



## Executive Order 12-04: Supporting and Strengthening Implementation of the State's Wetlands Policy

### *Stakeholder Discussion Issues*

#### Scope of Executive Order

The Executive Order (EO) provides 8 issues to address in cooperation with partner state agencies and invited stakeholders. All stakeholders will have the opportunity to identify issues that they believe should be addressed, even those that are not specifically included in the EO. Two of the issues included in the EO are overarching and should be considered during the discussion of the issues outlined below, these are:

EO 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.

EO 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.

The process outlined above will address the issues that are discussed below.

- Issue #1: De minimus Exemption (EO 2a).
- Issue #2: Alignment of Pre-Settlement Zones on Watershed Boundaries (EO 2b).
- Issue #3: Consistent Review, Approval and Implementation (EO 2c)
- Issue #4: Adequacy of Wetland Bank Program Funding (EO 2d).
- Issue #5: Costs and Benefits of Wetland Mitigation Targeted to Specific Watershed (EO 2e).
- Issue #6: Strategic Use of Funding Sources to Achieve Continued Restoration of Drained Wetlands (EO 3)

#### Issue #1: De minimus Exemption (EO 2a).

The de minimus exemption (Minn. Stat. 103G.2241, subd. 9; Minn. Rule 8420.0420, subp. 8) is structurally complex making it a challenge to properly apply. Different amounts of exempt wetland impacts are allowed depending on the presettlement wetland area (or 11-county metro area), wetland type, and relationship to several shoreland zones. Application is further complicated by restrictions on cumulative use of this exemption on an individual wetland. In addition, Minn. Stat. 103G.2243 and Minn. Rule 8420.0830, subp. 4. F. allows flexibility in the application of the exemptions under a Local Comprehensive Wetland Protection and Management Plan.

#### **Stakeholder Discussion Issues:**

- What is your impression on how de minimus impacts contribute to loss/net loss of wetlands?
- Should different de minimus amounts apply to different wetland types?
- Should different de minimus amounts apply to different geographic areas?
  - Pre-settlement wetland areas – (a) greater than 80%; (b) between 50 % and 80%; and (c) less than 50%.
  - 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 minimus enhance compliance?
- What kind of flexibility would make sense under a Local Comprehensive Wetland Protection and Management Plan?

Issue #2: Alignment of Pre-Settlement Zones on Watershed Boundaries (EO 2b).

Presettlement wetland areas were established along county boundaries in State law when WCA was enacted in 1991. Presettlement wetland areas are applicable to:

- (1) determining allowable wetland impacts under the de minimus exemption;
- (2) determining replacement ratios; and
- (3) in the siting of replacement wetlands.

Environmental and ecological management is increasingly looking to use watershed boundaries. In fact, the Wetland Bank Service Areas (Minn. Rule 8420.0522, subp. 7) that were established in the 2009 rule are watershed based. However, these areas do not follow the presettlement wetland areas.

**Stakeholder Discussion Issues:**

- 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 it 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%; is also partially in the 11-county metropolitan area for purposes of the de minimus exemption.
  - Should Chisago and Washington Counties be treated as part of the less than 50% area?
  - Should the watershed be shifted to one region 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

Issue #3: Consistent Review, Approval and Implementation (EO 2c)

Regulatory simplification and coordination has been an issue with water resources 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 the more significant requirements.

There are currently several separate efforts that are looking to ways 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.

**Stakeholder Discussion Issues:**

- 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 their 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.

Issue #4: Adequacy of Wetland Bank Program Funding (EO 2d).

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 inspect wetland banks, including the easement conditions, after the required monitoring period associated with bank establishment, generally every five years;
- Manage wetland bank accounting, deposits, withdrawals, transfers, etc.;
- Collect 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. Regarding wetland bank fees, BWSR collects this fee at the time of wetland bank establishment or transactions. This fee generally operates similar to the sales tax and generates approximately \$230,000 in revenue annually that is used to support wetland banking responsibilities.

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

- (1) Stable funding for the costs of long-term monitoring, especially as the number of bank sites grows; and
- (2) Funding for any necessary maintenance or management that is required at bank sites, such as to a water control structure.

**Stakeholder Discussion Issues:**

- 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 innovative 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 deal and the benefits 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 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?

Issue #5: Costs and Benefits of Wetland Mitigation Targeted to Specific Watershed (EO 2e).

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 incentivizes replacement close to the impact site by increasing the replacement ratio, as follows:

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

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 with Barr Engineering 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 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-Corps of Engineers staff team have begun working to addressing 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 issue #5. As this work progresses, the stakeholders for this EO process will be kept informed.

**Stakeholder Discussion Issues:**

- A fundamental premise is that you first look for credits 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 secure credits from the greater than 80% area?
- Should replacement for impacts that occur in the greater than 80% area be encouraged to seek credits in the less than 50% area?
- If so, how could these 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?

Issue #6: Strategic Use of Funding Sources to Achieve Continued Restoration of Drained Wetlands (EO 3)

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
- 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 wetlands impacts.
  - Fines and judgments.
- Local Government
  - Storm Water Management.
  - Parks and Recreation.
- Private Sources
  - Non-Governmental Organizations
  - Landowner Cash and In-Kind.
  - Corporate Sustainability Programs.

**Stakeholder Discussion Issues:**

- 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, 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?