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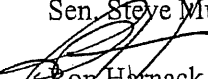
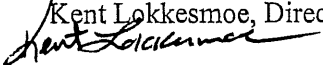
MEMORANDUM  
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January 12, 2001

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TO: Rep. Mark Holsten, Chair, Environment and Natural Resources  
Finance Committee  
Rep. Dennis Ozment, Chair, Environment and Natural Resources  
Policy Committee  
Rep. Tim Finseth, Chair, Agriculture and Rural Development Policy Committee  
Rep. Robert Ness, Chair, Agriculture and Rural Development Finance Committee  
Sen. Len Price, Chair, Environment and Agriculture Budget Division  
Senator Jane Krentz, Chair, Environment and Natural Resources Policy  
Committee  
Sen. Steve Murphy, Agriculture, General Legislation and Veterans Affairs Committee

FROM:  Ron Harnack, Executive Director, BWSR  
 Kent Lokkesmoe, Director, DNR-Waters

RE: **Wetland Regulatory Refinements - Report to the Legislature**

Attached is the report required by *ML 2000, Chap. 382, Sec. 19*, addressing consensus recommendations for modifications to wetland regulatory programs. This report was prepared in consultation with the same stakeholders who worked to develop the consensus changes in last year's legislation.

If you have any questions, please contact John Jaschke, BWSR at 651-297-3432 or John Linc Stine, DNR-Waters at 651-296-0440.

Attachment

c: Joe Bagnoli, Governor's Office  
Keith Bogut, Executive Budget Officer, Department of Finance  
John Linc Stine, DNR - Waters  
John Jaschke, BWSR  
Lee Pfannmuller, DNR - Ecological Services  
Dave Weirens, Association of Minnesota Counties  
LeAnn Buck, Minnesota Association of Soil and Water Conservation Districts  
Reme Stone, League of Minnesota Cities  
John Dooley, Minnesota Association of Townships  
Senator Roger Moe  
Representative Steve Sviggum  
Senator Dan Stevens

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2000 Minn. Laws Chap. 382  
Sec. 10 Subd. 2

2000 Minn. Laws Chap. 382  
Sec. 19

# WETLAND REGULATIONS LEGISLATIVE REPORT

January 12, 2001

This report has been prepared according to Senate File 83 (MN Laws 2000 Chapter 382, Sec 19) which states that: "by January 15, 2001, the board of water and soil resources and the commissioner of natural resources shall provide a joint report to the house and the senate committees responsible for agriculture and environmental policy on further technical changes to the Wetland Conservation Act and rules to provide for an improved regulatory consolidation process, public water inventory refinement, and other changes to improve wetland regulatory programs. The report shall include the language on any recommended draft law and rule changes." The estimated cost of preparing this report is \$5000 which reflects contributions of BWSR and DNR staff time and overhead costs.

This report was developed based on input from agency staff, local governments and various interest groups. A draft of this report was reviewed by the stakeholders group that worked to develop Senate File 83 last year. The short term actions items listed in this report represent recommendations that did not have any objections from the stakeholders (see attached list). Items for action are summarized below with suggested statute language changes listed in the endnotes.

## 1. Analysis of Previous Changes

- i. Wetland Conservation Act (Minnesota Rules, Chapter 8420) and DNR permit rules (Minnesota Rules, Part 6115) were amended in accordance with Section 20, Ch. 382, Laws 2000, effective July 31, 2000. These exempt rules must be replaced by permanent rules by July 31, 2002.
- ii. DNR is beginning the process of digitizing its public waters inventory maps to evaluate the reclassification of public waters wetlands consistent with Section 3, Ch. 382 Laws 2000. No public waters wetlands have been reclassified pursuant to this authority as of this date. The digital public water inventory update process is planned to be complete as of January 2002.
- iii. Less than 10 letters waiving DNR permit authority have been issued since the rule revisions were adopted, and there have been no agreements written with local government units by DNR as authorized by Section 17, Ch. 382 Laws 2000.
- iv. Less than 10 cease and desist orders have been written by enforcement authorities for work affecting public waters, pursuant to Section 15, Ch. 382 Laws 2000. A few of the orders have resulted in restoration plans delivered to the landowner.
- v. DNR has identified staff contacts for all Wetlands Conservation Act (WCA) Technical Evaluation Panels (TEP) throughout the state in order to implement Section 10, Ch. 382 Laws 2000. This information has been communicated to the Local Government Units (LGU) that administer the WCA. DNR has not appealed any WCA LGU decisions

as a result of its participation in a TEP since passage of Ch. 382 Laws 2000.

- vi. Joint training sessions between BWSR and DNR Waters, Enforcement and Ecological Services staff were held in May and September. Additional Sessions for all DNR field staff and for local governments are scheduled for January 2001.
- vii. Changes in work responsibilities at the local government unit and DNR field level are not yet quantifiable as most of the 2000 legislative and rule changes did not take effect until near the end of the growing/construction season.
- viii. An analysis of very recent major changes to the federal 404 program resulting from a 01/09/01 Supreme Court case needs to be done to determine the implications to state programs.

## **2. Ideas for Future Short Term Action**

### **A. Policy Items**

- 1. Ability for DNR to reclassify a public waters wetland (W) as a public water (P) where a state or federal government agency has become a landowner (of land adjacent to the public waters wetland) subsequent to the completion of the Public Waters Inventory (PWI). These public waters wetlands would have received the public water classification (P) had the state or federal government been a landowner (of land adjacent to the public waters wetland) prior to the PWI. This will make the classification of public waters wetlands consistent with M.S. 103G.005, Subd. 15<sup>i</sup>.
- 2. Provide DNR with authority to waive its permit jurisdiction for specific projects that affect wetland areas within public waters. This could provide greater simplification to public road authorities when they are conducting road projects that affect multiple water bodies<sup>ii</sup>.
- 3. Start the process of state 404 Assumption (and Federal Farm program delegation to the state via contract) to achieve greater regulatory simplification<sup>iii</sup>.
- 4. Change appeal period in WCA to 30 calendar days instead of 15 working days in order to achieve consistency with related land use decision-making and public waters law. Also, it is likely to reduce the number of appeals as parties have a greater chance to become informed and work things out informally<sup>iv</sup>. Since all decisions have the potential to be appealed, agencies will develop guidance or forms to inform project sponsors.
- 5. Calcareous Fen rulemaking authority to incorporate some of the recently developed guidelines<sup>v</sup>.
- 6. Consider use of forgivable Administrative Penalty Orders for wetland/waters violations. This proposal will reduce civil litigation and criminal citations while providing a better means of accomplishing restoration<sup>vi</sup>.

7. Wetland Delineator certification program enactment/funding (see separate report) to enhance quality of work for landowners and by government officials<sup>vii</sup>.
8. Wetland replacement standards in statute related to NWC and PVC should be eliminated and directed to be developed in rule. Too much detail for the statute<sup>viii</sup>.
9. Provide means to file wetland/waters restoration orders on the deed so that potential buyers will know of any unresolved regulatory issues before they buy property<sup>ix</sup>.

#### **B. Fiscal Items**

10. Funding (\$500,000) of a digital wetland and water body inventory to simplify the information used by citizens, state and local governments and private consultants to determine the regulatory entity covering their property or jurisdiction. This inventory would integrate available National Wetlands Inventory, Public Waters Inventory and the Stream hydrography data into one common geographic information system and would be provided to all federal and state agencies and local government units that implement the Wetlands Conservation Act.
11. A general fund budget item for the local government public road wetland replacement program (approximately \$2.75 million dollars per year – see separate report attached) would assure state commitment to existing requirements.
12. Refinement and funding for the Permanent Wetlands Preserve program (\$500,000) would allow it to be a targeted and flexible relief mechanism to buffer Public Drainage and Wetland regulatory conflicts.
13. LGU inflationary administrative grant increase for WCA program responsibilities (\$3.6 million per biennium same as since 1993, inflation "catchup" requires \$4.5 million per biennium).
14. Wetland Delineator certification program funding (\$150,000 per year -see separate attached report and endnote *vi*) would provide for implementation of a consensus proposal to enhance the quality of work for landowners and by government officials.

#### **14. Ideas for Future Longer-term Action**

The longer-term actions items listed below are those that will require additional stakeholder involvement in order to develop specific recommendations for action.

##### **A. Policy Items**

1. WCA exemptions made same for wetland types 3, 4, and 5 as for PWW. Public Drainage relationship to WCA (Drainage Exemption) should be made explicit and Public Waters protection should be made equal or greater protection than WCA.

2. Evaluate and then clarify or eliminate federal connections (404, Swampbuster, GP/LOP, GP-1) to state law/rule to make sure they are operating together and eliminate inconsistencies and redundancies.
3. Comprehensive and consistent administrative oversight and appeal process for all local land use decisions related to water and land use that are based on state standards (e.g., wetlands, shoreland, floodplain, ISTS).
4. Allow replacement of a portion of some metro or northern MN wetlands in the MN River basin for a set period of time upon which this provision would sunset.
5. Clarify the statutory terminology for wetlands and public water resources of all forms (lakes, streams, ditches, wetlands, etc.). The evolution of the statutes with regard to water law has resulted in a variety of terms that could be simplified; however, extensive study of the implications would be required since the terminology is widespread in MN statutes.
6. Consider authorizing periodic updates to the Public Waters Inventory.

**B. Fiscal Items**

7. Statewide Inventory of Public Drainage Systems.
8. Comprehensive updated digital inventory of public waters and wetlands.

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ENDNOTES: **Recommended Statute Changes**

i **103G.201 Public waters inventory.**

(a) The commissioner shall prepare a public waters inventory map of each county that shows the waters of this state that are designated as public waters under the public waters inventory and classification procedures prescribed under Laws 1979, chapter 199. The public waters inventory map for each county must be filed with the auditor of the county.

(b) The commissioner is authorized to revise the list of public waters established under Laws 1979, chapter 199, to reclassify those types 3, 4, and 5 wetlands previously identified as public waters wetlands under Laws 1979, chapter 199, as public waters or as wetlands under section 103G.005, subdivision 19. The commissioner may only reclassify public waters wetlands as public waters if:

(1) they are assigned a shoreland management classification by the commissioner under sections 103F.201 to 103F.22; or

(2) they are classified as lacustrine wetlands according to Classification of Wetlands and Deepwater Habitats of the United States (Cowardin, et al., 1979 edition), or,

(3) the state or federal government has become title holder to any of the beds or shores of the public waters wetland, unless the owner declares that the water is not necessary for the purposes of the public ownership, subsequent to the preparation of the public waters inventory map filed with the auditor of the county, pursuant to paragraph (a).

(c) The commissioner must provide notice of the reclassification to the local government unit, the county board, the watershed district, if one exists for the area, and the soil and water conservation district. Within 60 days of receiving notice from the commissioner, a party required to receive the notice may provide a resolution stating objections to the reclassification. If the commissioner receives an objection from a party required to receive the notice, the reclassification is not effective. If the commissioner does not receive an objection from a party required to receive the notice, the reclassification of a wetland under paragraph (b) is effective 60 days after the notice is received by all of the parties.

(d) The commissioner shall give priority to the reclassification of public waters wetlands that are or have the potential to be affected by public works projects.

ii **103G.245, Subdivision 5 is amended as follows:**

Subd. 5. Delegation of permit authority to local units of government.

(a) The commissioner may delegate public waters work permit authority to the appropriate county or municipality or to watershed districts or watershed management organizations that have elected to assert local authority over protected waters. The public waters work permit authority must be delegated under guidelines of the commissioner and the delegation must be done by agreement with the involved county,

municipality, watershed district, or water management organization and in compliance with section 103G.315.

(b) For projects affecting public waters wetlands or wetland areas of public waters as determined by the commissioner, the commissioner may waive the requirement for a public waters work permit if the local government unit makes a replacement, no-loss, or exemption determination in compliance with sections 103A.201, 103B.3355, and 103G.222 to 103G.2373, and rules adopted pursuant to these same sections.

(c) For projects affecting both public waters and wetlands, the local government unit may, by written agreement with the commissioner, waive the requirement for a replacement plan, no-loss, or exemption determination if a public waters work permit is required and the commissioner includes the provisions of sections 103A.201, 103B.3355, and 103G.222 to 103G.2373, and rules adopted pursuant to these same sections in the public waters work permit.

iii **M.S. 103G.127 Permit program under section 404 of the federal Clean Water Act.**

Notwithstanding any other law to the contrary, the commissioner, ~~with or the concurrence of the board of water and soil resources~~ with the concurrence each other, and the commissioner of agriculture, may adopt rules establishing a permit program for regulating the discharge of dredged and fill material into the waters of the state as necessary to obtain approval from the United States Environmental Protection Agency to administer the permit program under section 404 of the federal Clean Water Act, United States Code, title 33, section 1344. The rules may not be more restrictive than the program under section 404, or state law, if it is more restrictive than the federal program. The board and the commissioner shall consider alternatives for assumption of the section 404 permit program and administration of portions of the "swampbuster" provisions of the federal farm program.

iv **M.S. 103G.2242, Subd. 9. Appeal.** (a) Appeal of a replacement plan, exemption, wetland banking, wetland boundary or type determination, or no-loss decision may be obtained by mailing a petition and payment of a filing fee of \$200, which shall be retained by the board to defray administrative costs, to the board within ~~45~~ 30 calendar days after the postmarked date of the mailing specified in subdivision 7. If appeal is not sought within ~~45~~ 30 calendar days, the decision becomes final. The local government unit may require the petitioner to post a letter of credit, cashier's check, or cash in an amount not to exceed \$500. If the petition for hearing is accepted, the amount posted must be returned to the petitioner. Appeal may be made by:

(1) the wetland owner;

(2) any of those to whom notice is required to be mailed under subdivision 7; or

(3) 100 residents of the county in which a majority of the wetland is located.

(b) Within 30 days after receiving a petition, the board shall decide whether to grant the petition and hear the appeal. The board shall grant the petition unless the board finds that:

(1) the appeal is meritless, trivial, or brought solely for the purposes of delay;

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(2) the petitioner has not exhausted all local administrative remedies;

(3) expanded technical review is needed;

(4) the local government unit's record is not adequate; or

(5) the petitioner has not posted a letter of credit, cashier's check, or cash if required by the local government unit.

(c) In determining whether to grant the appeal, the board shall also consider the size of the wetland, other factors in controversy, any patterns of similar acts by the local government unit or petitioner, and the consequences of the delay resulting from the appeal.

(d) All appeals must be heard by the committee for dispute resolution of the board, and a decision made within 60 days of the filing of the local government unit's record and the written briefs submitted for the appeal. The decision must be served by mail on the parties to the appeal, and is not subject to the provisions of chapter 14. A decision whether to grant a petition for appeal and a decision on the merits of an appeal must be considered the decision of an agency in a contested case for purposes of judicial review under sections 14.63 to 14.69.

**M.S. 103G.223 Calcareous fens.**

Calcareous fens, as identified by the commissioner, may not be filled, drained, or otherwise degraded, wholly or partially, by any activity, unless the commissioner, under an approved management plan, decides some alteration is necessary. The commissioner, in conjunction with the board, may adopt rules related to the designation of calcareous fens and related to the development and approval of calcareous fen management plans. The commissioner may inventory calcareous fens using procedures referenced in section 103G.201.

<sup>vi</sup> **Note:** A draft DNR supported bill (Revisor # 01-0338, dated 12/05/00) proposes Administrative Penalty Order (APO) authority for the commissioner to address public waters and shoreland violations in a new section of statute 103G.252 and 103G.253. This authority mirrors that already in place for the commissioners of Health and the Pollution Control Agency. The maximum monetary amount of the administrative penalty order would be \$10,000 for each violator for all violations by the violator identified in an inspection or review of compliance. The penalty could be forgiven if compliance was achieved. The objective is to lessen the reliance on criminal prosecution for matters that could be handled through administrative means. In order to achieve consistency, edits need to be made to apply this language to the Wetland Conservation Act (WCA) by either expanding the commissioner's APO authority to WCA or establishing similar authority for the Board of Water and Soil Resources. The stakeholders group felt this authority should perhaps be limited to repeat offenders.

<sup>vii</sup> **M.S. 103G.2242, Subd. 2a. Wetland Delineator Certification.** The board shall establish a professional wetland delineator certification program by adopting rules by July 1, 2004 to establish standards for education, experience, and performance for persons completing wetland delineations.

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Delineator certification shall become mandatory on July 1, 2004. Wetlands may be delineated without certification by individual landowners for any project on their property, and for all non-regulatory projects. \$150,000 is appropriated from the general fund to the board of water and soil resources for each year of the biennium to be used for administrative expenses. This appropriation is to be considered an addition to the board's base budget and funds from either year can be carried forward and expended any time during the biennium.

viii

**103G.2242 Wetland value replacement plans.**

Subd. 12. Replacement credits. (a) No public or private wetland restoration, enhancement, or construction may be allowed for replacement unless specifically designated for replacement and paid for by the individual or organization performing the wetland restoration, enhancement, or construction, and is completed prior to any draining or filling of the wetland.

(b) Paragraph (a) does not apply to a wetland whose owner has paid back with interest the individual or organization restoring, enhancing, or constructing the wetland.

(c) Notwithstanding section 103G.222, subdivision 1, paragraph (i), and based on rules adopted by the board in conjunction with the commissioners of natural resources and agriculture, the following actions, as well as others established in rule, are eligible for replacement credit as determined by the local government unit, including enrollment in a statewide wetlands bank:

(1) Reestablishment of permanent native, non-invasive vegetative cover on a wetland on agricultural land that was planted with annually seeded crops, was in a crop rotation seeding of pasture grasses or legumes, or was ~~required to be set aside to receive price supports or other payments under United States Code, title 7, sections 1421 to 1469, in six of the last ten years prior to January 1, 1991.~~ Replacement credit may not exceed 50 percent of the total wetland area vegetatively restored in a land retirement program during the past 10 years;

(2) Buffer areas of permanent native, non-invasive vegetative cover established or preserved on upland adjacent to replacement wetlands, ~~provided that the upland buffer must be established at the time of wetland replacement and replacement credit for the buffer may not exceed 75 percent of the replacement wetland area and may only be used for replacement above a 1:1 ratio;~~

(3) Wetlands restored for conservation purposes under terminated easements or contracts, ~~provided that up to 75 percent of the restored wetland area is eligible for replacement credit and adjacent upland buffer areas reestablished to permanent vegetative cover are eligible for replacement credit above a 1:1 ratio in an amount not to exceed 25 percent of the restored wetland area; and~~

(4) Water quality treatment ponds constructed to pretreat storm water runoff prior to discharge to wetlands, public waters, or other water bodies, provided that the water quality treatment ponds must be associated with an ongoing or proposed project that will impact a wetland and replacement credit for the treatment ponds is based on the replacement of wetland functions and on an approved stormwater management plan for the local government ~~may not exceed 75 percent of the treatment pond area and may only be used for replacement above a 1:1 ratio.~~

(5) Notwithstanding section 103G.222, Subd. 1, (f) and (g), restoration projects with exceptional natural resource value may be eligible for replacement credit if approved by the board or the commissioner.

ix

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**M.S. 103G.2372 Enforcement.**

Subdivision 1. Commissioner of natural resources.

The commissioner of natural resources, conservation officers, and peace officers shall enforce laws preserving and protecting wetlands and public waters. The commissioner of natural resources, a conservation officer, or a peace officer may issue a cease and desist order to stop any illegal activity adversely affecting a wetland or public waters. In the order, or by separate order, the commissioner, conservation officer, or peace officer may require restoration or replacement of the wetland or public waters, as determined by the local soil and water conservation district for wetlands and the commissioner of natural resources for public waters. Restoration or replacement orders may be recorded by the commissioner of natural resources, conservation officers, or peace officers as a deed restriction on the property until the conditions of the order are met or the order is rescinded.

Subd. 2. Misdemeanor. A violation of an order issued under subdivision 1 is a misdemeanor and must be prosecuted by the county attorney where the wetland or public waters are located or the illegal activity occurred.

Subd. 3. Restitution. The court may, as part of sentencing, require a person convicted under subdivision 2 to restore or replace the wetland or public waters, as determined by the local soil and water conservation district for wetlands and the commissioner of natural resources for public waters



Jan. 11, 2001

SF83 Stakeholders

1/15/01 Leg. Report.

Name  
John Linc Stine  
John Jaschke  
Kurt Deter

Todd Manly  
John Dooley  
Nick Tiedeken  
Keith Hanson

tombru  
Sarma Straumanis  
Con Christensen  
Kelly J Bopray  
Lawrence Szdow

Mark Dittrich  
Ray Bohm  
John Jaschke  
Eric Evenson  
Louis Haik  
Susan Scribner  
Tim Edman

REPRESENTING

DNR Waters

BWSR

Counties, Watersheds, Viewers Ass, Drainage  
Inspection

DNR Engr.

Mn. Assn. of Twp

M-1005

Minnesota Power

St Louis County

Mn/DOT

MDNR-Eco Serv

Minn Assoc PROF SOIL SCIENTIST

MPCA

MDA

MAWD

BWSR

MCWD

Krebsbach & Haik Ltd

MAWD

Sen. Stevens



## **A Plan for the Certification of Wetland Delineators in Minnesota**

Senate File 83 (Chapter 382, Minnesota Laws of 2000) required the Board of Water and Soil Resources (BWSR), in consultation with the Minnesota Association of Professional Soil Scientists (MAPSS), the University of Minnesota (UM), and the Wetland Delineators Association (WDA) to submit a plan for a professional delineator certification program to the legislature by January 15, 2001.

Representatives of the aforementioned groups and individuals from state and federal agencies, local units of government and private consulting firms met several times during 2000. Staff from the BWSR chaired the meetings. The following text reflects the views of the participants and the process used to reach the recommendations which are at the end of this report.

### ***Benefits of delineator certification***

- A wetland delineator certification program would provide stability to the implementation of the Wetland Conservation Act and other wetland regulations by formally recognizing individuals uniquely qualified to perform wetland delineations.
- The regulatory process should be more efficient in that wetland delineation and typing determinations should be less frequently questioned.
- Consumers will be protected by knowing that delineations will be conducted by qualified persons operating under a code of ethics.
- The environment will be better served in that the jurisdictional boundaries of wetlands may be more precisely delineated.
- The practice of wetland delineation will be recognized as a distinct skill with economic value in the marketplace.
- Wetland delineators will have the responsibility to maintain and enhance their skills.

### ***Comparison to other certification programs***

Delineator certification programs of the U.S. Army Corps of Engineers and State of New Hampshire were reviewed. The Minnesota program for the certification of individuals involved with individual sewage treatment systems (ISTS) was also reviewed for its applicability to wetlands. This proposal reflects many aspects of those programs.

### ***General nature of the proposed certification program***

- With respect to all aspects of delineator certification, no distinction is made between public and private sector delineators.
- Certification will apply only to delineation. However, because wetland regulations often require that a wetland be classified by type (Circular 39 or Cowardin, et al.), it is expected that a certified wetland delineator be competent in wetland typing.

- Certification is required for practitioners from other states who delineate wetlands in Minnesota.
- A wetland delineator certification program would establish appropriate standards for education, experience, and performance for persons completing delineations.
- Delineator certification should become mandatory on July 1, 2004, after a three-year (voluntary) phase-in period. The effect of this is that, except for exempt persons or projects, after July 1, 2004, wetland delineations may be performed only by certified delineators.
- Exemptions: wetlands may be delineated without certification:
  - by individual landowners for projects on their property, and
  - for projects non-regulatory in nature such as wetland inventories.

### *Peer review committee*

A code of conduct and ethics agreement must be developed as part of a compliance program. Compliance includes complaints, sanctions, probation, decertification, and the associated protocols and procedures, which will be developed during rulemaking. The BWSR will chair an enforcement/ethics committee with other members nominated by MAPSS, WDA, UM, and representatives of local units of government, private sector delineators, and state and federal agencies. This committee will also evaluate applications and associated documentation concerning training and experience.

### *Applicability to federal agencies and regulations*

Endorsement of delineator certification will be sought from federal agencies by use of memoranda of agreement. The memoranda will address participation of federal staff in the planning and conduct of training and the applicability of delineator certification to federal regulations. The BWSR will assume responsibility for this task.

### *Implementation of delineator certification*

Administrative tasks, including training, and budget estimates are provided in *Attachment A*. It must be noted that without funding a delineator certification program cannot be initiated. The parties to this report do not exist in sufficient numbers to make this program self-supporting. Regarding a location for the program, the BWSR office in St. Paul is the first choice. Other options discussed included contracting with a private vendor. The BWSR is a preferred location due to its involvement with many aspects of wetland management and regulation. Training is major component of delineator certification, both in terms of initial certification and continuing education. All parties agreed that a major effort should be made to develop a cadre of in-state trainers from among public and private sector professionals. In addition, the University of Minnesota was urged to add to its offerings a course applicable to wetland delineation.

### *Specific elements of certification*

Education, training, and experience requirements are summarized in Attachment B. Considerable discussion occurred during the development of these elements. As written, they reflect a balance between stringent requirements which could exclude most delineators currently practicing and minimal standards that would not screen out incompetent practioners.

### *Enactment of the certification program*

- The program would be authorized by legislation in 2001. That legislation would frame the basic principles, establish guidelines for the voluntary (phase I) program, and authorize the BWSR to make appropriate amendments to the rules of the Wetland Conservation Act.
- Rule amendments must be completed and in effect by July 1, 2004.

### *Recommendation*

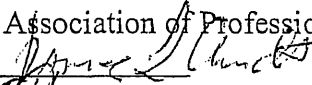
Finding that the establishment of a wetland delineator certification program is in the public interest and would further the management and protection of wetlands, it is the recommendation of the undersigned parties that legislation and an associated appropriation be pursued during the 2001 legislative session.

### *Signatures:*

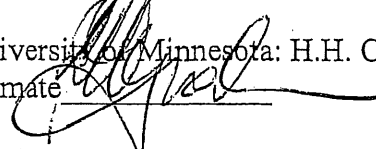
Board of Water and Soil Resources: Ron Harnack, Executive Director



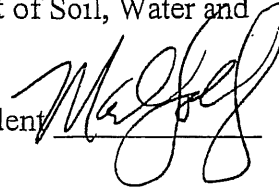
Minnesota Association of Professional Soil Scientists: Jim Arndt, President



University of Minnesota: H.H. Cheng; Head, Department of Soil, Water and Climate



Wetland Delineators Association: Mark Kjolhaug, President



Note: Letters of support and a list of meeting dates and attendees are attached

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**Attachment A**  
**BUDGET: Wetland Delineator Certification Program**

		Estimated Annual Costs		
		Phase I (Prior to 7-01-2004)	Phase II (After 7-01-2004)	In-kind contributions
A.	Administrative			
	• Record keeping	<u>\$100,000</u>	\$75,000*	
	• Enforcement	• \$75,000		
	- Complaints	professional staff (1		
	- Investigation	FTE)		
	• Collection of fees	• \$25,000 clerical		
	• Develop and	(0.5 FTE)		
	administer exams			
B.	Training			
	• Coordinate curriculum	\$50,000**	\$50,000**	\$50,000 (based on past
	• Organize and arrange			contributions)
	training			<u>Sources:</u>
				• BWSR
				• DNR
				• U of M
				• Corps of Engineers
				• NRCS
				• USFWS

Assumptions:

- Potentially 500 people will seek to become certified prior to July 1, 2004 (Phase I). The number certified by that date will stay relatively constant thereafter (new certifications may be slightly more than those vacating their certification).
- The certification fee is proposed to be \$50.00 per calendar year.
- After July 1, 2004 (phase II), the extent to which certification fees can be considered annual revenue will be predictable. That is not true, however, before July 1, 2004 because the frequency of certification cannot be predicted. Consequently, certification fees are not budgeted as implementation revenue during Phase I. Certification fees collected during Phase I will be used for training and will subsidize participants share of training costs.

Notes:

\*Certification fees are estimated to provide \$25,000 in annual revenue (500 \* \$50.00).

\*\*Participants also pay \$50,000, or ½ of total training costs. As stated under assumptions, revenue from certifications will be used to subsidize participants share of training costs.

**Attachment B**  
**SUMMARY OF WETLAND DELINEATOR**  
**CERTIFICATION PROGRAM**

ELEMENTS	PHASE I	PHASE II
Date	3 years in duration, beginning July 1, 2001	Beginning July 2, 2004
Voluntary Certification	Yes	
Mandatory Certification		Yes
Education and Training	One of the following needed plus experience before exam can be taken: <ul style="list-style-type: none"> <li>Broad coursework<sup>1</sup> <u>or</u></li> <li>A 4-5 day delineation course</li> </ul>	Both of the following plus experience <sup>2</sup> needed before exam can be taken: <ul style="list-style-type: none"> <li>Broad coursework <u>and</u></li> <li>A 4-5 day delineation course or equivalent training</li> </ul>
Experience	3 years (2 years with masters or PhD degree in a related field)	3 years (2 years with Masters or PhD degree in a related field)
Written Examination	Yes	Yes
Type of Examination	Basic	Comprehensive
Field Examination	No	No
Ethics Agreement	Yes	Yes
Compliance with sanctions and other enforcement actions	No	Yes
References	Yes (names only, letters not needed)	Yes (names only, letters not needed)
Continuing education required to maintain certification	Yes	Yes

Comments:

- Certification gained during phase I carries over to phase II.
- Continuing education is defined as "*Pertinent seminars or training sessions totaling 8 or more hours in duration each calendar year.*"
- Experience is defined as "*Where wetland management, wetland regulation, wetland delineation or wetland ecology activities are among the primary duties of their employment. A person so employed for one year would have experience equaling one year.*"
- Practitioners from other states doing wetland delineations in Minnesota must also be certified.

<sup>1</sup> Coursework would include wetland specific courses and other classes drawn from physical or biological sciences and engineering.

<sup>2</sup> "In-training" status will be granted to persons lacking experience but who pass the exam(s). Persons with "in-training" status will be eligible for certification upon proof of experience..



# WETLAND DELINEATOR CERTIFICATION PROGRAM

## Meeting Dates and Participants

### MEETING DATES:

August 17, 2000  
September 12, 2000  
October 24, 2000  
December 14, 2000

### PARTICIPANTS

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# Minnesota Local Government Roads Wetland Replacement Report to the Legislature and the Governor For FY02-03 Budget Consideration

October 16, 2000 (minor edits and resent electronically 11-16-00)

## Report Requirement

ML 2000, Chap. 492, Sec. 9, Subd. 5. "By October 15, 2000, the board of water and soil resources shall make a recommendation to the governor and the legislature on the inclusion of wetland replacement under Minnesota Statutes, section 103G.222, subdivision 1, paragraph (m), as a biennial budget item."

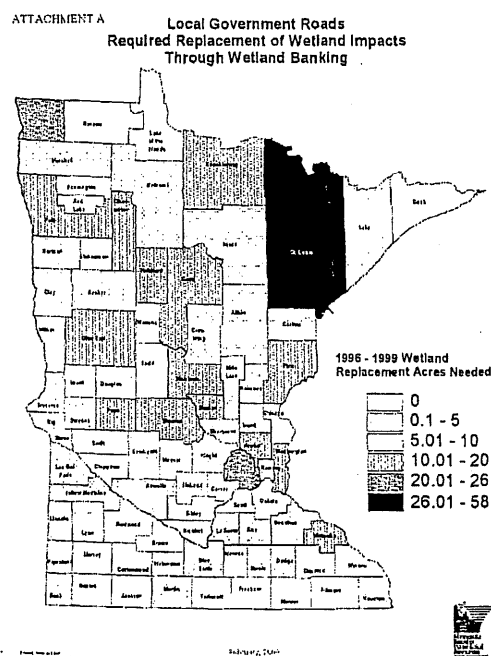
## Program Summary

The Minnesota Local Government Roads Wetland Replacement program was established in law in 1996 to replace wetlands lost to local government public transportation projects as required under M.S. 103G.222, Subd. 1(l). This program supports the "no-net-loss" requirements of both state and federal regulations. It benefits: (a) local road authorities by assigning responsibility for replacing the inevitable loss of wetlands to the state; (b) environmental interests by establishing higher quality wetland replacement sites; and (c) state taxpayers by reducing the overall costs of constructing these replacement wetlands due to economies of scale realized through this collective process.

## Program History and Outcomes

The 1996 and 2000 Legislatures amended the Wetland Conservation Act (WCA) after several years of controversy and regulatory inconsistency among local governments, business interests, environmental groups, and others. The local government roads wetland replacement program was a key outcome of these amendments as it transferred responsibility for replacing wetlands lost due to local government road construction from the local road authority to BWSR. This eliminates the need for local government transportation officials to undertake and finance environmental reclamation projects, and consolidates the necessary technical, financial and other implementation work. The result is higher quality, more cost-effective wetland replacement. See Figure 1 for distribution of local road projects wetland replacement needs.

Figure 1. Distribution of local road projects wetland replacement needs.



Benefits realized by the Local Government Roads Wetland Replacement program include:

- 1) Regulatory simplification and efficient and improved wetland mitigation are achieved by eliminating the need for each local road authority to maintain its own staff expertise and budget to mitigate impacts to wetlands from road projects.
- 2) Fragmented impacts from road projects are consolidated in targeted areas to provide habitat, water quality and other wetland functions away from traffic and highway runoff areas.
- 3) Water management goals such as improving water quality, flood control, greenway preservation and wildlife corridor enhancement can be better addressed collectively.
- 4) Site selection, ranking of project proposals and setting program strategies consistent with overall State and Federal wetland goals are achieved through an interagency committee process.

BWSR has adopted a 3-part strategy to achieve the wetland replacement required by law:

- 1) Develop projects with local or state partners through fee title or easement acquisition;
- 2) Purchase wetland credits from existing wetland banking accounts; and
- 3) Acquire easements in conjunction with existing conservation easement programs.

### Financial History

From the beginning, consensus has not been reached on whether this program should be funded from transportation sources, environmental sources or some combination of the two and thus it has always been funded with capital budget sources (see Table 1). Most recently, this program was funded for one year from the capital (bonding) budget by the 2000 legislature via a \$2.3 million capital appropriation with \$400 thousand supplement allocated for annual implementation costs. This amount was similar to previous appropriations and adequate for one year of projects covering the state's obligations at least through calendar year 1999. Prior experience shows that approximately 220 acres of wetlands need replacement each year, at an annual cost of \$2.75 million. The number of acres impacted depends most directly on the money available to local governments for road construction. The cost of establishing the wetlands varies widely, from a low of \$2 thousand/acre in rural Minnesota, up to \$100 thousand/acre for some urban renewal projects in the metro area. The BWSR projects that to meet its statutory obligations for the next two years will require \$5.5 million.

**Table 1. Appropriation History**

<b>Legislative Action</b>	<b>Appropriation</b>
2000 Bonding ML 2000, Chap. 492, Sec. 9, Subd. 5	\$ 2,300,000
1998 Capital Budget General Fund ML 1998, Chap. 404, Sec. 10, Subd. 3	\$ 2,750,000
1996 Bonding ML 1996, Chap. 463, Sec. 11, Subd. 4	\$3,000,000

### Environmental Funding Sources

Environmental/natural resource restoration projects are funded using a variety of sources (e.g., the general fund, dedicated funds, capital funds and a variety of federal, state, local and private sources). See Table 3 for a breakdown of recent biennial appropriations.

**Table 2: Direct Appropriations to Environment, Natural Resources, and Agriculture Agencies for 2000-2001 Biennium, by Fund<sup>ii</sup>**

<b>Fund</b>	<b>\$ Thousands</b>	<b>%</b>
General	\$421,587	60
Petro Tank Release	6,976	1
State Government	89	-
Special Revenue	723	-
Environmental	43,928	6
Solid Waste	14,382	6
Natural Resources	52,238	7
Game and Fish	121,934	18
Future Resources	14,840	2
Environmental Trust	25,460	4
Great Lakes Protection	200	-
	<b>\$702,357</b>	<b>100%</b>

### **Transportation Funding Sources**

The state of Minnesota has approximately 130,000 miles of local streets and highways (See Table 1). This reflects Minnesota's entire roadway system.

**Table 3. Approximate Mileage by System<sup>iii</sup>**

Trunk Highway (MnDOT)	11,930 (8.9%)
County State Aid	30,320 (22.5%)
County Road (local)	15,040 (11.2%)
City State Aid	2,690 (2.0%)
City (local streets)	15,310 (11.4%)
Township Roads	59,290 (44.1%)
<b>Total</b>	<b>134,580 miles</b>

In 1998, approximately \$2.8 billion in revenue was raised and available for Minnesota's roadway system. These revenues come from state highway user tax funds (motor fuel tax and motor vehicle registration), local property taxes, bonds and notes, and Minnesota's General Fund.

Of the \$2.8 billion available for all Minnesota roadways, Mn/DOT is responsible for the oversight of about \$1.5 billion in annual funding for highways. These state highway revenues are used for the construction and maintenance of about 12,000 miles of state trunk highways. Mn/DOT also distributes state funds and provides technical assistance for more than 33,000 miles of county state-aid and municipal state-aid highways and streets (see Table 2).

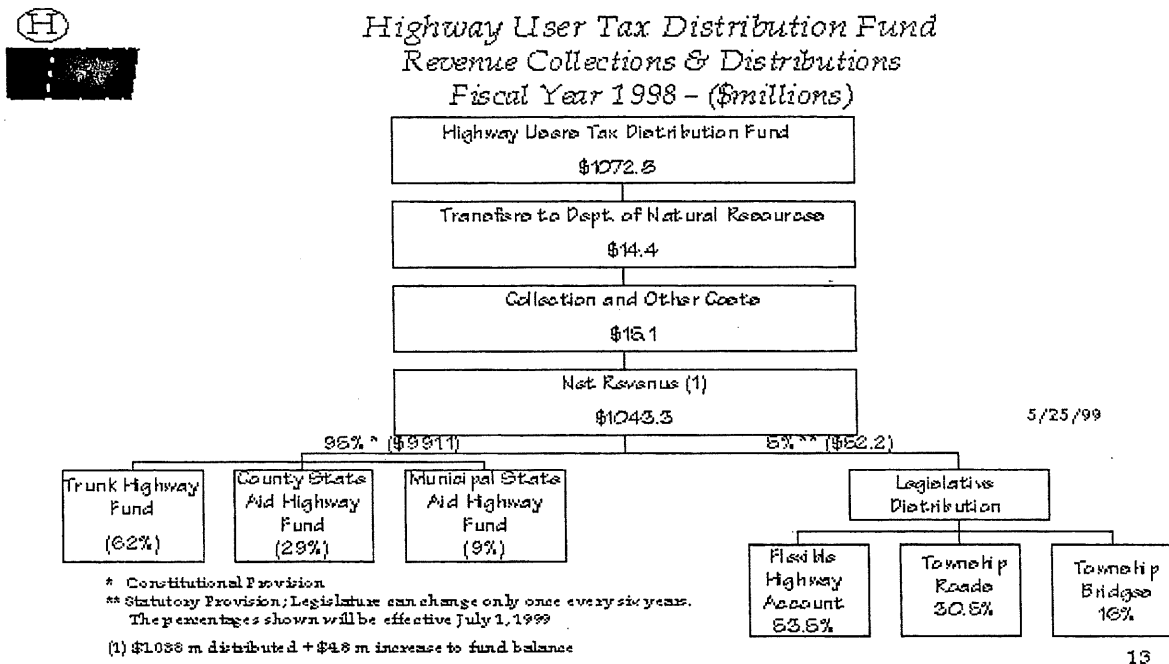
**Table 4. Approximate Highway User Tax Distribution for 1999**

**\* (does not include any local or non-state aid funds)<sup>iv</sup>**

Trunk Highway	\$647 million (61.0%)
County State Aid Highway *	\$303 million (28.6%)
Municipal State Aid*	\$94 million (8.9%)
Township Road Account*	\$17 million (1.6%)
<b>Total</b>	<b>\$1.1 billion</b>

State highway revenues are derived from various sources. A majority of the funding is provided through the Highway User Tax Distribution Fund that is comprised of motor fuel and motor vehicle registration taxes. The fund was established through a 1956 constitutional amendment and 1957 legislation, and is dedicated exclusively to "highway purposes" by the Minnesota Constitution\*. Five percent of the funding can be modified once every six years by the Legislature and was last modified in 1999. Thus, the next opportunity to make this modification does not occur until 2005. Figure 2 illustrates the dedicated funding sources for Minnesota's roads and highways.

**Figure 2. Highway User Tax Distribution Fund – 1998 Distribution**



## Program Rationale and Consequences

Local governments (counties, cities and townships) believe strongly this state mandate should be a base element in BWSR's budget. The Legislature also recognized the ongoing state obligation this program fulfills and thus included the requirement for this report in the appropriation language last year. There is stakeholder consensus on the benefits of the program and the need to permanently fund this state obligation. Without a continued state commitment to this funding, local governments face paying for this work out of their transportation budgets, which will:

- 1) Reduce or delay completion of local government road projects;
- 2) Increase local property tax levies;
- 3) Require a reversal of recent statute changes and undo a fragile stakeholder consensus that resulted in recent wetland regulatory reforms (*ML 2000, Chap. 382*); and
- 4) Negate an agreement with the U.S. Army Corps of Engineers (COE) that allows this program to meet federal regulatory requirements meaning local road authorities will again have to seek individual federal permits and be responsible for wetland replacement.

Last year the BWSR developed several options for potentially reducing the state's fiscal obligation. None of these options were viewed as acceptable by the consortium of stakeholders who developed the consensus proposal which lead to the statutory changes. The options were:

1. A. Reduce replacement ratio to 1:1 statewide = 30% cost reduction.

B. Reduce replacement ratio to 1.5:1 from 2:1 in metro, <50% areas, and 50-80% areas = 15% cost reduction.

2. Delete requirement to fund urban-renewal projects = 10% cost reduction.
3. Allow half of metro area filled wetlands to be replaced in non-metro areas = 18% cost reduction.
4. Combinations:  
 Combine #1A with #2 = 40% cost reduction.  
 Combine #1B with #2 = 25% cost reduction.  
 Combine #2 with #3 = 28% cost reduction.

Given the disinterest in pursuing non-consensus policy changes, the BWSR believes both state and local government interests are best served by continued and permanent funding for this program in an amount based on the documented need of \$2.75 million per year (\$5.5 million for the FY02-03 biennium).

### Recommendation

A recommendation for shared state funding of this mandated program is outlined in Table 4, which balances a shared responsibility between existing transportation sources (in proportion to existing current state contributions) and the general fund for the portion that would otherwise have to come from local property tax revenues. The decision on whether this program should be funded from transportation sources, the general fund, some combination of the two, or other sources must be decided through the legislative process.

**Table 5. Shared State Funding Proposal**

Local Road Authorities	Local Road Funding*		Estimated Annual Replacement Wetland Acres **	Proposed Annual Funding (\$ thousands)	
	State %	Local %		Transportation State-Aid Fund	General Fund
Township***	< 10	> 90	106.3	0	1,328
City	15	85	32.3	61	343
County	67	33	81.4	682	336
<b>TOTALS</b>			220	\$743	\$2,007

\* Based on state-aid funding proportions in Table 4, excluding Trunk Highways.

\*\* Based on 1996-1999 reports, number of road miles, and average annual costs to replace wetlands statewide (\$2.75 million) as mandated by M.S. 103G.222, Subd. 1(e).

\*\*\* Township road authorities receive approximately \$17 million per year for 59,290 miles of roads. These funds are dispersed, based on population and road miles, to townships having local levies for road projects<sup>vi</sup>. These estimates are based on an estimated cost per mile for road work equal to half of that for county roads.

#### Report Prepared by:

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## Endnotes:

### ***M.S. 103G.222, Subd. 1(l) -- as amended by MN Laws 2000, Chapter 382.***

~~(m)~~ (l) A replacement plan for wetlands is not required for individual projects that result in the filling or draining of wetlands for the repair, rehabilitation, reconstruction, or replacement of a currently serviceable existing state, city, county, or town public road necessary, as determined by the public transportation authority, to meet state or federal design or safety standards or requirements, excluding new roads or roads expanded solely for additional traffic capacity lanes. This paragraph only applies to authorities for public transportation projects that:

(1) minimize the amount of wetland filling or draining associated with the project and consider mitigating important site-specific wetland functions on-site; and

(2) except as provided in clause (3), submit annual project-specific reports by January 15 to the board, the technical evaluation panel, the commissioner of natural resources, and members of the public requesting a copy at least 30 days prior to construction that indicate the location, amount, and type of wetlands that have been filled or drained during the previous year and a projection of the location, amount, and type of wetlands to be filled or drained by the project or, alternatively, convene an annual meeting of the parties required to receive notice to review projects to be commenced during the upcoming year; and

(3) for minor and emergency maintenance work impacting less than 10,000 square feet, submit project-specific reports, within 30 days of commencing the activity, to the board that indicate the location, amount, and type of wetlands that have been filled or drained.

Those required to receive notice of public transportation projects may appeal minimization, delineation, and on-site mitigation decisions made by the public transportation authority to the board according to the provisions of section 103G.2242, subdivision 9. The technical evaluation panel shall review minimization and delineation decisions made by the public transportation authority and provide recommendations regarding on-site mitigation if requested to do so by the local government unit, a contiguous landowner, or a member of the technical evaluation panel.

**Except for state public transportation projects, for which the state department of transportation is responsible, the board must replace the wetlands, and wetland areas of public waters if authorized by the commissioner or a delegated authority, drained or filled by public transportation projects on existing roads in critical rural and urban watersheds.**

Public transportation authorities at their discretion may deviate from federal and state design standards on existing road projects when practical and reasonable to avoid wetland filling or draining, provided that public safety is not unreasonably compromised. The local road authority and its officers and employees are exempt from liability for any tort claim for injury to persons or property arising from travel on the highway and related to the deviation from the design standards for construction or reconstruction under this paragraph. This paragraph does not preclude an action for damages arising from negligence in construction or maintenance on a highway.

ii FISCAL ISSUE BRIEF Environment, Natural Resources and Agriculture Budget 2000-2001, page 1, *Senate Office of Fiscal Policy Analysis, February 2000*.  
<http://www.senate.leg.state.mn.us/departments/FiscalAnalysis/reports.htm>

iii Mn/DOT Office of State Aid for Local Transportation, Mike Pinsonneault, December 1999.

iv Mn/DOT Office of State Aid for Local Transportation, Mike Pinsonneault, December 1999.

v Mn/DOT Financial and Management Analysis Section, "Moving Minnesota from 2000 to 2020", pg. 92, <http://www.oim.dot.state.mn.us/PDPA/Plan.html>.

vi Personal communication, Mn/DOT Office of State Aid for Local Transportation, Mike Pinsonneault, November 2000.

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St. Louis Co.  
Legislature - DFL (Research)  
Dakota Co. Hwy.  
Mower SWCD  
Dakota SWCD  
USACOE  
AMC  
PCA - Water Quality

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