



## **Executive Order 12-04:**

# **Supporting and Strengthening Implementation of the State's Wetland Policy**

**Draft Report for Comment  
November 2012**

### **DEADLINE:**

**Comments are due by Monday, November 26, 12:00 noon  
to David Weirens at [david.weirens@state.mn.us](mailto:david.weirens@state.mn.us)**

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# Table of Contents

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<b>Executive Summary</b> .....	ii
<b>I. Introduction and Process</b> .....	1
<b>II. Issues, Stakeholder Input, and Recommendations</b> .....	4
Issue #1: De minimis Exemption .....	5
Issue #2: Alignment of Pre-Settlement Zones on Watershed Boundaries .....	8
Issue #3: Consistent Review, Approval and Implementation .....	10
Issue #4: Adequacy of Wetland Bank Program Funding .....	15
Issue #5: Costs and Benefits of Wetland Mitigation Targeted to Specific Watershed .....	17
Issue #6: Strategic Use of Funding Sources to Achieve Continued Restoration of Drained Wetlands .....	21
Other Issues .....	24
<b>III. Next Steps</b> .....	27
<b>Appendices</b>	
<b>A. Executive Order 12-04 Supporting and Strengthening Implementation of the State’s         Wetlands Policy</b> .....	28
<b>B. List of Stakeholder Organizations</b> .....	31
<b>C. Meeting Schedule</b> .....	32

# Executive Summary

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## Introduction and Process

The Board of Water and Soil Resources (BWSR) has developed recommendations at the direction of Governor Mark Dayton through *Executive Order 12-04 Supporting and Strengthening Implementation of the State's Wetlands Policy* (EO 12-04). After a Legislative debate over WCA provisions in 2012, the Governor called for recommendations to be developed based on a systematic evaluation of wetlands policy that incorporated input from stakeholder groups. Further, the Governor reaffirmed the public values of wetlands, the public interest in achieving no net loss of wetlands as well as the benefits of continued restoration of wetlands in Minnesota.

To those ends the Governor ordered BWSR, in cooperation with the Pollution Control Agency and the Departments of Natural Resources, Transportation and Agriculture, to address the following:

1. Assess potential changes to current policies that will improve wetland conservation in Minnesota in a manner that maintains and restores the integrity of Minnesota's wetlands, while recognizing that the ecology, distribution and type of wetland resources vary statewide.
2. Evaluate and develop recommendations to improve current wetland protection, restoration, and mitigation provisions regarding:
  - a. de minimis exemption allowances and flexibility options allowable with Board-approved Comprehensive Wetland Management Plans according to Minnesota Statutes, section 103G.2243;
  - b. alignment of pre-settlement wetland zones on watershed boundaries;
  - c. consistent review, approval and implementation for projects subject to wetland replacement requirements;
  - d. the adequacy of funding mechanisms to cover costs of inspections, monitoring and oversight of wetland bank sites; and
  - e. the costs and benefits of wetland mitigation targeted to specific watersheds.
3. Develop recommendations to provide for the continued restoration of drained wetlands using various funding sources to achieve the multiple benefits that wetlands provide for strategic conservation purposes.
4. Identify opportunities to improve coordination of wetland regulatory efforts between state and federal agencies by improving the processes for landowners, permit applications, local governments, and regulators so that greater efficiency and cost-effectiveness are realized.

This report provides recommendations that should contribute to better wetlands policy. The recommendations in each section are not listed in priority order. Improved wetlands policy can be measured by:

1. An increase in the quantity, quality and biological diversity of Minnesota's wetlands,
2. Improved timeliness and clarity of processes for Minnesota's regulated landowners, and
3. Improved efficiency and reduced costs for applicants, agencies and local governments involved in wetlands management.

The process to comply with the EO12-04 was designed to capture thoughtful input reflecting relatively broad and diverse perspectives from invited stakeholders. The process was not intended to be a general public input process with extensive outreach and a large volume of comments. Nor was the process intended to negotiate one or more specific proposals for consideration by the Legislature in 2013. BWSR sought to better understand a range of key perspectives and positions to define policy areas where there is potential to align interests to improve policies.

The process invited participation from 42 stakeholder organizations. Representatives of these organizations were invited to participate in eleven facilitated meetings. There were five cluster meetings, four regional meetings and two core stakeholder meetings. The set of meetings was structured to create different opportunities to provide input that could offer depth and nuance in the understanding of different interest's perspectives. Records of each meeting were prepared that documented the ideas, concerns and suggestions presented by stakeholders. Invitations to the process were targeted to the 42 identified stakeholder groups. However, project staff also encouraged any interested party seeking greater involvement in the process to share their perspectives in writing. Meeting notes and summaries of other input are available on the BWSR website: [http://bwsr.state.mn.us/wetlands/executive\\_order\\_12-04/](http://bwsr.state.mn.us/wetlands/executive_order_12-04/).

Project staff drew out issues and themes heard throughout the process. Then based on their experience with wetlands programs and policies, they identified potential policy solutions where there appears to be potential common ground to support further detailed policy development. Concepts have been vetted and refined with cooperating agencies and with additional input from stakeholders.

As project staff met with stakeholders some issues consistently rose to the top as a priority for discussion. Stakeholders did not suggest that the other issues identified in EO 12-04 were not significant, but in the time available for discussion they prioritized three to four issues. Priority discussion issues included:

- *Defining policy goals and measures of success;*
- *Consistency of policy and interagency cooperation;*
- *Targeting of Wetland Mitigation; and*
- *De minimis Exemption.*

Based on these discussions and further assessment and discussion with cooperating agencies, BWSR makes the following recommendations.

## Recommendations

### Issue #1: De minimis Exemption.

- i. Simplification. The options listed below should be evaluated to simplify the De minimis Exemption while maintaining current overall levels of protection and enhancing compliance. Simplification options associated with geographic differences in the application of this Exemption are discussed in Issue #2: Alignment of Pre-Settlement Zones on Watershed Boundaries.
  - a. Eliminate some or all of the wetland type criteria from the Exemption.
  - b. Consider revising de minimis amounts in shoreland areas while improving coordination with other programs to ensure that riparian/water quality values are protected.
  - c. Simplify the 5% cumulative impact provision.
  - d. Reduce the cost to road authorities by establishing a process to estimate small impacts that would otherwise qualify for the de minimis exemption that are to be reported by the road authority to BWSR under the Local Government Road Wetlands Replacement Program.
  
- ii. Flexibility.
  - a. Amend Minn. Stat. 103G.2241, subd. 9 to allow local wetland plans and official controls to deviate (including being less restrictive) from state standards where the overall effect will be at least as protective of wetland functions and values; and
  - b. Work with the State agencies and the US Army Corps of Engineers to develop and implement a local government wetland planning and local controls option that will be applicable under state and federal laws to provide flexibility to local governments in the application of a de minimis while protecting important wetland functions. This work would include the identification of necessary changes to statute, rule and policy that are required to place such a program into effect.
  
- iii. Resources
  - a. Increase State funding to support local government capacity to effectively work with landowners via early project reviews and project reviews to avoid and reduce wetland impacts while allowing desired development.

### Issue #2: Alignment of Pre-Settlement Zones on Watershed Boundaries.

Evaluate, in cooperation with the US Army Corps of Engineers, simplifying the geography of WCA by eliminating or adjusting current pre-settlement wetland zones. A guidepost for these changes is to ensure the same or similar levels of regulation as under current law. The options that should be evaluated are:

- i. Rectify bank service areas along county lines to a “nearest county boundary fit” and establish an 11-county metropolitan area (Anoka, Carver, Chisago, Dakota, Hennepin, Isanti, Ramsey, Scott, Sherburne, Washington, Wright) wetland bank service area; or
- ii. Eliminate the 50-80% zone, thereby creating a greater than 80% and a less than 80% zone and establish an 11-county metropolitan area wetland bank service area.

*Issue #3: Consistent Review, Approval and Implementation.*

- i. Coordination should be improved between WCA and CWA Section 404. The following options should be explored to address the issues stated by stakeholders.
  - a. BWSR should work with the St. Paul District of the U.S. Army Corps of Engineers to explore options to reduce regulatory redundancy and overlap. One option is to implement a new US Army Corps of Engineers programmatic general permit and the existing WCA Federal Approvals Exemption. Under this concept, WCA would regulate relatively small impacts, and the Corps would regulate relatively larger impacts, subject to program jurisdiction.
  - b. BWSR should evaluate assuming CWA Section 404. This evaluation should assess the costs and benefits of Assumption, as well as identify changes to state wetland and water regulatory programs that may be required.
- ii. Coordination should be improved so that MPCA CWA 401 certification process fit within existing wetland processes, reduce redundancy, and focus on larger projects with more significant environmental risks. Timeliness of MPCA 401 certifications was frequently commented on, therefore it is recommended that the MPCA should act quickly following referral, by the US Army Corps of Engineers. One option is to integrate the MPCA into the multi-agency joint notification process shared by WCA, the US Army Corps of Engineers, and DNR Public Waters Programs
- iii. BWSR should continue current cooperative efforts with the USDA Natural Resource Conservation Service (NRCS) to improve coordination of WCA and Swampbuster implementation activities at the local level, including improved communication of program requirements to agricultural producers. This cooperative effort should include exploring methods to improve data sharing on agricultural activities subject to Swampbuster. Development of the Agricultural Wetland Bank should continue. Areas of agreement should be documented in an interagency Memorandum of Understanding between BWSR and NRCS, including any items identified according to Minn. Stat. § 103G.2241, Subd. 1(7). The implementation of this recommendation will be directly affected by the next Federal Farm Bill.
- iv. BWSR should conduct a review of the Local Government Road Wetland Replacement Program with its stakeholders to ensure the Program is structured and operated to address current local government road authority needs.

- v. BWSR should explore the possibility of establishing an in lieu fee wetland mitigation program consistent with Minn. Stat. § 103G.2242, Subd. 3. The possibility of amending this statute to expand BWSR's authority statewide to all project types, including mining, should also be considered. One option that should be considered to address mining related issues is the Northeast Regional Wetland Mitigation Cooperative that was proposed in the Northeast Minnesota Wetland Mitigation Inventory and Assessment (January 2010).
- vi. Clarify and strengthen the local government role in the approval of off-site wetland replacement projects completed to replace wetland impacts occurring under a Permit to Mine. BWSR should discuss the options outlined below with the DNR and integrate the resulting recommendations into the northeast mitigation options discussed under Issue #5.
  - a. Designate DNR as a WCA Local Government Unit for wetland impacts occurring under a permit to mine. The procedures for off-site mitigation would then be consistent with all other projects under WCA, meaning local governments would approve wetland mitigation sites.
  - b. Modify DNR Permit to Mine processes to establish a formal notification and comment process for actions associated with wetland regulations; DNR would be required to respond to all timely comments. DNR decisions relating to wetland mitigation would be appealable to BWSR.
  - c. DNR retains Permit to Mine Authority, but approval and management of wetland mitigation would be delegated to BWSR.
- vii. Increase State funding to local governments that implement WCA. According to data available to BWSR, local governments are currently underfunded \$2.0 to \$3.0 million in State funds.
- viii. Several other studies and evaluations are underway that address similar issues regarding environmental management and regulation. The implementation of recommendations of these other efforts should be integrated with those of this report. (see partial list in Issue #3: Consistent Review, Approval and Implementation).

#### *Issue #4: Adequacy of Wetland Bank Program Funding.*

- i. BWSR should conduct an actuarial study to estimate future costs for wetland bank monitoring, maintenance and compliance and the associated State risk. This study should also evaluate long-term costs and methods of finance associated with general administration, application review and processing, and credit management. An implementation plan should then be developed to ensure the long-term viability of the Wetland Banking Program.

- ii. Another option to consider is combining monitoring and maintenance responsibilities of wetland banking with other public land management programs, such as Reinvest in Minnesota Reserve.
- iii. BWSR should explore the potential for using alternative methods to monitor wetland bank sites, such as via aerial imagery.

*Issue #5: Costs and Benefits of Wetland Mitigation Targeted to Specific Watershed.*

- i. Continue to focus mitigation efforts on wetland banking and watershed based bank service areas as the basis for wetland mitigation under WCA.
- ii. BWSR should leverage the work of an interagency group (BWSR, DNR, MPCA, and the US Army Corps of Engineers) that has already been established to address the issue of wetland mitigation, particularly for large wetland impacts in the northeast. The group is currently in the process of developing recommendations. The group expects to complete their work and provide their recommendations by spring 2013. However, some general initiatives have been identified. BWSR recommends pursuing these and other initiatives that are identified by the interagency group:
  - 1. Improve available information and options for the siting of wetland mitigation within the watershed of impact.
    - a. Develop interagency guidance summarizing the State and Federal criteria for evaluating project proposals, particularly the adequacy of potential mitigation sites.
    - b. Explore the potential for targeting broader, non-traditional options for mitigation (improving and protecting trout streams or adjacent upland habitat, etc.) within northeast watersheds.
    - c. Review the requirements of other regulatory programs with relevance to wetland function and explore the potential for mitigating some wetland functions within the watershed (e.g. water quality), while allowing others to be replaced outside the watershed (wildlife habitat, floodwater retention, etc)
    - d. Pursue funding to establish an electronic database to develop a running inventory of potential wetland mitigation sites that have been considered (by project proponents and regulatory agencies) in the northeast, including relevant information on each. This inventory will help applicants in their search for wetland mitigation sites and agencies in determining the availability of potential mitigation sites within specific watersheds.
  - 2. Develop recommendations for procedural/administrative mechanisms to target and bring about mitigation in priority watersheds when mitigation is not reasonably available within the watershed of the wetland impact. The mechanism may include

an in-lieu fee program or other options, as well as procedures for identifying priority watersheds.

*Issue #6: Strategic Use of Funding Sources to Achieve Continued Restoration of Drained Wetlands.*

- i. Continue efforts, particularly collaborative efforts such as the Prairie Pothole Regional Integrated Landscape Conservation Strategy, to improve science and decision tools that refine the ability to target wetland restorations to their highest value locations.
- ii. There are limited resources available to support wetland management on private lands, if those wetlands are not enrolled in a conservation program. Assess gaps in those programs and support funding initiatives to improve and maintain the quality of these wetlands.
- iii. Evaluate if current payment rates available under conservation programs are sufficient to attract landowner interest in participating in wetland restoration.
- iv. Work with conservation partners to evaluate how voluntary efforts can be enhanced with wetland bank funding so that there is an opportunity to leverage mitigation funding while continuing to avoid subsidizing mitigation with conservation dollars.
- v. Support local government planning in the metropolitan area to support more strategic wetland management.

*Other Issues - No Net Loss*

- i. Clarify the state policy goal of no net loss applies to state wetland protection programs on a statewide basis.
  - a. The statewide no net loss goal should recognize that there are areas, such as northeast Minnesota, that can tolerate some loss of wetlands, while other areas of the state already face a significant deficit of wetland resources.
  - b. Improve wetland accounting within WCA , and possibly other State wetland protection programs, by periodically providing available data on:
    1. Impacts subject to replacement;
    2. Mitigation occurring through wetland replacement; and
    3. Reported exempt impacts; and
    4. Provide a simplified web-based tool to facilitate reporting exempt impacts.
  - c. Continue to support DNR/MPCA efforts to survey and track wetland quantity and quality trends.
- ii. Clarify that voluntary restoration activities are intended to restore wetlands at a level above and beyond the no net loss goal of State wetland protection programs.

### Other Issues - Agricultural Drainage Recommendations

- i. Assess the extent to which wetlands on agricultural lands are being lost or degraded and that are not subject to compensation requirements under existing programs.
- ii. BWSR should evaluate the following:
  - a. The potential for incentives and funding for landowners to install managed drainage systems that can maintain the benefits of temporary/seasonal wetlands and to install other BMPs to minimize impacts to adjacent wetlands and waterways.
  - b. The mechanisms for landowners and local drainage authorities to collaborate on drainage projects to improve water quality via the state drainage code.

# I. Introduction and Process

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The Board of Water and Soil Resources (BWSR) has developed recommendations at the direction of Governor Mark Dayton through *Executive Order 12-04 Supporting and Strengthening Implementation of the State's Wetlands Policy* (Appendix A). The Order follows legislative debate in 2012 on wetlands policy which focused primarily on Minnesota's Wetland Conservation Act (WCA). Several bills were independently introduced to address specific stakeholder concerns. These bills and the subsequent debate did not reflect a careful evaluation of WCA or wetlands policy as a whole. While several modest changes to WCA were adopted, the Governor called for recommendations to be developed based on a more systematic evaluation of wetlands policy.

EO 12-04 reaffirms the public values of wetlands, the public interest in achieving a no net loss of wetlands as well as the benefits of continued restoration of wetlands in Minnesota.

The Governor directed BWSR, in cooperation with the Pollution Control Agency and the Departments of Natural Resources, Transportation and Agriculture, to undertake the following steps regarding how to maintain No Net Loss of Wetlands as a State goal under the Wetland Conservation Act and to further advance the long-term protection and enhancement of Minnesota's wetland resources:

1. Assess potential changes to current policies that will improve wetland conservation in Minnesota in a manner that maintains and restores the integrity of Minnesota's wetlands, while recognizing that the ecology, distribution and type of wetland resources vary statewide.
2. Evaluate and develop recommendations to improve current wetland protection, restoration, and mitigation provisions regarding:
  - a. de minimis exemption allowances and flexibility options allowable with Board-approved Comprehensive Wetland Management Plans according to Minnesota Statutes, section 103G.2243;
  - b. alignment of pre-settlement wetland zones on watershed boundaries;
  - c. consistent review, approval and implementation for projects subject to wetland replacement requirements;
  - d. the adequacy of funding mechanisms to cover costs of inspections, monitoring and oversight of wetland bank sites; and
  - e. the costs and benefits of wetland mitigation targeted to specific watersheds.
3. Develop recommendations to provide for the continued restoration of drained wetlands using various funding sources to achieve the multiple benefits that wetlands provide for strategic conservation purposes.

4. Identify opportunities to improve coordination of wetland regulatory efforts between state and federal agencies by improving the processes for landowners, permit applications, local governments, and regulators so that greater efficiency and cost-effectiveness are realized.

The Order further required these steps to be completed by December 15, 2012.

This report provides recommendations that should contribute to better wetlands policy. The recommendations in each section are not listed in priority order. Improved wetlands policy can be measured by:

1. An increase in the quantity, quality and biological diversity of Minnesota's wetlands,
2. Improved timeliness and clarity of permitting processes for Minnesota's regulated landowners, and
3. Improved efficiency and reduced costs for applicants, agencies and local governments involved in wetlands management.

### **Stakeholder Participation.**

The EO 12-04 further charged BWSR to develop recommendations with "invited stakeholder participation." Wetland policy and protection programs have a wide range of stakeholders, including local governments, environmental and conservation organizations, agricultural organizations, regulated landowners and business interests as well as federal and state agency partners. The perspectives and concerns of these groups of stakeholders vary considerably across Minnesota. The process to comply with the Order was designed to capture thoughtful input reflecting relatively broad and diverse perspectives.

The stakeholder participation strategy was designed to ensure transparency and target discussions among the invited stakeholders to issues included in the Order. The process was not intended to be a general public input process with extensive outreach and a large volume of comments. Nor was the process intended to negotiate one or more specific proposals for consideration by the Legislature in 2013. BWSR sought to better understand a range of key perspectives and positions to define policy areas where there is potential to align interests to improve policies.

The process started with the identification of 42 stakeholder organizations, which were solicited for formal contacts (See Appendix B). The organizations were divided into six clusters of similar interests including: Agriculture, Business and Industry, Environment and Conservation, Local Governments, Other Organizations, and Federal Government. Three types of meetings were convened with stakeholders:

1. Cluster Meetings
2. Regional Meetings
3. Core-stakeholder Meetings

Each meeting type sought to achieve a different purpose. Cluster meetings were designed to allow a deeper and more nuanced discussion of the perspectives of those groups, which often

operate on a state-wide basis. Regional meetings were open to the widest range of stakeholders and were intended to drill down into differences and nuances of issues that relate to Minnesota's diverse geography. The Core-Stakeholder group meetings were intended to provide for a greater degree of interaction between interest groups active in legislative and policy development processes.

Project staff conducted eleven meetings, each about three hours in length (Appendix C). These meetings followed similar agendas; a brief overview of EO 12-04 and the input process followed by facilitated discussion of the issues laid out in the Executive Order. The discussions were set up to address the more specific charges (items 2 and 3 in the Order) anticipating that the stakeholders would discuss issues in a manner that would address the broader concerns (items 1 and 4 in the Order). At each meeting, the stakeholders would help determine which issues contained in the Order to focus on. Detailed notes were taken at each meeting by multiple staff. Records of each meeting were prepared that documented the ideas, concerns and suggestions presented by stakeholders. The meeting notes are available on the BWSR website: [http://bwsr.state.mn.us/wetlands/executive\\_order\\_12-04/](http://bwsr.state.mn.us/wetlands/executive_order_12-04/).

Invitations to the process were targeted to the 42 identified stakeholder groups. However, anyone that showed up at any meeting was welcomed to fully participate. Project staff also encouraged any interested party seeking greater involvement in the process to share their perspectives in writing. This additional input has also been summarized and documented and is available on the BWSR website at the above location.

### **Report Development.**

Project staff began drawing out and summarizing different issues and themes heard after the first several meetings. Based on their experience with wetlands programs and policies they sought to identify potential policy solutions where there appears to be enough common ground between stakeholders to support further detailed policy development. Available resources and time allowed for development of only high level or directional policy recommendations. Detailed legislative proposals were not developed.

Preliminary recommendations were presented at the final Core-Stakeholder group meeting on October 23, 2012. Based on that feedback and further staff analysis, recommendations were further refined into a draft report. The draft report was then shared with the interagency team for further review and comment. Based on feedback from cooperating agency partners, the draft report was revised. This revised draft was forwarded to the BWSR Wetland Committee as well as shared with invited stakeholders. Based on Wetland Committee response and further stakeholder response a final draft was prepared for review by the BWSR board on December 12, 2012. Upon approval of the Board of Water and Soil Resources, the report was deemed complete and final.

# II. Issues, Stakeholder Input, and Recommendations

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## Introduction

As project staff met with stakeholders some issues consistently rose to the top as a priority for discussion. Priority discussion issues included:

- *Defining policy goals and measures of success:* In many of the meetings, stakeholders wanted more information about what no-net loss means, how it is measured and where the state stands in achieving no-net loss, this discussion often revolved around whether no net loss means local vs. statewide, and how do wetland functions and values fit in;
- *Consistency of policy and interagency cooperation:* While there are issues of consistency internally among single agencies, the broader concerns expressed by the stakeholders generally pointed to interagency coordination as the underlying concern about consistency, duplication and timeliness in the application of wetlands regulations. As the process moved forward, these issues have been consolidated into one issue and recommendations are presented in that manner;
- *Targeting of Wetland Mitigation:* Concerns were repeatedly stated that current wetland mitigation policies inhibit achieving desirable public benefits, and present a practical difficulty to wetland rich areas of the state in reasonably complying with regulations; and
- *De minimis Exemption:* This provision of WCA is a necessary safety valve for small impacts, but has gotten very complicated due to frequent amendments intended to address competing interests. Simplifying this exemption would increase landowner compliance and reduce local government costs.

Stakeholders did not suggest that the other issues identified in EO 12-04 were not significant, but in the time available for discussion they prioritized three to four issues. For a variety of reasons, the issues that resonated with participating stakeholders were those that pertained to the regulatory side of wetlands policy. Strategic investment in voluntary conservation was acknowledged as important but relatively few comments were offered and stakeholders did not sustain discussion around how funding is used or wetlands targeting is pursued. Often the discussion returned or connected back to the concept of targeting mitigation associated with regulatory programs.

Alignment of pre-settlement wetland zones was often not considered a key issue by stakeholders, but as project staff improved their framing of the issues interest in the issue did increase. Finally, the long term funding of state liabilities associated with the wetland banking program received the least attention by stakeholders, but there was general consensus that long-term funding is

important. They acknowledged that BWSR needs to pay attention to the issue, but indicated that it is a low priority for stakeholders.

## Issue #1: De minimis Exemption.

### A. Background.

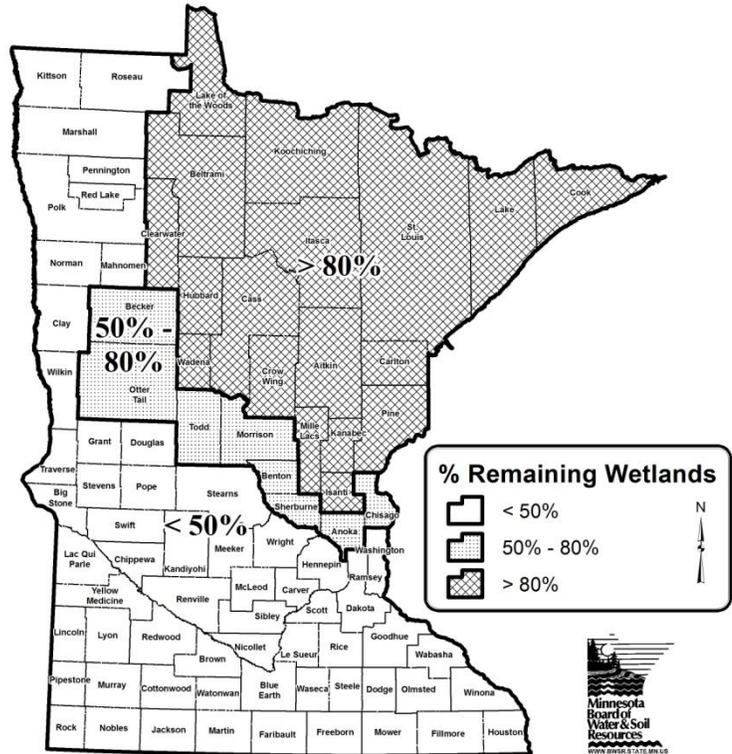
WCA exempts small wetland impacts through a de minimis exemption (Minn. Stat. 103G.2241, subd. 9; Minn. Rule 8420.0420, subp. 8). This exemption provides regulatory relief for individuals completing small projects that would have a minimal impact. However, the De minimis Exemption is structurally complex. Different amounts of exempt wetland impacts are allowed depending on the presettlement wetland area (see figure 1), 11-county metro area, wetland type, and relationship to shoreland zones. Application is further complicated by restrictions on cumulative use of this exemption on an individual wetland (i.e. the 5% rule). This complexity has evolved over time to recognize the different extent of wetlands across the state. In addition, Minn. Rule 8420.0830, subp. 4. F. allows certain limited flexibility in the application of the exemptions under a Local Comprehensive Wetland Protection and Management Plan.

Stakeholders were presented with the following questions to facilitate discussion:

- What is your impression on how de minimis impacts contribute to loss/net loss of wetlands?
- Should different de minimis amounts apply to different wetland types?
- Should different de minimis amounts apply to different geographic areas?
  - Pre-settlement wetland areas – (a) greater than 80%; (b) between 50 % and 80%; and (c) less than 50%. (see Figure 1)
  - 11-County Metropolitan Area.
  - Shoreland wetland protection zone and shoreland building setback zone
- Are the cumulative impact provisions still important and needed?
- Would a simpler de minimis enhance compliance?

Figure 1:

Minnesota Wetland Conservation Act  
Pre-settlement Wetland Areas



- What kind of flexibility would make sense under a Local Comprehensive Wetland Protection and Management Plan?

## **B. What did we hear?**

The discussion indicated that local governments have a wide variety of experience and concerns with the De minimis Exemption. The greatest concerns were expressed by counties in northeast Minnesota with extensive wetland resources. Landowners are generally able to use the exemption, but the law is complicated which confuses and frustrates many landowners. The greatest areas of concern were:

- The “5% rule” is difficult to understand and apply correctly;
- Landowners cannot determine wetland type and are uncertain as to what is allowed; and
- The extent to which the WCAS de minimis aligns with other programs, such as DNR Public Waters.

Simplification of the law is generally understood to be a positive and would improve landowner understanding and compliance, and also reduce enforcement and local government costs. However, conservation organizations were concerned that simplification not be a means to make the WCA more permissive. Other discussion indicated that this exemption is not an issue for most business and industrial activities because either their impacts are so large as to make this provision irrelevant, or they have the expertise to incorporate the de minimis in the regulatory processes with local governments.

The Executive Order also required evaluating and addressing recommendations regarding “flexibility options allowable with Board-approved Comprehensive Wetland Management Plans according to Minnesota Statutes, section 103G.2243”. Several stakeholders stated that a barrier to making effective use of current flexibility via these plans has been US Army Corps of Engineers acceptance of these plans.

Local government road authorities discussed the cost effectiveness of current BWSR policy to not apply the De minimis Exemption for road projects when BWSR provides the required wetland replacement. The issue is the expense they go through to identify, delineate and report de minimis eligible impacts to BWSR.

In addition, the issues outlined below were discussed.

- The current de minimis amounts are important to northern counties.
- The 5% cumulative impact provision is important, but can be difficult to implement in a fair manner.
- More flexibility would be useful, especially in shoreland areas, where small de minimis amounts eliminate opportunities to negotiate with landowners.
- Wetland type adds to complexity and confusion.

- The de minimis should be based on function and/or wetland quality, more emphasis on science, not just location.
- Streamlining to reduce the burden on local governments and reduce confusion by landowners.
- The cost (to local governments and landowners) of the replacement plan process for small impacts outweighs the benefit.
- The de minimis contradicts the goal of the Executive Order which is to “improve wetland conservation”.
- Exemptions under Section 404 are activity based while under WCA they are type and location based.
- US Army Corps of Engineers is more flexible than WCA, the de minimis should be changed to match the existing general permit
- Exemption use should be reported and tracked to gather a better sense of the impact of this exemption, and provide a means to establish accountability.
- Leave WCA alone for a while to improve consistency.

### **C. What solutions were suggested?**

- i. Provide information on the De minimis Exemption geared towards landowners to enhance understanding.
- ii. Local governments should advertise that they have staff available to assist landowners in compliance.
- iii. Allow small impacts to be exempt from sequencing (avoidance, minimization, replacement) and go directly to in lieu fee replacement (make a payment to a third party to restore wetlands for mitigation).
- iv. Simplify by setting a specific amount of wetland impact that applies in all cases, and then allow replacement via banking for impacts above this amount up to a threshold
- v. Remove type from the exemption, and focus on location.
- vi. Determine de minimis amounts and use based on project type or purpose.
- vii. Increase funding to local governments to support implementation of WCA, including the De minimis Exemption.
- viii. Establish an expedited process to estimate wetland impacts for road authorities to use for BWSR Road Program eligible projects.
- ix. Work with the US Army Corps of Engineers to achieve state-federal acceptance of local wetland management plans.

### **D. Recommendations.**

- i. Simplification. The options listed below should be evaluated to simplify the De minimis Exemption while maintaining current overall levels of protection and enhancing compliance. Simplification options associated with geographic differences in the

application of this Exemption are discussed in Issue #2: Alignment of Pre-Settlement Zones on Watershed Boundaries.

- a. Eliminate some or all of the wetland type criteria from the Exemption.
- b. Consider revising de minimis amounts in shoreland areas while improving coordination with other programs to ensure that riparian/water quality values are protected.
- c. Simplify the 5% cumulative impact provision.
- d. Reduce the cost to road authorities by establishing a process to estimate small impacts that would otherwise qualify for the de minimis exemption that are to be reported by the road authority to BWSR under the Local Government Road Wetlands Replacement Program.

ii. Flexibility.

- a. Amend Minn. Stat. 103G.2241, subd. 9 to allow local wetland plans and official controls to deviate (including being less restrictive) from state standards where the overall effect will be at least as protective of wetland functions and values; and
- b. Work with the State agencies and the US Army Corps of Engineers to develop and implement a local government wetland planning and local controls option that will be applicable under state and federal laws to provide flexibility to local governments in the application of a de minimis while protecting important wetland functions. This work would include the identification of necessary changes to statute, rule and policy that are required to place such a program into effect.

iii. Resources

- a. Increase State funding to support local government capacity to effectively work with landowners via early project reviews and project reviews to avoid and reduce wetland impacts while allowing desired development.

## **Issue #2: Alignment of Pre-Settlement Zones on Watershed Boundaries.**

### **A. Background.**

Presettlement wetland areas were established along county boundaries in State law when WCA was enacted in 1991 in recognition of the varying extent and conditions of wetland resources across Minnesota. Presettlement wetland areas (see figure 1 on page 5) are used to determine:

1. Allowable wetland impacts under the De minimis Exemption;
2. Authority to use certain actions eligible for credit (i.e. preservation in only greater than 80% areas);
3. Replacement ratios;

4. The siting of replacement wetlands; and
5. How much flexibility is allowed under Comprehensive Wetland Protection and Management Plans.

Since the establishment of WCA, environmental and ecological management policies and programs have increasingly shifted to being based on watershed boundaries. In fact, the Wetland Bank Service Areas (Minn. Rule 8420.0522, subp. 7) that were established in 2007 were developed using watershed and major basin boundaries. The move towards watershed based management is in recognition that water resources can be most effectively managed as a whole system. However, these bank service areas do not follow the presettlement wetland area boundaries.

Stakeholders were presented with the following questions to facilitate discussion:

- What are the challenges with the existing 3 pre-settlement areas system?
- What if the state is divided into two regions (i.e. greater than 80% and less than 80%)?
- Is it important to have boundaries follow county lines?
- If boundaries were to follow bank service areas – which are largely major basins – will this cause undue operational difficulties?
- How should the St. Croix River Basin be addressed? It includes parts of the greater than 80%, 50 to 80% and less than 50% areas and is partially in the 11-county metropolitan area.
  - Should Chisago and Washington Counties become part of the less than 50% area?
  - Should the watershed be shifted to one presettlement area or another?
  - Should it be a universe unto itself (regulations that only apply here)?
- Will alignment changes (statewide and for the St. Croix) make implementation easier?
- How might alignment changes affect the Wetland Banking Program?
- Are there any outcomes that will cause this to be unfair to anyone?
  - Are there ways to mitigate those concerns?

#### **B. What did we hear?**

The discussion at the stakeholder meetings was limited on this issue. There was general agreement that implementing the program along major watershed boundaries would improve coordination between wetland and other environmental programs. Some went so far as to suggest it is imperative to make this change, to fit into the movement towards the “one watershed – one plan” concept. The issue raised is how the watershed approach would work in combination with a program that is administered on the basis of political boundaries.

A concern was raised at one meeting to not implement changes to the pre-settlement zones without guidance and a full understanding of the potential implications of such a change. There were also concerns regarding how this change would affect county implementation, and that there would be increased costs.

Similar to comments made when other issues were discussed, is that mitigation siting should be based on functions and values, not just location. The current system can result in practical hardships for landowners and wetland bankers by restricting their mitigation options.

This issue is closely related to Issue #5: Costs and Benefits of Wetland Mitigation Targeted to Specific Watershed, in that they both address requirements regarding where wetland mitigation can occur. These cross-cutting issues will be discussed in issue #5, as they are most relevant to that issue.

### **C. What solutions were suggested?**

- i. WCA should continue to be implemented based on county boundaries due to its implementation largely on this basis.
- ii. Pre-settlement zones should follow bank service areas that are rectified along county lines to a “nearest county boundary fit”.
- iii. Create two presettlement zones – (1) greater than 80% and a (2) less than 80% .
- iv. Do away with the pre-settlement zone concept altogether and use the watershed basin approach; this would provide greater consistency with the US Army Corps of Engineers.
- v. Eliminate pre-settlement zones and apply standards (wetland replacement and de minimis) separately.
- vi. An 11-county metro area bank service area should be considered in any proposal to address pre-settlement areas and watershed boundaries.
- vii. Conduct another study to re-evaluate the pre-settlement areas because of improvements in technology and tools.

### **D. Recommendations.**

Evaluate, in cooperation with the US Army Corps of Engineers, simplifying the geography of WCA by eliminating or adjusting current pre-settlement wetland zones. A guidepost for these changes is to ensure the same or similar levels of regulation as under current law. The options that should be evaluated are:

- i. Rectify bank service areas along county lines to a “nearest county boundary fit” and establish an 11-county metropolitan area (Anoka, Carver, Chisago, Dakota, Hennepin, Isanti, Ramsey, Scott, Sherburne, Washington, Wright) wetland bank service area; or
- ii. Eliminate the 50-80% zone, thereby creating a greater than 80% and a less than 80% zone and establish an 11-county metropolitan area wetland bank service area.

## **Issue #3: Consistent Review, Approval and Implementation.**

### **A. Background.**

Regulatory simplification and coordination has been an issue with water resources regulations before enactment of WCA, and it continues to be an issue today, as evidenced by the programs that may apply to activities in wetlands and waters: WCA (BWSR); Public Waters Program (DNR); Permit to Mine (DNR); Clean Water Act Section 401 Certifications (MPCA); Stormwater Management (MPCA); Clean Water Act Section 404 (US Army Corps of Engineers); and Swampbuster (USDA-Natural Resources Conservation Service) are among the more significant requirements and regulations.

There are currently several separate efforts that are looking to streamline existing regulatory processes (in addition to this one):

- 1) Executive Order 11-04 (Environmental Permitting Efficiency), MPCA and DNR;
- 2) Water Permit Streamlining for Transportation Projects (Laws of Minnesota 2012, Chapter 287, Article 3, Section 63), MnDOT; and
- 3) Water Governance Evaluation Project (Laws of Minnesota 2011, 1<sup>st</sup> Special Session, Chapter 2, Article 4, Section 33), MPCA.

Stakeholders were presented with the following questions to facilitate discussion:

- As discussed above, there are a number of programs that may apply to a given project or activity, where do these programs cause problems?
- Where are there opportunities to streamline regulatory oversight?
- What drives the inconsistencies between programs?
  - Regulatory jurisdiction, location, mitigation requirements, decision-making process, other?
- There is a tension between state-wide uniformity and tailoring programs and processes to account for regional variability and local situations.

## **B. What did we hear?**

This issue generated significant discussion at all of the meetings. Questions were asked as to why there are so many government agencies at all levels involved in wetland and water regulatory decision making.

- BWSR should explore assumption of the Clean Water Act (CWA) Section 404 program.
- Consistency between and within federal, state and local governments.
- Unreasonable process requirements for projects to prove they are allowed under the law.
- The multiple processes need to be simultaneous, not sequential; coordinated, not uncoordinated.
- Wetlands policies should be consistently administered statewide, especially in relation to the 50-80% area.
- Processes and requirements (delineation, type, etc.) need to be clarified and simplified with fewer steps and reduced timelines.
- Different programs should all require the same or similar information to reduce the burden on the proposer.
- All agencies need to be at the table at the beginning of a project to minimize delays and coordination issues.
- It is not clear always which agency has the final say on a project that impacts a wetland, especially related to agriculture.

- Project proposers need to understand the regulatory processes and have reasonable expectations on how fast they can be completed.
- Wetland programs should be more user friendly, and apply common sense.
- Inconsistent interpretation and application of wetland program rules are perceived as a fairness issue by applicants.
- There is too much government watching government.
- There is a lack of trust with the federal, state and local governments.
- There is not enough consistency over time, rules change and people change.
- Concerns over the effect of wetland regulations and mitigation on the property tax base.
- Terminology (restore, create, replace, etc.) differences confuses people.
- Agricultural tiling and drainage need enhanced regulation.
- Inadequate funding to support the expected level of regulation under WCA.
- Wetland regulations need to be based on science.
- Mitigation may be required for projects that technically impact wetlands but provide an overall natural resource enhancement or provide a public benefit (i.e. flood control).
- Public value needs to be central to wetland regulations.
- Replacement ratios should be modified to take into account the actual benefit offered by a particular wetland rather than an arbitrary ratio.
- Seek legislative authority to require notification of all exemptions.
- Local wetland management plans should be a tool to streamline and align local and state wetland rules.
- Requiring replacing specific wetland functions should be avoided.

Issues specific to a given program came up frequently as well:

- Local governments implementing WCA are more restrictive than the State rule;
- Public safety and critical service projects (hospitals, airports, etc) are sometimes held up and/or compromised to protect wetlands (project eligibility under the Local Government Roads Wetland Replacement Program);
- BWSR administrative interpretation of the road program is overly narrow and should include other transportation modes, including pedestrian, bicycle, and transit;
- Conflicts between WCA and the Shoreland Management program places local governments in a difficult position with landowners;
- The US Army Corps of Engineers does not issue Section 404 permits in a timely fashion;
- The MPCA CWA Section 401 certifications are an additional layer of regulation that is not well coordinated or timely;
- Issuance of Permits to Mine should be separate from mitigation;
- DNR Permit to Mine authority is not implemented consistent with WCA wetland mitigation requirements; and

- Local governments should be involved in mitigation site selection related to Permits to Mine.

However, not everything was criticized, as the WCA technical evaluation panels (TEP) are highly regarded. It was also remarked that a majority of projects go smoothly, and that only a small percentage of projects, that tend to be complex, have process issues.

### **C. What solutions were suggested?**

- i. More local government training.
- ii. Implement WCA more like the Shoreland Program, through local ordinances.
- iii. The State should assume all or part of the CWA Section 404 Program.
- iv. As an alternative to Assumption, the State and US Army Corps of Engineers should agree to a process where the US Army Corps of Engineers issues a general permit for impacts below a certain threshold, and BWSR implements the Federal Approvals Exemption for projects above this threshold.
- v. Better integration of MPCA CWA Section 401 certifications into the process, and have it focus more on water and less on wetlands.
- vi. Work with the Minnesota Congressional Delegation to influence the US Army Corps of Engineers and make Assumption easier and workable.
- vii. Develop a better system to coordinate WCA and Swampbuster.
- viii. Provide a direct role for local governments in the DNR Permit to Mine process.
- ix. Reduce and streamline the wetland banking paperwork.

### **D. Recommendations.**

- i. Coordination should be improved between WCA and CWA Section 404. The following options should be explored to address the issues stated by stakeholders.
  - a. BWSR should work with the St. Paul District of the U.S. Army Corps of Engineers to explore options to reduce regulatory redundancy and overlap. One option is to implement a new US Army Corps of Engineers programmatic general permit and the existing WCA Federal Approvals Exemption. Under this concept, WCA would regulate relatively small impacts, and the Corps would regulate relatively larger impacts, subject to program jurisdiction.
  - b. BWSR should evaluate assuming CWA Section 404. This evaluation should assess the costs and benefits of Assumption, as well as identify changes to state wetland and water regulatory programs that may be required.
- ii. Coordination should be improved so that MPCA CWA 401 certification process fit within existing wetland processes, reduce redundancy, and focus on larger projects with more significant environmental risks. Timeliness of MPCA 401 certifications was frequently commented on, therefore it is recommended that the MPCA should act quickly following referral, by the US Army Corps of Engineers. One option is to integrate the MPCA into the

- multi-agency joint notification process shared by WCA, the US Army Corps of Engineers, and DNR Public Waters Programs
- iii. BWSR should continue current cooperative efforts with the USDA Natural Resource Conservation Service (NRCS) to improve coordination of WCA and Swampbuster implementation activities at the local level, including improved communication of program requirements to agricultural producers. This cooperative effort should include exploring methods to improve data sharing on agricultural activities subject to Swampbuster. Development of the Agricultural Wetland Bank should continue. Areas of agreement should be documented in an interagency Memorandum of Understanding between BWSR and NRCS, including any items identified according to Minn. Stat. § 103G.2241, Subd. 1(7). The implementation of this recommendation will be directly affected by the next Federal Farm Bill.
  - iv. BWSR should conduct a review of the Local Government Road Wetland Replacement Program with its stakeholders to ensure the Program is structured and operated to address current local government road authority needs.
  - v. BWSR should explore the possibility of establishing an in lieu fee wetland mitigation program consistent with Minn. Stat. § 103G.2242, Subd. 3. The possibility of amending this statute to expand BWSR's authority statewide to all project types, including mining, should also be considered. One option that should be considered to address mining related issues is the Northeast Regional Wetland Mitigation Cooperative that was proposed in the Northeast Minnesota Wetland Mitigation Inventory and Assessment (January 2010).
  - vi. Clarify and strengthen the local government role in the approval of off-site wetland replacement projects completed to replace wetland impacts occurring under a Permit to Mine. BWSR should discuss the options outlined below with the DNR and integrate the resulting recommendations into the northeast mitigation options discussed under Issue #5.
    - a. Designate DNR as a WCA Local Government Unit for wetland impacts occurring under a permit to mine. The procedures for off-site mitigation would then be consistent with all other projects under WCA, meaning local governments would approve wetland mitigation sites.
    - b. Modify DNR Permit to Mine processes to establish a formal notification and comment process for actions associated with wetland regulations; DNR would be required to respond to all timely comments. DNR decisions relating to wetland mitigation would be appealable to BWSR.
    - c. DNR retains Permit to Mine Authority, but approval and management of wetland mitigation would be delegated to BWSR.
  - vii. Increase State funding to local governments that implement WCA. According to data available to BWSR, local governments are currently underfunded \$2.0 to \$3.0 million in State funds.

- viii. Several other studies and evaluations are underway that address similar issues regarding environmental management and regulation. The implementation of recommendations of these other efforts should be integrated with those of this report. (see partial list in Issue #3: Consistent Review, Approval and Implementation).

## **Issue #4: Adequacy of Wetland Bank Program Funding.**

### **A. Background.**

The Minnesota Wetland Banking Program is the largest wetland banking program in the country with 3,959 acres of wetland credits available in 202 banks. In addition to overall responsibility for the implementation of WCA, BWSR has several responsibilities regarding the wetland banking program. These include:

- Participating on local technical evaluation panels to consider wetland banking plans reviewing monitoring reports, and requests for deposit of credits;
- Developing and accepting easements on bank sites;
- Periodically inspecting wetland banks, including the easement conditions, after the required monitoring period associated with bank establishment, generally every five years;
- Managing wetland bank accounting, deposits, withdrawals, transfers, etc.;
- Collecting wetland banking fees; and
- Compliance/Enforcement.

These responsibilities are financially supported by State General Funds, wetland bank fee revenue, and agreements with other state and federal agencies. BWSR collects wetland bank fees at the time of wetland bank establishment and for subsequent transactions. This fee generally operates similar to the sales tax and generates approximately \$230,000 in revenue annually that is used to support BWSR's wetland banking responsibilities.

Current funding is generally adequate to support current activities. There are two areas of concern, these are:

1. The costs of long-term monitoring, especially as the number of bank sites grows; and
2. Funding for necessary maintenance, management and compliance at bank sites.

Stakeholders were presented with the following questions to facilitate discussion:

- How should the State's costs for the wetland banking program be funded (i.e. fees, General Fund, Bond Funds, etc)?
- Statute changes in 2012 allow new forms of wetland banking, how should these be funded?
- Is this simply a General Fund function and the taxpayer should be on the hook or is this the responsibility of banking parties to provide as they secure enduring benefits?
- How can long-term maintenance be funded?

- A wetland tax incentive to assist landowners in meeting maintenance costs?
- Ecosystem trading?
- What happens if two or three landowners and decades down the road....nobody remembers the agreement and the benefits/credits are long spent or just assumed?
- When should (or if) monitoring stop and let nature run its course (i.e. when should a banked wetland be viewed the same as a natural wetland)?
- Should monitoring be administered the same as regulatory compliance after some number of years with less rigorous/frequent inspections?
  - What about wetland bank sites that utilize constructed facilities, such as water control structures, berms etc.?
  - What about invasive species and vegetative management?
  - Does wetland quality matter?
- Are there technologies that can automate or otherwise reduce the cost of monitoring and compliance?

#### **B. What did we hear?**

The discussion at the stakeholder meetings was very limited on this issue. This was considered to be an administrative issue that BWSR would need to define and directly lead. With this in mind, it was suggested that BWSR quantify the financial need and the State's potential risks.

Several comments stated that long-term maintenance should be the responsibility of the bank owner via an insurance or financial assurance mechanism. Fines and wetland banking fees were also identified as potential sources of funding. In addition, BWSR should consider how to utilize partnerships with non-governmental organizations to meet wetland banking responsibilities.

Wetland banking is considered to be the preferred method of mitigation in most circumstances, and BWSR needs the resources to continue to effectively manage this program. A concern expressed is that the longer this discussion is delayed, the more vulnerable the State is to spending taxpayer dollars to fix problems. A solution that was identified is to establish a dedicated fund, but the concern is that the Legislature would raid such a fund to address a future budget shortfall.

#### **C. What solutions were suggested?**

- i. Establish a dedicated fund to support long term monitoring and other management costs.
- ii. Require wetland bankers to provide necessary funds via an insurance mechanism.
- iii. Use fine revenue to establish a dedicated fund.

#### **D. Recommendations.**

- iv. BWSR should conduct an actuarial study to estimate future costs for wetland bank monitoring, maintenance and compliance and the associated State risk. This study should also evaluate long-term costs and methods of finance associated with general administration, application review and processing, and credit management. An implementation plan should then be developed to ensure the long-term viability of the Wetland Banking Program.

- v. Another option to consider is combining monitoring and maintenance responsibilities of wetland banking with other public land management programs, such as Reinvest in Minnesota Reserve.
- vi. BWSR should explore the potential for using alternative methods to monitor wetland bank sites, such as via aerial imagery.

## Issue #5: Costs and Benefits of Wetland Mitigation Targeted to Specific Watershed.

### A. Background.

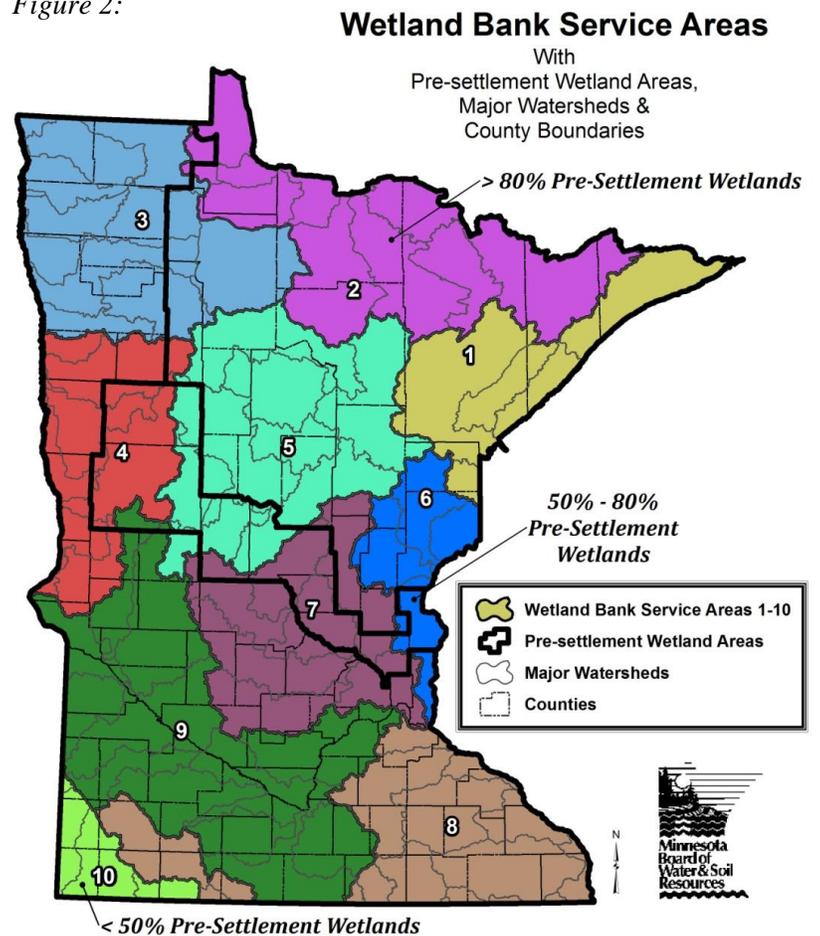
WCA statute and rule requires wetland impacts to be replaced by a wetland replacement siting priority order that places an emphasis on replacing wetland impacts as close to the impact site as possible. The rule incents replacement close to the impact site by increasing the replacement ratio, as follows:

- For project-specific replacement, the replacement ratio increases when the replacement occurs outside of the major watershed where the impact occurs; and
- For replacement by wetland banking, the replacement ratio increases when the replacement occurs outside the bank service area where the impact occurs.

Figure 2 shows the complex geography of the WCA. Wetland bank services areas, pre-settlement wetland areas, major watersheds, and counties all can impact where mitigation is located.

Outside of the greater than 80% area, wetland replacement is generally readily available through either wetland banking within the bank service area or by restoring or creating a wetland on-site or within the major watershed. To address wetland replacement concerns in the greater than 80% area, BWSR contracted undertook a study in 2009 to identify potential wetland replacement opportunities in northeast Minnesota. This study identified a limited amount of potential wetland replacement and made several recommendations to continue

Figure 2:



working on these issues. The concerns over wetland replacement in this area have grown as mining expansions have been moving forward.

In the past year a BWSR-DNR-MPCA-US Army Corps of Engineers staff team have begun working to address wetland regulations in Northeast Minnesota, with a focus on mining and other large projects. It is proposed that the work of this team will provide recommendations to address Executive Order Issue #5.

Stakeholders were presented with the following questions to facilitate discussion:

- A fundamental premise is to first look for credits/replacement in the same watershed - Is this valid?
- How much effort should be exerted to exhaust opportunities prior to moving further out?
- Should impacts in a less than 50% area be *allowed* to be replaced from the greater than 80% area?
- Should replacement for impacts that occur in the greater than 80% area be *encouraged* to seek replacement in the less than 50% area?
- If so, how could the objectives of allowing greater flexibility in the location of wetland replacement be achieved?
  - Regulatory requirement.
  - Use an incentive such as reducing the replacement ratio.
  - Narrow the cost differential.
    - Establish a flat fee for credits in the wetland banking program.
    - Subsidize credits in areas where they provide greater public value.
    - In Lieu Fee Programs.
- If moving replacement to a different presettlement wetland area is encouraged, should it be allowed anywhere or should it be directed to specific conservation priority areas as a condition of this regulatory flexibility (i.e. should replacement wetlands be “steered” to where they will provide the greatest benefit)
- How can the economic incentive to use the lowest cost land be addressed?
- How does wetland preservation fit into the geographic location of wetland mitigation?

#### **B. What did we hear?**

- Conceptually replacement of lost wetland functions and values as close to the impact makes sense.
- Wetland banking provides an efficient and effective way to ensure replacement of lost public values.
- Focus on public value and benefits associated with wetlands rather than simple acres would lead to a better mitigation program.
- Large impacts in NE Minnesota, primarily mining projects, are particularly problematic.
  - Large projects compete with mitigation needed for general development projects in the region.

- On-site mitigation through reclamation is very difficult (case example is Hibtac, which is located in 3 bank service areas, where restoration opportunities are on-site, but are in a different bank service area.)
- The mitigation requirements exceed the potential for available mitigation within the impacted bank service area.
- There are degraded or negatively impacted watersheds that could benefit from mitigation activities.
- Economic incentives for the mining companies have led to large mitigation projects in Aitkin and Lake of the Woods (LOW) Counties. These mitigation sites do not ameliorate impacts locally nor do they necessarily provide significant public value. Aitkin and LOW are high wetland counties and mitigation comes at the expense of upland habitats and the limited local agricultural land base.
- Mitigation of these projects could provide greater public value by being targeted in areas where a majority of wetlands have been drained such as the Minnesota River Basin and the Red River Valley.
- Agricultural groups have expressed concerns that such a mitigation strategy not be done prior to getting an agricultural wetland mitigation banking program established.
- Some concerns were expressed about simple shifts of water quality impacts from one part of the state to another part of the state.
- A NIMBY (not in my backyard) problem could arise if too many wetlands are restored in a particular area.
- There should be flexibility in allowing wetland restorations to occur outside of the immediate watershed where the impact took place.
- Any flexibility in allowing replacement outside of the impact site watershed needs to ensure that local ecological functions and values are maintained.
- An in lieu fee program where you could replace impacts in areas with the greatest perceived benefit should be established.
- A barrier to replacing wetland impacts in a different bank service area is the need to verify that there are no available mitigation opportunities on-site, in the major watershed, and then the existing bank service area. Even if replacement is then allowed outside of the bank service area, a higher replacement ratio applies.
- There will be significant economic barriers to seeking mitigation in western and southern Minnesota because of higher land prices. This may require some kind of alternative mechanism or additional incentive.
- The State should identify priority areas for restoration and targeting of wetland replacement.
- Wetland banking prices are higher than they need to be because in many places there is not enough competition.

- Partnering with other projects (i.e. flood damage reduction) could provide additional flood damage reduction and wetland replacement benefits.
- Metro area mitigation is occurring in rural areas where land prices are lower. Mitigation should be focused in the metro area where wetland values are also needed.
- Watershed districts that cover larger areas with a more diverse land use can develop good wetland plans to target mitigation and allow development.
- Wetland mitigation in the greater than 80% area has an economic impact on cattle farming due to loss of hay and grazing land.
- May be able to get higher wetland function by consolidating several small wetlands into a larger one.
- Required wetland replacement should be coordinated with conservation programs.

### **C. What solutions were suggested?**

- i. Continue to focus on wetland banking.
- ii. Create a state-wide banking program to facilitate greater competition and lower costs for mitigation credits.
- iii. Allow impacts in wetland rich areas to be replaced in other areas (without a replacement ratio increase) when that replacement would provide a better public function and value.
- iv. For large project (i.e. mining) mitigation in NE Minnesota:
  - Focus on state wide public benefits by enabling wetland mitigation from large projects in NE Minnesota to be accomplished in southern and western Minnesota (<50% areas).
  - Remove barriers and costs:
    - Eliminate the replacement ratio penalty for replacing impacts in other bank service areas.
    - Allow for mitigation of public values of degraded NE Minnesota resources (i.e. stream bank restoration projects)
    - Allow mitigation in other parts of the state based on public value. It was assumed that a prairie pothole in a heavily drained area would provide greater benefit than an equivalent area of wetland in a county with a lot of wetlands.
  - Create an in-lieu mitigation program for the state to find the best wetland mitigation opportunities on a state-wide basis. Payment rates could be based on:
    - Least cost mitigation opportunity currently available
    - An assessment methodology of impacted wetland values.
  - Establish regulatory standards that direct mitigation to higher value areas.

### **D. Recommendations**

- i. Continue to focus mitigation efforts on wetland banking and watershed based bank service areas as the basis for wetland mitigation under WCA.

- ii. BWSR should leverage the work of an interagency group (BWSR, DNR, MPCA, and the US Army Corps of Engineers) that has already been established to address the issue of wetland mitigation, particularly for large wetland impacts in the northeast. The group is currently in the process of developing recommendations. The group expects to complete their work and provide their recommendations by spring 2013. However, some general initiatives have been identified. BWSR recommends pursuing these and other initiatives that are identified by the interagency group:
  - 1. Improve available information and options for the siting of wetland mitigation within the watershed of impact.
    - a. Develop interagency guidance summarizing the State and Federal criteria for evaluating project proposals, particularly the adequacy of potential mitigation sites.
    - b. Explore the potential for targeting broader, non-traditional options for mitigation (improving and protecting trout streams or adjacent upland habitat, etc.) within northeast watersheds.
    - c. Review the requirements of other regulatory programs with relevance to wetland function and explore the potential for mitigating some wetland functions within the watershed (e.g. water quality), while allowing others to be replaced outside the watershed (wildlife habitat, floodwater retention, etc)
    - d. Pursue funding to establish an electronic database to develop a running inventory of potential wetland mitigation sites that have been considered (by project proponents and regulatory agencies) in the northeast, including relevant information on each. This inventory will help applicants in their search for wetland mitigation sites and agencies in determining the availability of potential mitigation sites within specific watersheds.
  - 2. Develop recommendations for procedural/administrative mechanisms to target and bring about mitigation in priority watersheds when mitigation is not reasonably available within the watershed of the wetland impact. The mechanism may include an in-lieu fee program or other options, as well as procedures for identifying priority watersheds.

## **Issue #6: Strategic Use of Funding Sources to Achieve Continued Restoration of Drained Wetlands.**

### **A. Background.**

There are currently a wide-array of sources available to finance wetland restorations. A considerable amount of coordination currently occurs among the entities that manage conservation funds, but are there additional opportunities to achieve maximum value and multiple benefits of these efforts?

Funding opportunities include the following:

- Federal
  - US Fish and Wildlife Service
  - Farm Bill Programs: Wetland Reserve Program/Conservation Reserve Program/Environmental Quality Incentives Program
  - US Army Corps of Engineers
  - US Environmental Protection Agency
  
- State
  - Game and Fish Fund.
  - Bonding.
  - Lessard-Sams Outdoor Heritage Committee.
  - Legislative-Citizens Commission on Minnesota Resources.
  - Clean Water Fund.
  - Parks and Trails Fund.
  - Mitigation funds from public wetland impacts.
  - Fines and judgments.
  
- Local Government
  - Watershed Restoration Management.
  - Parks and Recreation.
  
- Private Sources
  - Non-Governmental Organizations
  - Landowner Cash and In-Kind.
  - Corporate Sustainability Programs.
  - Mitigation required for private sector wetland impacts.

Stakeholders were presented with the following questions to facilitate discussion:

- What should be the goals of wetland restoration programs?
- Do we need additional plans, methods, or tools to further coordination and achieve multiple benefits?
  - Examples of current plans - Wetland Restoration Strategy, Duck Plan, Prairie Plan, Mn Wetland Conservation Plan, Mn State Conservation Strategy, Comprehensive Wetland Plans, Local Water Management Plans, TMDL Implementation Plans, etc.
- Do we need to improve our capacity to monetize multiple benefits?
  - Water retention, water quality, habitat, etc.
- If we use water quality money – do we expect/tolerate different wetland management conditions. i.e. more bounce in restored wetlands?
- Are current funding levels adequate and sufficiently stable?
- Is funding being coordinated and targeted to maximize public benefits?

- Are the existing array of programs getting the desired results in regards to wetland restorations? If not, what are the impediments to strategic wetland restorations?

## **B. What did we hear?**

The stakeholder input meetings reflected greater interest in addressing the regulatory side of wetlands policy, rather than voluntary conservation. Input on strategic restoration was relatively limited, and often the discussion became interwoven with the discussion on Issue #5: Costs and Benefits of Targeting Mitigation to a Specific Watershed.

- A number of stakeholders expressed considerable interest in the need for continued wetland restoration in western and southern Minnesota.
- BWSR and its partners should continue to work with farmers and landowners on strategic targeting of wetland restorations.
- There is the potential for competition between conservation and regulatory programs over restorable wetlands.
- Permitting delays which increase the costs of restoration projects.
- Township officials have expressed concerns about impacts on tax base, local economic opportunity and weed management on public lands.
- No additional public land acquisition.
- The State should give tax breaks or credits for the voluntary restoration of wetlands.
- Metro watershed districts have good planning processes in place to identify where wetland conservation and restoration is most appropriate and valuable.
- Overloaded wetlands can be a source of phosphorous, this negative water quality impact should be considered.
- Existing wetlands should be enhanced and better managed.
- Flood damage reduction projects can also be managed to achieve wetland function.

## **C. What solutions were suggested?**

- i. Develop a state wide wetlands vision, like the Prairie Plan.
- ii. Conduct fiscal impact studies on public land and easement acquisition prior to completing those transactions.
- iii. Limit county, township and watershed regulations and policies that inhibit landowners from working with conservation agencies to restore wetlands.
- iv. Targeting should focus on areas in southwest Minnesota where there are old tile drainage systems that are not really adequate for agronomic purposes, but viewers reports have not indicated that there is a sufficient benefit to improving the public drainage system.
- v. Evaluate where drainage law structure (viewing and benefits determination) negatively impacts the ability to restore wetlands.
- vi. Create linkages between voluntary and regulatory programs to more effectively use mitigation funding.

- vii. Support the Prairie Pothole Regional Integrated Landscape Conservation Strategy, a multi-stakeholder effort intended to help develop priorities and tools to optimize wetland restoration sites based on water quality, water retention and wildlife habitat.

#### **D. Recommendations.**

- i. Continue efforts, particularly collaborative efforts such as the Prairie Pothole Regional Integrated Landscape Conservation Strategy, to improve science and decision tools that refine the ability to target wetland restorations to their highest value locations.
- ii. There are limited resources available to support wetland management on private lands, if those wetlands are not enrolled in a conservation program. Assess gaps in those programs and support funding initiatives to improve and maintain the quality of these wetlands.
- iii. Evaluate if current payment rates available under conservation programs are sufficient to attract landowner interest in participating in wetland restoration.
- iv. Work with conservation partners to evaluate how voluntary efforts can be enhanced with wetland bank funding so that there is an opportunity to leverage mitigation funding while continuing to avoid subsidizing mitigation with conservation dollars.
- v. Support local government planning in the metropolitan area to support more strategic wetland management.

### **Other Issues.**

The discussion throughout these stakeholder processes was focused on the six specific issues included in the Executive Order. However, comment and discussion on any wetlands issue was welcome and accepted. Each of the meeting summaries includes a listing of issues that did not fit one of these six issue categories. The “other issues” received at one of the meetings, or submitted separately in writing have been organized (more information is available on the BWSR website) as listed below.

- Agriculture/Drainage
- Economic Impacts
- Enforcement and Violations
- Executive Order 12-04 Process Issues
- Geographic Differences
- Management of Conservation Lands
- Measuring Outcomes
- Miscellaneous Issues
- Program Consistency Over Time
- Program Funding
- Requirements and Standards

- Transportation
- Water Quality
- Wetland Data and No Net Loss
- Wetland Resources Needing More Consideration

Two issues warrant additional consideration: (1) Wetland Data and No Net Loss; and (2) Agricultural Drainage.

Issue: Wetland Data and No Net Loss.

This issue came up at virtually all of the meetings, and may be a barrier to gaining additional agreement on wetland issues. The questions range from the basic – What is no net loss? To the complex – No net loss should take into account functions and values, without getting caught up in the acre to acre. Is no net loss measured statewide or locally? Is there a baseline year to measure no net loss? Do regulatory and conservation activities count toward no net loss? It would be helpful to provide clarity on what no net loss is and how it should be measured. Recommendations on this topic are outlined below.

**No Net Loss Recommendations:**

- i. Clarify the state policy goal of no net loss applies to state wetland protection programs on a statewide basis.
  - a. The statewide no net loss goal should recognize that there are areas, such as northeast Minnesota, that can tolerate some loss of wetlands, while other areas of the state already face a significant deficit of wetland resources.
  - b. Improve wetland accounting within WCA , and possibly other State wetland protection programs, by periodically providing available data on:
    1. Impacts subject to replacement;
    2. Mitigation occurring through wetland replacement; and
    3. Reported exempt impacts; and
    4. Provide a simplified web-based tool to facilitate reporting exempt impacts.
  - c. Continue to support DNR/MPCA efforts to survey and track wetland quantity and quality trends.
- ii. Clarify that voluntary restoration activities are intended to restore wetlands at a level above and beyond the no net loss goal of State wetland protection programs.

Issue: Agricultural Drainage.

Issues relating to agricultural drainage received limited attention during the stakeholder meetings. This has more to do with the structure of the Executive Order, than with the potential impacts that agriculture drainage may have on Minnesota wetland resources. This is evidenced by the comments were received that point to the need to direct attention to these issues.

Specifically, drainage improvements and installation of subsurface drain tile has increased significantly over the past several years. This activity includes new drain tile as well as replacement of old clay tiles. This activity does not necessarily result in the drainage of wetlands, but may affect wetlands.

Impacts to wetlands may include draining of seasonal and temporary wetlands, many of which are exempt under WCA. Unmanaged tile systems can broadly affect local hydrology which can diminish or eliminate wetlands, even if not installed directly in wetlands. In addition, agricultural drainage may affect wetlands through hydrologic fluctuations (diverting flow or bounce in downstream basins) and nutrient input. Recommendations to address these issues are provided below.

**Agricultural Drainage Recommendations:**

- i. Assess the extent to which wetlands on agricultural lands are being lost or degraded and that are not subject to compensation requirements under existing programs.
- ii. BWSR should evaluate the following:
  - a. The potential for incentives and funding for landowners to install managed drainage systems that can maintain the benefits of temporary/seasonal wetlands and to install other BMPs to minimize impacts to adjacent wetlands and waterways.
  - b. The mechanisms for landowners and local drainage authorities to collaborate on drainage projects to improve water quality via the state drainage code.

### III. Next Steps

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BWSR and cooperating State agencies will need to get further direction from the Governor's Office following completion of the report. However, in anticipation of this further directive, BWSR and the cooperating state agencies will begin to develop an implementation plan soon after the report is delivered to Governor Dayton.

The implementation of these recommendations will require a combination of interagency agreements between state and federal agencies, statutory, rule, policy, and guidance changes. The further development of these recommendations will require the participation of many, if not all, of the same federal and state agencies, local governments and stakeholders that participated in this Executive Order process.

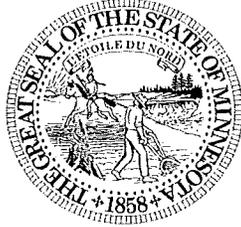
The effort to turn these recommendations into implementable actions will require a significant investment of staff time by the participating agencies. Further, it is expected that additional funding and staffing will be required to pursue most of the recommendations included in this report. In addition, several of the recommendations would likely require the expenditure of funds to properly evaluate identified options and generate specific implementation proposals.

An essential first step is to generate priorities based on the recommendations, which includes direction provided from the Governor's Office. This prioritization will be developed in consultation with agency leaders.

As this work progresses, stakeholders will be kept informed, and be asked to participate as appropriate.

# Appendix A.

## STATE OF MINNESOTA EXECUTIVE DEPARTMENT



**MARK DAYTON**  
**GOVERNOR**

**Executive Order 12-04**

### **Supporting and Strengthening Implementation of the State's Wetlands Policy**

**I, Mark Dayton, Governor of the State of Minnesota,** by virtue of the authority vested in me by the Constitution and applicable statutes, do hereby issue this Executive Order:

**Whereas,** Minnesota Statutes, section 103A.201, subdivision 2(b) states that wetlands of Minnesota provide public value by conserving surface waters, maintaining and improving water quality, preserving wildlife habitat, providing recreational opportunities, reducing runoff, providing for floodwater retention, reducing stream sedimentation, contributing to improved subsurface moisture, helping moderate climatic change, enhancing the natural beauty of the landscape, and are important to comprehensive water management; and

**Whereas,** the same law states that it is in the public interest to achieve no net loss in the quantity, quality, and biological diversity of Minnesota's existing wetlands; increase the quantity, quality, and biological diversity of Minnesota's wetlands by restoring or enhancing diminished or drained wetlands; avoid direct or indirect impacts from activities which destroy or diminish the quantity and biological diversity of wetlands; and replace wetland values where avoidance of activity is not feasible and prudent; and

**Whereas,** wetland conservation and protection responsibilities are shared between federal, state and local agencies and private sector organizations; and,

**Whereas,** wetlands types in Minnesota vary considerably and are distributed quite differently across the State; and,

**Whereas**, wetland protection and enhancement is an integral part of accomplishing the State's clean water and outdoor heritage goals envisioned by the 2008 Legacy Amendment as prescribed in Article XI, Section 15 of Minnesota's Constitution.

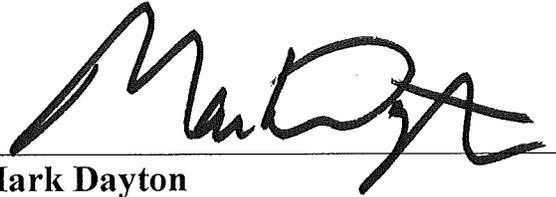
**Now, Therefore**, I hereby order the Board of Water and Soil Resources, in cooperation with the Department of Natural Resources, the Department of Transportation, the Minnesota Pollution Control Agency, the Minnesota Department of Agriculture, and with the invited participation of stakeholders, to undertake the following steps by December 15, 2012, regarding how to maintain No Net Loss of Wetland as a State goal under the Wetland Conservation Act and to further advance the long-term protection and enhancement of Minnesota's wetland resources:

1. Assess potential changes to current policies that will improve wetland conservation in Minnesota in a manner that maintains and restores the integrity Minnesota's wetlands, while recognizing that the ecology, distribution and type of wetland resources vary statewide.
2. Evaluate and develop recommendations to improve current wetland protection, restoration, and mitigation provisions regarding:
  - a. de minimis exemption allowances and flexibility options allowable with Board-approved Comprehensive Wetland Management Plans according to Minnesota Statutes, section 103G.2243;
  - b. alignment of pre-settlement wetland zones on watershed boundaries
  - c. consistent review, approval, and implementation for projects subject to wetland replacement requirements;
  - d. the adequacy of funding mechanisms to cover costs of inspection, monitoring and oversight of wetland bank sites; and
  - e. the costs and benefits of wetland mitigation targeted to specific watershed.
3. Develop recommendations to provide for the continued restoration of drained wetlands using various funding sources to achieve the multiple benefits that wetlands provide for strategic conservation purposes.
4. Identify opportunities to improve coordination of wetland regulatory efforts between state and federal agencies by improving the processes for landowners, permit applicants, local governments and regulators so that greater efficiency and cost-effectiveness are realized.

Other state departments and agencies shall cooperate as requested with the agencies charged with the execution of this Order. The agencies charged with execution of this Order shall use existing information to the greatest extent practicable before generating any new data or analysis.

Under Minnesota Statutes, section 4.035, subdivision 2, this Executive Order is effective 15 days after publication in the State Register and filing with the Secretary of State and shall remain in effect until December 15, 2012.

In Testimony Whereof, I have set my hand on this 3<sup>rd</sup> day of May 2012.



**Mark Dayton**  
Governor

Filed According to Law:



**Mark Ritchie**  
Secretary of State



# Appendix B.

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## List of Stakeholder Organizations

### **Agriculture**

- 1) Minnesota Agricultural Water Resources Center
- 2) Minnesota Agri-Growth Council
- 3) Minnesota Association of Wheat Growers
- 4) Minnesota Corn Growers Association
- 5) Minnesota Farm Bureau Federation
- 6) Minnesota Farmers Union
- 7) Minnesota Soybean Growers Association

### **Business**

- 8) Aggregate Ready-Mix Assoc. of Minnesota
- 9) Builders Association of Minnesota
- 10) Builders Association of the Twin Cities
- 11) Iron Mining Association of Minnesota
- 12) Minnesota Association of Realtors
- 13) Minnesota Chamber of Commerce
- 14) Minnesota Timber Producers Association/Minnesota Forest Industries
- 15) Utilities - Allete Minnesota Power

### **Environment/Conservation**

- 16) Audubon Minnesota
- 17) Fish and Wildlife Legislative Alliance
- 18) Izaak Walton League - Minnesota Division
- 19) Minnesota Center for Environmental Advocacy
- 20) Minnesota Conservation Federation
- 21) Minnesota Ducks Unlimited
- 22) Minnesota Environmental Partnership
- 23) Minnesota Sierra Club - North Star

### **Chapter**

- 24) Minnesota Waterfowl Association
- 25) Pheasants Forever

### **Local Government**

- 26) Association of Minnesota Counties
- 27) League of Minnesota Cities
- 28) Minnesota Inter-County Association
- 29) Minnesota Association of Conservation District Employees
- 30) Minnesota Association of Soil and Water Conservation Districts
- 31) Minnesota Association of County Planning and Zoning Administrators
- 32) Minnesota Association of Townships
- 33) Minnesota Association of Watershed Districts
- 34) Minnesota County Engineers Association
- 35) Minnesota Rural Counties Caucus

### **Other Organizations**

- 36) Minnesota Association of Professional Soil Scientists
- 37) Minnesota Viewers Association
- 38) Wetland Professionals Association

### **Federal Government**

- 39) U.S. Army Corps of Engineers
- 40) U.S. Fish and Wildlife Service
- 41) USDA Natural Resources Conservation Service
- 42) U.S. Environmental Protection Agency

# Appendix C.

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## Meeting Schedule.

1. **Sector Outreach:** BWSR leveraged existing multi-organizational forums and umbrella groups that have a stake in wetlands policy. Targeted discussions that address the issues identified in EO 12-04 were tailored around those sector's perspectives and concerns.
  - a. Agriculture - August 27, 2012  
MN Corn Growers Association, Shakopee, MN
  - b. Agriculture - October 22, 2012  
Mn Farm Bureau, Eagan, Minnesota
  - c. Environment and Conservation - October 15, 2012  
Mn Center for Environmental Advocacy, St. Paul, MN
  - d. Business and Industry - September 24, 2012  
Mn Chamber of Commerce, St. Paul, MN
  - e. Local Government - September 18, 2012  
Association of Minnesota Counties, St. Paul, MN
2. **Regional Outreach:** BWSR convened four regional meetings to invite input from stakeholders. These forums were tailored to draw out different regional perspectives on the issues identified in EO12-04 in the context of the regional economies, wetland resources, and related natural resource or environmental conditions. Forums were held in:
  - a. September 27, 2012  
Blue Earth County Library, Mankato, Minnesota
  - b. October 10, 2012  
Bemidji City Hall, Bemidji, Minnesota
  - c. October 11, 2012  
Minnesota Discovery Center, Chisholm, Minnesota
  - d. October 16, 2012  
Shoreview Community Center, Shoreview, Minnesota

3. **Core Stakeholder Meetings:** BWSR convened two meetings in the Twin Cities of the identified stakeholder groups to develop input and cross interest dialogue regarding wetlands policy in Minnesota.
  - a. September 19, 2012  
Bunker Hills Regional Park, Activity Center' Andover, Minnesota
  - b. October 23, 2012  
Shoreview Community Center, Shoreview, Minnesota



