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Information Brief

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Issues in Wetland Protection

New provisions to protect the state's remaining wetlands were enacted by the 1991 Minnesota Legislature in the Wetland Conservation Act.

The wetland law was one of the last to pass before the legislature adjourned. Both the House and the Senate had passed dramatically different wetland bills before going to conference committee. In the attempt to pass a new wetland law during the session's closing days, a number of issues still remain for future legislative deliberation.

This information brief

- briefly states the main provisions of the Wetland Conservation Act
- lists some major issues that remain to be resolved in conjunction with the 1991 wetland law.

Main Provisions of the Wetland Conservation Act

Regulation

A wetland may not be drained or filled unless it is replaced by restoring or creating wetland areas of at least equal public value.

By July 1, 1993, the Board of Water and Soil Resources (BOWSR) will adopt rules to determine the public value of wetlands. Public value criteria will be the basis for assuring adequate replacement of wetlands.

Wetlands on nonagricultural land must be replaced at an acre ratio of 2 to 1; wetlands on agricultural land are at a 1 to 1 ratio.

A replacement plan approved by the local unit of government must assure that wetland values are replaced before or concurrent with the draining or filling of a wetland.

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A three-member technical evaluation panel, using the "Federal manual for Identifying and Delineating Jurisdictional Wetlands" and an on-site inspection, will provide technical wetland determination decisions to a local government that approves a replacement plan.

Exemptions

Certain wetlands through 24 separate exemptions are not subject to replacement.

Payments

Willing landowners may receive payments for permanent easements on type 1, 2 or 3 wetlands. The payments are set as follows:

- 50 percent of the estimated agricultural market value outside of the seven county metropolitan area and for wetlands on agricultural land within the metro area
- 20 percent of the estimated agricultural market value for metro wetlands on nonagricultural land
- 90 percent of estimated agricultural market value for adjacent cropped upland acreage (may be 4 acres to 1 acre of wetland)
- 60 percent for adjacent noncropped upland acreage.

A wetland owner in a designated wetland preservation area (at least 8 years in duration) is eligible for property tax exemption on the wetlands while in a designation.

A wetland owner who desires to drain or fill, but cannot get local approval for a replacement plan, may receive compensation at 50 percent of the estimated agricultural market value through BOWSR.

Funding

New and existing bonding totals \$9.1 million for permanent wetland easements, and \$5 million for wetland restorations.

Major Unresolved Issues

The issues are briefly stated, followed by applicable policy and funding questions.

Easements for Waterbank Agreements

(Article 3)

The 1991 wetlands law allows the Board of Water and Soil Resources and willing landowners to place types 1, 2 and 3 wetlands¹ into permanent conservation easements for protection from future wetland alteration. The new law replaces the existing system in which the Department of Natural Resources (DNR) has permanent and temporary easements on types 3, 4 and 5 wetlands enrolled under the waterbank program.

Wetlands under "waterbank" were slated to be protected by the 1991 law. However, the new law does not allow permanent easements on types 4 and 5 wetlands. Many temporary (20 year) waterbank easements may expire in the next few years.

The policy and funding issues to be decided here are:

- Should type 4 and 5 wetlands be eligible for permanent easement status?
- How much money would it take to do so?

Compensation for Denied Use

(Article 7, section 17)

The 1991 wetlands law provides that a person who drains or fills a wetland must be compensated by BOWSR, if the person's wetland replacement plan is not approved by the local unit of government.

The following policy and funding concerns may need to be clarified in determining compensation for a denied use of a wetland.

- What is the incentive for a landowner to provide an adequate replacement plan?
- What will the state receive for the compensation?
- What if the plan conditions make the proposed use of the wetland unworkable or not feasible (an eligibility condition for compensation)?
- What is meant by "damages" a person may suffer if a replacement plan is not approved?
- How much will this potentially cost?

¹Defined in U.S. Fish and Wildlife Circular #39 (1971 Edition).

- Should the legislature appropriate additional money to allow it?
- A related funding issue is that easement compensation in the law for a wetland on nonagricultural land within the seven-county metropolitan area is 20 percent of market value, while any wetland owner under Article 7 receiving compensation will receive 50 percent. Is this fair? Why would a landowner within the metro area be willing to enroll a wetland for easement?

Agricultural Land Definition

The 1991 wetland law is full of references to "wetlands located on agricultural lands" or "agricultural wetlands." This is especially true in the articles and sections on compensation, regulation, and exemptions from regulation. These agricultural wetlands are generally subject to less strict regulation or are exempt from regulation. Higher levels of compensation may be provided as well.

The law does not define "agricultural land." Should this be left to administrative or judicial constructions? If not, what should the legislature include in a definition of agricultural land for wetland purposes (do existing statutes provide guidance)?

State Roads and Wetland Regulation

(Article 6, section 15)

The 1991 wetland law permits a wetland to be altered (without replacement) for certain road activities. Specifically mentioned in the law are forest road activities.

None of the exemptions make specific reference to state roads, but concern has been expressed; should they be eligible for an exemption or treated any differently from other roads?

Since "state roads" aren't exempt now, a state road project will need to replace an altered wetland. The replacement plan will need to be approved by the affected local unit of government.

A policy issue here is should the local approval process, in which local politics may stop valid projects, apply to state agencies (the Department of Transportation, etc.)?

Six Out-of-Ten Planting Regime

(Article 6, section 10)

If a wetland was planted with annually seeded crops, or set aside to receive federal price support, in six of the last ten years, the law exempts it from a wetland replacement plan.

Many prairie wetlands are farmed only during drought years, which makes them eligible for federal set-aside (under rules of the U.S. Agricultural Stabilization and Conservation Service). If set-aside because of drought, the wetlands actually may be planted only four out of ten years because the federal government can count the years they were used as set-aside as planted.

- Is it fair to require a six out of ten year planting exemption when, in many cases, a four out of ten year planting will qualify for the exemption, or should the set-aside language be dropped?

Wetland Replacement Plan

(Article 6, section 8, and Article 7)

Under the new law, a wetland drained or filled must be replaced by the landowner. After the rules by the Board of Water and Soil Resources go into effect, May 1, 1993, replacement must be accomplished before or concurrently with the wetland alteration.

January 1, 1992 until July 1, 1993 is an interim regulation period. This period is a "soft moratorium," because wetland drainage or filling is allowed if an Article 6 exemption applies, or if the soil and water conservation district or the local permitting authority certifies replacement of the wetland.

When the rules are completed, a landowner draining or filling must replace both the public values of a wetland and on an acre-to-acre basis. The interim regulation period does not provide any direction to a local government unit on when wetland replacement must take place.

The policy concerns include:

- When should wetland replacement be required during the interim period: within a certain time period after the rules are finalized, or before or concurrently with the interim wetland alteration?

There are a number of administrative issues related to wetland replacement that the board faces. Among them are:

- Insuring that local government units certify proper wetland replacement; and
- A process for exempting landowners with rightful claim exemptions, so that local units, private citizens, and enforcement authorities know who is exempt from wetland replacement.

