking out three, four, five years back.

Peterson That whole exemption is really wide open to interpretation. What's a similar local governmental approval. You get a grading permit for phase 1, is that good enough to be exempt?

Jamnik I think that's why for the most part, I think, particularly the sophisticated suburban community type folks will close that one down locally.

Helland Ben, are we ready to get back to the nationwide permits?

Wopat

Corps Permits

Exemptions on nationwide permits. We have exemptions also in the Clean Water Act and those are very narrowly read. And exemptions are something that we have no discretion about at all. Nationwide permits, on the other hand, even though they are granted at the Washington level, may be overridden by the district engineer if he feels that there is concern for the aquatic environment so they do involve considerable discretion. The recent proposed changes are still up in the air because certification of those is required by January 12, is when they expired, and the recent response this last week by the division engineer was that he would not accept the PCA conditions, so most of the nationwide permits aren't in effect in Minnesota and I think that it's fair to say that adding mitigation and previous notification to a number of the nationwide permits has made them more complex than they were before. It probably will require some pretty extensive negotiations at the state agencies on determining what regional conditions will have to be applied before we can, in fact, bring those back into existence.

Helland How far can the Pollution Control Agency go when attaching conditions or proposing conditions?

Wopat Well, they can propose pretty much anything they want. What's acceptable is another matter. The problem with the first go around was that they were basically asking the federal program to run the state program, that the conditions were subject to all these state statutes. And my staff is not able to implement that program, I don't think, so we rejected those and said some of the suggestions they had with regard to protecting special resources are appropriate for regional

conditions unless we can negotiate those with them. And those would be much like the regional conditions that we had on the last set of nationwide permits. The big difference between the old ones and the new ones, I think, are the 12 new ones require notification in advance in potential mitigation, which is in contrast to the one that was under that sort of a scheme before. So I see a lot of additional work, and I see a lot of mitigation planning which is very labor intensive. So instead of being a benefit to us, I think it's going to be a detriment.

Helland Is the ball back in their court, so to speak, in the agency's court?

Wopat It's back in PCA's court right now. The division engineer wrote a letter the other day suggesting that we contact them for discussion of the non-section 10 permits. All of those permits that were structures in navigable waters have survived. They're deemed not to have a discharge so they don't require 401 certification, but all of the Clean Water Act ones are not in effect at this time. The Corps still views them as being effective for the federal government, so the applicant needs to go back to the state agency and get individual certification for each project.

Helland Does this have the potential to affect funding in the state dramatically if the changes go through in some widespread fashion?

Wopat It could if by funding in the state you mean the state agencies. The PCA, I believe, intends to play a much stronger role in the clean water act than it has in the past. At least that has been their indication. So I would anticipate that, yes, it would require increased funding.

Funding Increase

Helland Does anybody else want to talk about the Corps nationwide permits at all? Let's talk about mitigation a little bit. Ben mentioned earlier that Florida study that showed there was only a 12 percent success rate for creation of fresh-water wetlands. We know the creation of wetlands is certainly not anywhere near being a science, and that required mitigation in Florida never happened at least one third of the time. Why is our law going to work when that study has such a low success rate so far in Florida?

Mitigation Requirements

Weirens The question that first occurs to me is, why wasn't it successful in the Florida program? What were the circumstances that the mitigation did not occur or was not successful? Is there a way to use their experiences to make sure the program here will achieve greater success?

Peterson The two things operating in Florida's situation: one is, is it technically more difficult to create or restore wetlands in Florida than it is here? And I would submit that in a lot of cases it probably is. The hydrology and water chemistry of wetlands in Florida is quite a bit different than

Enforcement

here. Our wetlands are commonly groundwater expressions or perched wetlands where water is temporarily trapped in a location. Those are relatively easy to recreate. Some of the wetland types that they deal with in Florida are very complex and more difficult to recreate. The other thing operating is simply enforcement. They're getting away with something if they're not doing the mitigation that they're committed to doing. Their feet aren't being held to the fire and I think there's a vicious circle that gets created there if that's the case, because once people start seeing that they're economically better off to do things the wrong way rather than the right way, you see more and more people doing things the wrong way, trying to get forgiveness rather than permission. That's something that we need to avoid here.

Svoboda

Mitigation Complexity

I think the business of wetland restoration and creation is far more art than science. The concern I have with the way the statute is structured is that in the past we had a relatively small group of experts who were fairly skilled in being able to restore and mitigate wetlands and all of a sudden we're opening up this concept to a whole series of review committees across the entire state that may number in the dozens, if not the hundreds, and they're going to be making decisions about what's acceptable mitigation or not. As a wetland scientist, I like to see the challenge of wetland restoration go beyond just creating a hole in the landscape and filling it with water. I mean that's not what we're after here. The object of the whole process of wetland conservation is to conserve something that's worth conserving. The way I look at it, many of our wetlands, I think, are being misperceived in that they're perhaps nothing better than an abandoned cornfield filled with weeds and covered with water. In other words, a former native prairie that's now no longer farmed and is filled with weeds is not a native prairie, and I think the same thing is true with our wetlands. That we have very few native wetlands left and I think Ben's ecologist, Steve Eggers, can testify to that very clearly. So when we talk about mitigation, restoration and creation, a wetland is not an isolated component in and of itself. It's an expression of what goes on in the surrounding landscape and that whether it's a groundwater fed wetland or whether it's an perched wetland. Its water table needs to be in balance with the watershed and so, if you enlarge a wetland basin, you're changing water balance and that ultimately is going to have an effect on the nature and the character of the wetland. I can change wetlands without going below what one might define as the delineated edge just by going and completely regrading the surrounding landscape. I can dry a wetland up just by cutting off its water supply. So we need to look at this whole concept of mitigation, I think, in a more broad perspective, recognizing that wetlands are an expression of, and a reflection of, the past land use, the current land use and the future land use. Wetlands have been degraded by past land use, by sedimentation, pesticide loading, deposition of garbage, a lot of them are substantially degraded. I think as development proceeds around wetlands in an urban

Wetland Change

landscape, that unless the proper precautions are taken, those wetlands are going to certainly change in character, certainly change in quality. We can mitigate on site, for example, for loss of water quality and quantity by altering one basin and replacing that function near to the location of the project. We can't replace again, even respecting the wetland boundaries, the lost wildlife habitat function, because the wetland again doesn't stand alone. The wildlife habitat, or the wildlife that inhabits that wetland, depends in large part on undisturbed habitat in the surrounding drainage area. So I think to replace the lost wildlife habitat function, which is going to occur no matter what we do with the wetlands, we're going to have to look at some sort of off-site mitigation, because otherwise the consequences are going to be a continued net decline in the habitat function.

Helland Is the loss of wildlife habitat function ever the most important function in a given wetland?

Svoboda It depends on who you ask the question to.

Helland As you can see, there's nobody from the Fish and Wildlife Service or DNR here.

Svoboda And certainly in my experience, sitting around the table in discussions of mitigation, each agency representative is going to bring their own perspective to the table. The Corps, their role and purpose in the process is to try and balance all the competing interests. The Environmental Protection Agency, if Ted Rockwell were here, would likely speak to the fact that their primary concern is water quality and quantity. Fish and Wildlife Service and certain elements of the DNR are going to argue for lost wildlife habitat. So it depends on who happens to be participating in the process and what their particular agency's policy and mission is.

Wetland Value

Weirens But Frank, aren't many of your concerns addressed through the public value system which is structured within the law. The rulemaking is a different story and there are many questions opened up there, but won't many of your issues be addressed in some way through the public value.

Svoboda By public value, are you talking about, for example, the recommended method, wetland evaluation methodology.

Weirens I'm referring to what they have in the law that, as part of mitigation, the wetland that's going to be impacted will have to be given some certain values and I can't imagine how to do that, but as a part of that mitigation plan you have to see how you're going to replace those values that have been damaged.

Svoboda

Regulatory Purpose

That's exactly my point. With so many different individuals or technical review teams out there, there's no way that you can structure the language in the regulations such that everybody's going to interpret it the same way. Since this new law has been enacted, I've been in meetings with several different attorneys and each attorney, and these are people who are experts in legal language, have interpreted the same part of the law a different way. And so I think now, when you take the regulations, no matter how tightly you try and craft that language, some people are going to be very diligent about how they interpret that and others are just going to be, well, we're going to dig a hole in the ground and fill it with water and that's their answer to mitigation. That, as a scientist, is what I'm concerned about. It's our responsibility as stewards of the environment to go, and this is my personal opinion, beyond just satisfying what the letter of the regulation is, but to actually go to the heart of it and what's the intent. That is the reason we're protecting wetlands to begin with. The reason it started was that

Wetland Quality

the impetus of the sportsman and the fish and wildlife interests many decades back, and finally the momentum started picking up, the wetland resource started diminishing, and people began to get concerned about wetlands not only for fish and wildlife habitat but also water quality concerns. But I think the wetlands we're protecting today are substantially degraded, in terms of the quality, that they were in the 30s, 40s, 50s, and even the 60s. And if we want to protect wetlands and we want to be consistent with the intent of what we're doing, we need to look at where we are today and what can we do to restore that quality. Those wetlands are production factories for all sorts of things, and just some storm water pond in the middle of Golden Valley or Plymouth or Maple Grove isn't going to get at what we're really trying to get at the heart of here, and that is, we have a precious resource to protect and some of it has been damaged, and we need to recognize that damage and try and restore the integrity of the system.

Peterson

Mitigation Location

I would agree that wetland compensation should really be geared toward the functions that you're trying to replace, and certain functions have to be replaced virtually on site if you're going to offset the stormwater storage and treatment values of an existing wetland. If you don't recreate that value within the same watershed, you're not replacing that value. On the other hand, some other wetland values maybe aren't quite so location specific. Wildlife habitat's a good example. You may, putting it across the line in the next county or even in the next watershed, actually be able to replace that function better, and perhaps put it in a better context, than you would be putting it in if you did it on site. That's one of the concerns I have about the location restrictions in the act. But, with regard to compensation, that it always be in the same county and in the same watershed, most of the time that's advantageous. There are occasions, I think, where we actually do compensation plans where we split the functions up. If I'm replacing the stormwater treatment value of a wetland by building a

stormwater pond, that pond isn't going to have much wildlife value. Quite frequently, if you build a pond for that purpose plus we build an area that's specifically designed for wetland wildlife habitat, and don't route any urban runoff to that water body at all, I think there maybe needs to be a little more flexibility as to where we distribute those functions from a location standpoint. On the other hand, if the wetland you're affecting is in Golden Valley and you're replacing it in Norwood-Young America, I think that's going too far. There need to be some location restrictions on all the values that we try and replace, but they should be geared toward what value you're working with.

Hanna

Total Mitigation

I concur with Frank that when you, you really can't mitigate the wetland 100 percent. When you leave a hole in the ecological system, you're going to change the groundwater hydrology, you're going to change a number of different things and probably that's one reason we have that two for one. You'll never get 100 percent mitigation, but you have a better chance by doubling up that number in the long haul. But I agree, you can't do it 100 percent. It disturbs the system.

Peterson

I think the best reason to have something more than one to one on an acreage basis is to give you the flexibility to split up incompatible functions. While water quality and wildlife habitat may be compatible functions in an undeveloped area, once you develop it and change the quality of the water going in, they become incompatible. And quite frequently when we've been working with situations where we have to provide one and a half to one or two to one, perhaps that first half to one will be the stormwater pond that we build on site. The remaining mitigation is for the other functions.

Helland

Does anybody want to share their perspective on pros and cons of mitigation banking?

Wopat

Mitigation Banking

We've been working on mitigation banking with the Minnesota DOT since 1984, although we were never really parties to the agreement. The Environmental Protection Agency and the Corps were not parties to the agreement that was signed by the Department of Transportation, the Fish and Wildlife Service and the DNR. We have tried to modify that and bring in some of the more recent concepts and I must say that the DOT hasn't been particularly receptive to those. Their concern is being able to quantify objectively values and that's tough to do with anything other than the habitat evaluation procedures which is what they're using. The concern of EPA and Corps for that is that those emphasize fish and wildlife values and don't emphasize Clean Water Act values which is, for our program, what is directed at and when I read the state's program, it's more directed towards the concept of mitigation banking. I think it is an excellent concept but I think it still needs to be preceded by a state wetlands management plan otherwise you really can't do an effective job of balancing if balancing is good

Management Plan

and I'm not sure all ecologists would agree that that's good either. But what we have right now with independent projects is, we have a little bit of mitigation over here and a little bit over there and a little bit up there, and a little bit down here and none of it's being managed and none of it's being looked at for the overall picture. So I think that the concept is good but it needs to be founded on some overall plan, and it needs to have defined criteria for success. That may have been part of the Florida problem is that you just determined that you need mitigation of X number of acres, but you don't really define what the parameters are. What type of water quality are you trying to achieve? How much open water? How much revegetation? Which species are you trying to create the habitat for? And unless you have all those defined up front, you're probably not going to have a very successful mitigation project. Banking is also coming into play in private industry. I see the Savannah district has an area of, I think it's several thousand acres, where private parties have purchased and are restoring wetlands with the idea of selling those credits to private developers. I'm not sure that that's been accepted yet, but I can see that as being a market that is going to be created as a result of the various wetland protection statutes. My other point on mitigation banks, or on any mitigation site, is that they don't do you much good unless you protect them after they've been created. So we generally have a requirement in our mitigation program that you have to put that on title so that it runs with the land and so that the subsequent purchasers are required to maintain that as a conservancy area. I think that's important to protecting the integrity of what you've made an investment in. The last part, back to the Florida experiment, about why didn't it work and hopefully we can avoid that in Minnesota, is enforcement and it's not a simple concept. Enforcement is tough because it requires resources again to be out on site and it also requires you to take that additional step, and if the party is not going to voluntarily agree to bring it in compliance with what they said they would do, you're forced to litigate. And from the federal perspective, at least, it's pretty tough to get the U.S. Attorney to take umpteen environmental cases when they've got so many cases, murders, rapes and those sort of things on their schedule. So it's almost a situation where I think environmental law, environmental values have to be sold through education. The public has to believe that there is a public good and that they are going to benefit in the long run, or their children, and they're willing to voluntarily support it. Everything we can do with regard to selling that at all levels of government, I think, is probably the best resource or protection we can provide.

Enforcement

Education

Weirens Ben, do you feel, is there any real difference between how banking can work between the public and the private sector?

Wopat Yes, because theoretically to use the bank, you still have to have gone through the standard checks. You should still go through the mitigation

Mitigation Banking

sequencing process and try to avoid impacts to wetlands, then minimize them to the maximum, if possible, and lastly, compensate. With a mitigation bank there's a tendency to want to jump immediately to compensation and forget about doing any avoidance or minimization. I think the highway department is obviously a good example for a mitigation bank because of the linear nature of their projects. They're going to encounter wetlands. In Minnesota, at least in Wisconsin, there's no way that they can build a stretch of highway for any distance and not encounter wetlands. And they have some limited ability to shift routes, so you're going to have wetland impacts consequently they're probably going to meet the sequencing provisions and the mitigation bank makes good sense. There aren't very many other industries like that. The cranberry industry in Wisconsin is real interested in it because cranberries are basically developed in wetlands also. And if you don't have a wetland you have to create one to grow cranberries. So we may look at exporting a mitigation bank to the cranberry industry. Other than that, I think that its prime value is for "ma and pa" operations so that you don't get the little one acre, two acres here and there. If you're talking to a major developer of a big project, they're generally going to be able to come up with a mitigation scheme that's large enough in size that it has individual integrity, that you're willing to accept that as a mitigation site and monitor it, and often they will monitor it and you can tie that into your program. We have five year mitigation requirements now and if what we were seeking to achieve doesn't work, there is an obligation for them to go back and do whatever tinkering is necessary to achieve the values you were seeking. And again that's something that maybe ma and pa can't do, so for them ideally they would like to be able to say, I'm impacting three acres of type 6 wetlands, type 6 wetlands are worth approximately $600 an acre, so if I pay $1,800 into this bank, the bank will go out and replace it. They'll make an acquisition somewhere or they'll make a creation and I'm covered.

Weirens

It's probably no surprise to anybody here, but the primary interest for counties is how it relates to road construction. And that's where my question was answered. You gave the answer that I thought was a very positive one. And that's something that I know a lot of counties are very interested in. A number of counties with agreements with the DNR, that are very similar to what MnDOT has, would allow the counties to bank with the conservation end all those activities, but I think very obviously somebody has seen it as a very positive way of being more efficient in the development of the wetland areas and it would be much more cost effective. It's extremely expensive to mitigate individual small wetland impacts and it drives the county nuts to have to go and spend these umpteen thousand dollars for half an acre to be replaced, and things on that order. It really is something, I think, from a public works perspective, whose time has come and one that needs to be expanded to all governmental activities, because there are a

County Banking

number of checks and balances that are more obvious in the public sector than in the private side. And I guess whatever can be done to further that concept is something that we would love to move ahead on and find some way to make it work, at least at a minimum for starters, on highway construction, and then move into other areas as the concept moves along and as it functions.

Wopat

Federal Banking

I was just going to mention that that was part of the president's message on August 9, and as a result there have been a number of initiatives launched at the federal level and one of them is to study mitigation banking. There has been a group appointed and I received a letter two days ago that had a survey of all the mitigation banks that are either in effect across the nation or are being proposed and the group that's under the leadership of the Institute for Water Resources is going to be formulating some recommendations to the president on establishing mitigation banks. And at least the preliminary statements indicate that they would have a great deal more flexibility than we are currently talking about. Not talking in-kind, they're talking about out-of- kind and off-site. So that may open the door to things we have not necessarily endorsed here in Minnesota in the past.

Svoboda

Appropriate Mitigation

I think when we talk about mitigation we have to be cognizant of the choice of words that we use. For example, require and replacement and kind, and if you go to many of the northern Minnesota counties where they may encounter hardwood swamps with trees 100 - 150 years old, or tamarack swamps with trees of the same age, it's not possible to replace something like that in-kind because that's developed over a period of time, so you can't replace it exactly. Or, on the other hand, where there's literally hundreds of thousands of acres of type 6 alder swamp, is it desirable to replace in kind 18 acres of that or 20 acres of that as the result of a county highway project, when, in fact, there's a deficit of other types of wetland habitat in western Minnesota as a result of agricultural drainage? So diminishment of functional value as a result of that 20 acres of filling may be insignificant in that particular context. It might be wise to exercise some sort of judgment here as to what is appropriate mitigation based on the project's location and the nature of the wetlands that are being impacted.

Wopat

I agree entirely, Frank, and that's one of the reasons that the state wetlands management plan is a necessary concept. There are some problems with, and we have explored having the state Department of Transportation rehabilitate prairie potholes in the southwestern part of the state for projects done in the northern part of the state. That's a problem also, as Ron pointed out, taking away a resource from one area, creating it in another area. It's also a legal one of taking funds for a project constructed up in district 6 and shifting it down to district 8. Can you do that legally? And there are some unknowns that we have to deal with.

Svoboda And that's why I say it needs to be placed in the context of immediate project area and whether or not that loss would be significant.

Peterson I think perhaps a better approach rather than replacing the lost values far, far away in another place, where wetlands are rarer and endangered, perhaps a better approach would be to replace them at a higher ratio. If you take out a prairie pothole on a highway project in Blue Earth county, maybe you ought to be replacing that at five to one instead of two to one. And maybe up in St. Louis county, maybe all their swamps can be one to one. That way you're keeping the values close to home and you're recognizing that in a lot of parts in northeastern Minnesota uplands are rarer than wetlands. I mean in Aitkin county there are lots of places where we've had mitigation sites. They've said, we don't want you creating a wetland there. That upland is more valuable to us. But I think mitigation banking is really highly compatible with this planning idea that we were talking about, particularly municipal comprehensive plans, either citywide or limited area plans. And it makes it a lot easier for the developers to buy into the program, and it makes it a lot easier to plan where your compensation is going to be. It gives you a lot more options and flexibility to do bigger and better projects. Quite frequently I'm hammered on about doing restoration projects, restoration being preferable to creation. In outstate Minnesota that's possible, but there's a lot of areas around the metro area where to restore wetlands means to reverse the drainage projects that have been done over the years and you can't do that without affecting lots of landowners upstream if you're doing a comprehensive plan for a whole city. That maybe gives you the flexibility to pick up on a significant part of a drainage area and reverse some of those processes. I was involved years ago, when the mitigation banking process first got started at MnDOT, and I think it's probably evolved quite a bit since those days, but my recollection from our early meetings was that the whole intent was not to get at large impacts on large projects that had a lot of resources and potential right of way to work within that. The whole idea was to offset these small individual impacts that accumulate and I think by building that into a planning process that allows you to do that, there may be projects that are big enough and involve enough space that mitigation or compensation outside of the banking process may prove more economical.

Replacement Ratio

Svoboda I think that point that you brought up, Ron, about the differential mitigation ratio is one that needs to be pursued because I think we need to link mitigation to scarcity of wetlands and quality of the wetland impact and where you have a wetland of much higher value, I think the suggestion of a higher mitigation ratio is really a valid one. I think that's something that needs to be pursued.

Ray I agree, and I think that from a developer's perspective something tied

to the value of the wetlands would be better received then what exists now which is, if you're a developer, it's two to one, if you're a farmer, it's one to one.

Peterson

Replacement Problems

I've recently been involved in a project where I've been trying to replace about six or seven acres of shrub swamp in an area where everything is shrub swamp. And we had to go to some pretty extreme lengths to find a place that we could do this just because of the extensive nature of that wetland type in that area and what we ended up having to propose to do was to yank out, to remove an abandoned railroad grade that had cut across miles and miles of shrub swamp and return it to shrub swamp simply because there was no contiguous place anywhere near that where we could create that wetland type or restore it. It isn't so common.

Wopat

Speaking of the mitigation ratios, we do have ratios built into our proposal to the Minnesota DOT and I'd be happy to provide those if someone's interested in seeing those.

Helland

I'd like to end up with a couple general questions here and it's 11:30 and if you have to leave, by all means go ahead. We didn't start till 20 to 10:00 and I was trying to keep this at two hours. The questions are: Does there have to be a consistency of application of rules statewide in order to make the state program work? And then, how critical is the funding issue for the local units of government in order to make this all work. I'll let anybody respond that wants to.

Weirens

Local Funding

I'll go first. I'll tackle the easy one first and that's the funding question. I think it's extremely critical to the applications program. It depends upon what sort of wetland protection did the legislature expect when they passed this. I think the expectation that we're going to have a tremendous program with people combing the state, making sure that things happen out there or don't happen and shouldn't. Without funding it's not going to happen that way. You know people are used to the Cadillac program, well we are going to have the Hyundai program. But in order to have the program that people expect, there's going to need to be a lot of funding. That is the central issue that I'm hearing from the counties out there in that they are not concerned about making the program work, they are very confident they can make this program work out. Their problem is how are you going to pay for it. There is no provision for that. The $75 application fee, that's not even going to come close to covering the costs of the program. Some legislators believe that's the case and it's impossible. The only way the program is going to work right now, and my advice to the counties when they ask me what I think they ought to do, is to place as much of the responsibility on the project proposer as possible to do all the footwork, to do everything. Only in certain cases, where it's very questionable, to send people out in the field to review the site and take

a look at it. It's the kind of thing that without money you'd have largely a paper shuffle and without money, that's all you're ever going to have with this kind of a program. And I think that's the bottom line. It needs money to make it work the way it's expected and it's not going to without it. The other issue about consistency, I guess I'm not as sure how important it is on a statewide basis. From what I hear it\ doesn't happen under the current federal or state program necessarily. There is some dispute about that. And the way it's structured, it clearly says that well we want to have some consistency by having 87 counties or 850 cities involved, whatever, and it's not going to happen. You have so many different people involved, little different interpretations, they'll come to some different opinions as to what ought to happen. The very nature of the program allows itself to create an inconsistency as it's implemented.

Statewide Consistency

Helland Rick, has there been any concern on either of those two areas expressed by the planning and zoning administrators that you've heard about?

Hanna The money and the workload factors are always a problem. With different programs coming down, for example, the shoreland program, there's a lot of requirements in there that require on-site inspections and so forth and we were originally told that there's going to be some implementation money and now that's not so sure. So the money is always a critical issue. As far as consistency goes, if you mean everything should be done the same way across the state, no I think that we recognize the state is very different from one end to the other and the shoreland program recognizes this. In that respect, there should be flexibility that as far as whether everybody enforces their particular rules, the way they interpret it, yes it should be.

Funding

Helland Anyone else have a perspective on either of those two?

Ray I think from a developer's perspective the funding is important as well. They want to see the localities having the personnel and having the technical expertise and having people who have time to deal with them on these issues. So the funding is important from their perspective as well. I think from a developer's perspective, I don't think we're looking for absolute consistency. It's recognized there are differences in the wetland types and that the programs are going to necessarily differ in different areas of the site in different areas of the state. But I think that some consistency in terms of procedures and other things are going to be necessary or else you're just going to have different programs from one local unit of government to the other and I think that some consistency is in order. It doesn't have to be absolute.

Wopat I guess I would like to see adequate staffing, funding, training for the local units of government because if that happens and if they can run an effective and efficient program, that would allow me to enter into

general permits with the local government units where we would not duplicate that. That's the sort of agreement we have with the state and I can see extending it to local units of government as long as they are applying similar criteria in a similar fashion. That, in fact, is assumption of the 404 program by local government units. We would still retain some oversight and we would still have certain wetlands that are not regulated under the state statute that we'd be responsible for, but we can certainly narrow the scope, but I don't think any of that's possible unless there are adequate resources to put into the local government units. So that's very high on my list. That was #3 in my concerns. My first concern still is defining who constitutes the local government unit and I would certainly like to be able to have one single point of contact and I guess at this point because of familiarity I favor the county zoning administrators because they do have some knowledge of regulatory programs and of the issues that we normally deal with.

Nordstrom

Rule Consistency

Recognizing that you never can get 100 percent consistency, but I think it ought be the goal of the administrating agency to try to get as much consistency as possible. Our experience in the federal side in the FSA activities, we have a lot of landowners that work in both counties, have a farm in more than one county or three counties, for example, depending on their location. It's very conceivable they're going to get very frustrated if in moving around from one county to the next and their operation of the farm which is pretty identical that they run into a different set of rules and interpretations. And so from that standpoint, what we ought to be striving for is the best consistency as we can achieve with the resources that we have available. And the second thing is that I would encourage the state government to emphasize and fund, and funding is going to be a real issue because I think in order to achieve a level of consistency there's got to be a level of training that goes along with that, and if you don't provide the funds to insure that that training occurs, then you're setting yourself up for less than desirable consistency.

Helland

I think we've run out of time. Thank you very much for your time and for coming. This will be transcribed, as I said, and we'll send it out to each of you. Frank also brought something that he did for the meeting which you can pick up at the front of the table here. Thanks again for coming.