

940287

STUDY AND REPORT ON WETLAND ISSUES
MN WETLAND CONSERVATION ACT (WCA)

Required by: MN Laws 1993, Chapter 175

PREAMBLE: The rule governing the implementation of the Wetland Conservation Act is being adopted by local units of government after January 1, 1994. Consequently, much of the information and data pertinent to the Chapter 175 report is not yet available. The Wetland Heritage Advisory Committee (WHAC) suggests that it is premature to recommend changes to the statute and rule. The WHAC will monitor program implementation during the calendar year 1994 by tracking the actions of local government units (LGUs) through information from LGU's and the Board of Water and Soil Resources (BWSR). The WHAC may then make recommendations to the BWSR based on those findings.

The issues that follow are the items that the WHAC was to address in the Chapter 175 report. As stated in the preamble, the WHAC will defer specific recommendations on changes to the statute and rule until a future date. The responses reflect the current views of WHAC on the issues.

ISSUE:

- (1) The appropriateness of requirements under existing state laws relating to replacement of drained and filled wetlands;

Response by the Committee:

The adopted replacement requirements were developed to maintain a "no-net-loss" of wetland acreage and public values. This is required by the Wetland Conservation Act (WCA). The adopted replacement method allows wetland replacement by wetland restoration or creation either directly or through a withdrawal from the state wetland "bank" established in the WCA rule.

The issue of whether the 2:1 replacement ratio for non-agricultural land in counties with < 80% of their presettlement wetlands remaining will offset the wetland loss from exemptions and discourage wetland draining and filling in developing areas is yet unknown as this provision did not become effective until January 1, 1994.

- (2) The advisability of establishing a minimum size of wetland that would not be subject to regulation under these laws;

The Chapter 175 revisions to the WCA included a "deminimus" exemption (#25) which allows wetland areas of up to 400 square feet to be drained or filled without replacement. To minimize the effects of cumulative use of this exemption on a wetland basin, the rule prohibits the use of

the exemption after five percent of a wetland basin has been drained or filled. To document these actions, LGUs must maintain records of the use of the exemption per wetland basin. Because of the record keeping burden, some LGUs may not offer the exemption. Changing the "de minimus" to a larger size would further complicate record keeping, contradict the "no-net-loss" legislative mandate and compromise efforts to streamline wetland regulations which are based on the belief of Federal officials that Minnesota is serious about wetland protection. Regulatory simplification will not be achieved unless Federal agencies such as the Corps of Engineers believe that the WCA and rule will be properly implemented.

- (3) The appropriate level of regulation of activities in wetlands located in counties in which a high percentage of presettlement wetland acreage is present;

The Chapter 175 revisions changed to 1:1 the minimum replacement ratio for counties with > 80% of their presettlement wetlands remaining. This change was made in recognition of the extensive wetland acreages in these counties and the difficulty of locating wetland replacement sites. The difficulty in suggesting a more flexible program in counties with large wetland acreages stems from regulatory simplification (which was addressed in the previous issue) and consistency of regulation while achieving the "no-net-loss" goal of the Act. It is doubtful that progress can continue to be made in the simplification of regulations if LGUs had more flexibility than currently provided for the WCA rule. With respect to consistency of regulation, members of the regulated public have stated repeatedly that they do not favor local flexibility if it means dealing with different regulations as they work across LGU boundaries.

- (4) The appropriate level of regulation for activities in type 1 wetlands, as defined in United States Fish and Wildlife Circular No. 39 (1971 edition);

Type 1 wetlands, except for bottomland hardwoods, of any size on agricultural land are exempted from regulation under the WCA by Exemption #7. This exemption honors the investment agricultural landowners have made on property they planned to drain or fill for crop production. Type 1 wetlands typically have many of the same functions and values of other wetlands including those mentioned in the WCA: water quality, flood control, public recreation and commercial use. Given the manner in which all types of wetlands function as systems on the landscape, there is no scientific basis to protect type 1 wetlands with any less enthusiasm. The continuing argument about type 1 wetlands is grounded in conflicting values. Hence, the difficulty in bringing the issue to a resolution. Moreover, it is difficult to promote regulatory simplification -- which is based on our good faith effort to protect all wetlands--and at the same time deregulate additional wetlands. The WHAC recommends that the exemptions remain unchanged until more information is available for their evaluation.

- (5) The feasibility and advisability of allowing local units of government to establish alternative regulatory programs for wetlands that would operate in lieu of state law;

The WCA rule provides the minimum standards necessary to achieve the consistency among LGUs demanded by the regulated public and required for regulatory simplification. LGUs can adopt additional procedures and offer added protection through local official controls such as zoning ordinances. Also, LGUs have the option of developing and utilizing their own replacement methodology and including local public values into the replacement requirements. Further, LGUs are given encouragement to develop comprehensive wetland management plans by the offer of simplified wetland replacement. WHAC recognizes the need for creativity and flexibility in the implementation of WCA while acknowledging the limits imposed by regulatory simplification.

- (6) Other issues identified by the committee as deserving of comment:

- (a) The 1993 Legislature appropriated approximately one-half of the amount required to implement the WCA program. Many LGUs have stated that the amount is not adequate. The WHAC recommends that the Legislature re-examine the amount of funding necessary for LGUs to effectively administer the program.
- (b) Local officials have expressed concern that wetland regulations may have a negative effect on property values. The Committee recommends that this issue be monitored.
- (c) In view of the current efforts to achieve simplification of WCA and Corps of Engineers wetland regulations thru procedures such as the "programmatic general permit", the committee believes that it is no longer necessary to separately regulate DNR Protected Waters [note: this would require a statute change].
- (d) The committee believes that proposals to drain or fill wetlands should be subject to public review. However, the notice requirements of the WCA may unduly delay project review and approval [note: this would require a statute change].
- (e) The committee believes local decisions should be subject to appeal by the public. However, the appeal requirements of the WCA may unduly delay project approval [note: this would require a statute change].
- (f) The committee believes that all state regulatory agencies should use the same methodology when delineating the jurisdictional boundary of a wetland; DNR uses a different methodology than required by the WCA and Corps of Engineers [note: this would require a statute change].