

Minnesota Board of Water and Soil Resources. Minutes.

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August 20, 2018

Minnesota Board of Water & Soil Resources

DATE: January 16, 2007

TO: Board of Water and Soil Resources Members, Advisors, and Staff

FROM: Doug Thomas, Acting Executive Director

SUBJECT: January 24, 2007, Board Meeting Notice

The Board of Water and Soil Resources (BWSR) will meet on Wednesday, January 24, 2007, beginning at 9:00 a.m. The meeting will be held in the second floor conference room, at 520 Lafayette Road North, in St. Paul. Parking is available in the lot directly in front of the building (use hooded parking areas).

The following information pertains to agenda items:

COMMITTEE RECOMMENDATIONS

METRO WATER PLANNING COMMITTEE

1. **Brown's Creek Watershed District, Watershed Management Plan** – The Watershed Management Plan was filed with the Board on December 4, 2006. Highlights of the plan and the planning process are further described in the attached draft Order. The District relied heavily on Citizen and Technical Advisory Committees to obtain agency and citizen input early in the planning process to provide direction and develop Plan policies and goals. Comments from the formal review period were relatively limited due to early agency involvement, and were satisfactorily addressed by the District. The Metro Water Planning Committee unanimously recommends the Plan be approved per the attached draft Order. ***DECISION ITEM***

2. **South Washington Watershed District, Complaint of Failure to Implement** – On August 17, 2006, the Board received a complaint that the South Washington Watershed District (SWWD) was failing to implement its 1997 Watershed Management Plan. Filing of the complaint resulted in a staff investigation. The results of this investigation were documented in a letter dated November 29, 2006, from BWSR's Executive Director to the complainant. The complaint, the 11/29/06 letter, and Metro Water Planning Committee Overview are attached. The Metro Water Planning Committee met on January 9, 2006, to review and discuss the complaint. The Committee unanimously recommends that the full Board concur with

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the staff recommendation to address the issue in the final draft of the 2007 SWWD Plan update (expected this summer) and find the SWWD to be implementing its 1997 Watershed Management Plan. ***DECISION ITEM***

3. **Mississippi Watershed Management Organization Major Plan Amendment** – A Major Amendment to the Watershed Management Plan was filed with the Board on December 7, 2006. The attached draft Order contains a summary of the planning process, the reviewing agencies' comments, and highlights of the plan. Very few comments were received during the review process that resulted in revisions to the Plan Amendment. The Metro Water Planning Committee unanimously recommends the amendment be approved per the attached draft order. ***DECISION ITEM***

4. **Nine Mile Creek Watershed District, Watershed Management Plan** – The Watershed Management Plan was filed with the Board on November 28, 2006. The attached draft Order contains a summary of the planning process, the reviewing agencies' comments, and highlights of the plan. Relatively few formal comments were received during the review process in part due to the District's aggressive approach to acquire early citizens', muncipalities', and state agencies' input. The Metro Water Planning Committee voted 4-0, with Committee Member Tolliver abstaining, to recommend the Plan be approved per the attached draft Order. ***DECISION ITEM***

NORTHERN WATER PLANNING COMMITTEE

1. **Hubbard County Comprehensive Local Water Management Plan** – Hubbard County submitted their Revised Local Water Management Plan for final state review and comment. The Northern Water Planning Committee met January 10th after the state agencies comment period ended. The Committee's recommendations or requirements will be presented at the regular board meeting for action. ***DECISION ITEM***

2. **Mille Lacs County Local Water Management Plan** – The Northern Water Planning Committee met on January 10th to review the Mille Lacs County Water Plan. The priority concerns as identified in the LWMP are: the cumulative effects of development on surface and groundwater, and the development of TMDLs for impaired waters in Mille Lacs. The Plan will run from January 1, 2007 through December 31, 2016 with a 5-year revision. The Northern Water Planning Committee recommended approval without additional comment. ***DECISION ITEM***

SOUTHERN WATER PLANNING COMMITTEE

1. **Steele County Local Water Management Plan Update** – Steele County submitted their Local Water Management Plan Update, a record of the public hearing, and copies of all written comments pertaining to the Update to the Board for final State

review on November 2, 2006. On January 10, 2007, the Southern Water Planning Committee reviewed the recommendations of the state review agencies regarding final approval of the Steele County Local Water Management Plan Update. The Southern Water Planning Committee recommends approval. The Findings of Fact, Conclusions, and Order are drafted for the full Board's review and action. ***DECISION ITEM***

2. **Wabasha County Priority Concerns Scoping Document -** Wabasha County, as part of updating their Local Water Management Plan, submitted the Priority Concerns Scoping Document for state review and comment. The Southern Water Planning Committee met January 10, 2007, after the state agency review period ended. The Committee's recommendation for the content of the final plan is drafted for the full Board review and action. The state's expectations for the final plan must be sent to Wabasha County. ***DECISION ITEM***

NEW BUSINESS

1. **Public Hearing on Petition for Enlargement and Increase Number of Managers of Carnelian-Marine Watershed District** - Washington County filed a petition with the Board on December 22, 2006 to enlarge the Carnelian-Marine Watershed District (District) and to increase the number of managers. Washington County is qualified to file the petition because Washington County contains all of the area in both the current and proposed District. The proposed area to be added to the District includes the Marine on St. Croix Watershed Management Organization (WMO) and other areas that are not presently covered by a watershed management plan. Watershed management planning is required for all areas in the seven county metro area. Washington County seeks the proposed action based on their Water Governance Study. Washington County has been working on this for a number of years and has built strong support in the affected area for the proposed action. Washington County filed a similar petition with the Board six years ago that was denied because the Marine on St. Croix WMO existed and would not dissolve. Case law does not support a watershed district being expanded into an area covered by a WMO. Now the Marine on St. Croix WMO member communities have passed resolutions to dissolve the WMO contingent on the Board approving the proposed action. The Board's Metro Water Planning Committee would preside over a public hearing. Staff find the petition sufficient and have coordinated with the pertinent parties and facilities such that a public hearing is recommended to be set per the attached draft Order. ***DECISION ITEM***

2. **WCA Appeal of a Wetland Boundary and Replacement Plan Decision, Rice Creek Watershed District, File 05-1 –** An appeal of a wetland boundary and replacement plan decision by the Rice Creek Watershed District (District) was filed with the Board on January 13, 2005, by a member of the Technical Evaluation Panel

(TEP), who is staff of the Board. The replacement plan was first approved by the District on May 26, 2004. This approval was appealed and the Board remanded the matter back to the District with conditions. The conditions included review by an expanded TEP with the inclusion of additional experts and submission of a complete replacement plan application that would be noticed to the TEP. Under remand, on December 15, 2004, the District made a decision to reaffirm its previous decision. This decision was against the TEP recommendation and the District's staff recommendation. The project involves wetland filling based on a rough grading plan.

The area subject to the replacement plan decision falls within the District's Anoka County Ditch 53-62 Comprehensive Wetland Management Plan (CWMP). There was considerable controversy surrounding the Board's review, and ultimate approval, of the District's CWMP, especially regarding the Board's subsequent oversight after its approval. As a result, the Board required specific changes to the draft CWMP before it was approved.

The appeal was accepted on February 7, 2005. Pre-hearing conferences were held on June 7 and June 21, 2005. Settlement was explored at the pre-hearing conferences and settlement negotiations continued for over a year. The written briefing schedule began in November, 2006 and the Dispute Resolution Committee (DRC) heard oral arguments on December 13, 2006. The DRC continued the hearing on January 11, 2007.

On January 10, 2007, the District withdrew its approval of the wetland delineation for the replacement plan because of the lowering of a culvert in the ditch system. The DRC deliberated over the issue of whether the replacement plan application was sufficient. The Dispute Resolution Committee decided on a three to one vote to recommend remanding the decision of the District to require submittal of a complete replacement plan application following a new wetland delineation per the attached draft Order. ***DECISION ITEM***

3. **Request to Release 12.5 Acres from Perpetual RIM Reserve Conservation Easement 76-15-01-01, Swift County** – see attached. ***DECISION ITEM***

4. '**07 Non Point Engineering Assistance (NPEA) Challenge Grant** - The NPEA Challenge Grant is a competitive opportunity for SWCD NPEA Joint Powers Boards to receive needed supplemental funding for landowners implementing high priority conservation practices. The Cost Share Committee is submitting their allocation recommendation. See attached. ***DECISION ITEM***

5. **Invasive Species Overview** - Jay Rendall, DNR Invasive Species Program Coordinator, will give an overview of invasive species in Minnesota. The Department of Natural Resources (DNR) and Minnesota Department of Agriculture (MDA) are leading the effort to develop a state plan to effectively manage invasive species. The BWSR is a participatory agency in the state plan.

   Background Information - In its efforts to restore wetlands through various programs, the BWSR staff contend with invasive species on most projects. Some of the species that pose a threat to wetland restoration and wetland health are narrow-leaved cattail and hybrid cattail (shallow water zones), reed canary grass and purple loosestrife (wetland fringes), Canada thistle, bull thistle, musk thistle, leafy spurge, spotted knapweed, tansy and wild parsnip (upland buffers). The major problems caused by invasive species are that they invade areas, form monocultures, decrease native species biodiversity and degrade wildlife habitat. ***INFORMATION ITEM***

If you have any questions regarding the agenda, please feel free to give me a call at 651-297-5617. The meeting will adjourn about 12:30 p.m. I look forward to seeing you on January 24th!

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BOARD OF WATER AND SOIL RESOURCES
520 LAFAYETTE ROAD NORTH
2nd FLOOR CONFERENCE ROOM
ST. PAUL, MINNESOTA 55155
WEDNESDAY, JANUARY 24, 2007

PRELIMINARY AGENDA

9:00 AM CALL MEETING TO ORDER

PLEDGE OF ALLEGIANCE

ADOPT AGENDA

MINUTES OF DECEMBER 20, 2006

OPEN MIKE (10-minute agenda time, two-minute limit/person)

REPORTS

- Chair – Randy Kramer
- Executive Director – John Jaschke
- Dispute Resolution Committee – Randy Kramer
- Wetlands Committee – LuAnn Tolliver
- Cost-Share/Soil Conservation Committee – Louise Smallidge
- Education and Public Relations Committee – Kay Cook
- Administrative Advisory Committee – Randy Kramer

COMMITTEE RECOMMENDATIONS

Metro Water Planning Committee

1. Browns Creek Watershed District Watershed Management Plan – *DECISION ITEM*

2. South Washington Watershed District Complaint of Failure to Implement – *DECISION ITEM*

3. Mississippi Watershed Management Organization Major Plan Amendment – *DECISION ITEM*

4. Nine Mile Creek Watershed District, Watershed Management Plan – *DECISION ITEM*

Northern Water Planning Committee

1. Hubbard County Comprehensive Local Water Management Plan – *DECISION ITEM*

2. Mille Lacs County Local Water Management Plan – *DECISION ITEM*

Southern Water Planning Committee

1. Steele County Local Water Management Plan Update – *DECISION ITEM*

2. Wabasha County Priority Concerns Scoping Document – *DECISION ITEM*

NEW BUSINESS

1. Public Hearing on Petition for Enlargement and Increase Number of Managers of Carnelian-Marine Watershed District – Jim Haertel - *DECISION ITEM*

2. WCA Appeal of a Wetland Boundary and Replacement Plan Decision, Rice Creek Watershed District, File 05-1 Jim Haertel – *DECISION ITEM*

3. Request to Release 12.5 Acres from Perpetual RIM Reserve Conservation Easement 76-15-01-01, Swift County – Tim Fredbo – *DECISION ITEM*

4. '07 Non-Point Engineering Assistance Challenge Grant – Wayne Zellmer – *DECISION ITEM*

5. Invasive Species Overview – Jay Rendall, DNR Invasive Species Program Coordinator – *INFORMATION ITEM*

6. Budget Update – John Jaschke – *INFORMATION ITEM*

AGENCY REPORTS

- Minnesota Department of Agriculture – Joe Martin
- Minnesota Department of Health – Dan Wilson
- Minnesota Department of Natural Resources – Gene Merriam
- Minnesota Extension Service – Jim Anderson
- Minnesota Pollution Control Agency – Lisa Thorvig

ADVISORY COMMENTS

- Association of Minnesota Counties (AMC) – Annalee Garletz
- Minnesota Association of Conservation District Employees (MACDE) – Rick Reimer
- Minnesota Association of Soil and Water Conservation Districts (MASWCD) – LeAnn Buck
- Minnesota Association of Townships (MAT) – Sandy Hooker
- Minnesota Association of Watershed Districts (MAWD) – Ray Bohn
- Natural Resources Conservation Service (NRCS) – Tim Koehler
- Others

UPCOMING MEETINGS

- Next Board Meeting, February 28, 2007, St. Paul

12:30 PM **ADJOURN**

Dispute Resolution Report
January 11, 2007
by: Jim Haertel

There are presently 24 appeals pending. All of the appeals involve WCA except File 05-24. There have been three new appeals filed since the last report dated December 7, 2006.

File 06-43. This is a new appeal of a restoration order in Morrison County. The appeal involves the placement of fill in wetland near a lake. The appeal has been placed in abeyance and the restoration order has been stayed pending field review by the Technical Evaluation Panel this spring.

File 06-42. This is a new appeal of a restoration order in Mille Lacs County. The appeal involves the excavation and placement of fill in wetland, some being associated with a cattle crossing. No decision has been made on the appeal.

File 06-41. This is a new appeal of a restoration order in Otter Tail County. The appeal involves the placement of fill in wetland near a lake. No decision has been made on the appeal.

File 06-39. This is a new appeal of a restoration order in Mille Lacs County. The appeal regards the placement of fill in wetlands associated with construction of a driveway. No decision has been made on the appeal.

File 06-28. This is an appeal of a restoration order in St. Louis County. The appeal regards the placement of fill in Type 7 wetland associated with construction of a road. The appeal has been remanded for TEP review of a wetland delineation and measurement of the wetland fill areas.

File 06-27. This is an appeal of a replacement plan decision in Otter Tail County. A permanent road was constructed in Type 6/7 wetland with a portion of it in the shoreland zone. A Restoration Order was issued and a replacement plan application was submitted to retain the road. An LGU staff individual denied the replacement plan. The appeal has been remanded for a public hearing at the local level.

File 06-26. This is an appeal of a wetland exemption determination in Cass County. The LGU approved the wetland exemption. The TEP recommended the exemption not be approved. The activity involves the placement of drain tile in a Type 2 wetland that was previously hayed and is now a sod farm. The appeal has been accepted and a pre-hearing has been scheduled.

File 06-23. This is an appeal of a replacement plan decision in Kanabec County. The LGU denied the wetland replacement plan application. A previous denial of the same replacement plan application had been appealed, the appeal was remanded for a hearing, and now the current denial has been appealed. The appeal has been placed in abeyance pending the outcome of a lawsuit between the landowner and the county. The lawsuit concerns the county's possible noncompliance with the 60-day rule. The county prevailed in district court, however it appears the decision will be appealed to the Court of Appeals.

File 06-20. This is an appeal of a restoration order in Carlton County. The appeal regards filling and grading in Type 2 and Type 6 wetlands for construction of an airplane hangar, airstrip extension and taxiway. The restoration order has been stayed and the appeal has been placed in abeyance pending TEP review of a wetland delineation and restoration plan.

File 06-17. This is an appeal of a replacement plan decision in the City of Montgomery in LeSueur County. The LGU denied an after-the-fact wetland replacement plan application based on a lack of sufficient reasons why the restoration could not be completed. The appeal has been remanded for further processing at the local level.

File 06-12. This is an appeal of a no-loss decision in Stearns County. It involves the same project and issues as File 06-6. After a restoration order was issued, a no-loss application was submitted by the developer and denied by the LGU. The appeal has been remanded for further technical evaluation.

File 06-6. This is an appeal of a restoration order in Stearns County. At issue are numerous wetlands impacted by filling, sedimentation, reduction of hydrology and lack of Best Management Practices associated with a residential development. The appeal has been denied in part. The Restoration Order has been affirmed in part and has been stayed in part.

File 06-5. This is an appeal of a wetland boundary and type decision in the City of Hermantown in St. Louis County. The appeal concerns the denial of a wetland delineation. There are issues regarding the soils and vegetation in a disturbed area. The area has been disturbed by wetland filling and a cease and desist order has been issued to the developer. The appeal has been remanded for further processing by the LGU.

File 06-4. This is an appeal of a restoration order in Carlton County. At issue is the unauthorized placement of fill in wetland for a roadway. The appeal is in abeyance pending completion of a wetland delineation during the growing season.

File 06-2. This is an appeal of a restoration order in Mille Lacs County. At issue is the unauthorized placement of fill in wetland for construction of a road. Also, unstable steep slopes exist along the edge of the fill in wetland. The appeal is in abeyance pending further technical work during the growing season.

File 06-1. This is an appeal of a replacement plan approval in Itasca County. The appeal contends that sequencing was not followed. The TEP recommended denial on a 3:1 vote. The SWCD approval was on a 3:2 vote. The application sought wetland filling for three outbuildings and lake access. The appeal has been accepted and is in abeyance pending settlement discussions.

File 05-26. This is an appeal of a replacement plan decision in Crow Wing County. The appeal concerns the denial of a wetland replacement plan application. The application was denied because there was no hardship to support approval. Upon inspection it appears a decision was made to deny a variance, however it is likely no WCA decision was made. The appeal has been accepted and is in abeyance pending settlement discussions.

File 05-24. This is an appeal, actually three appeals, of the Bois de Sioux Watershed District compensation to landowners related to a project. The appeal has been held in abeyance pending settlement discussions, was starting to be move forward for a hearing before the DRC, and now is in settlement discussions.

File 05-20. This is an appeal of a replacement plan decision in Cokato, Wright County. The decision approved the filling of a 0.2 acre Type 2 wetland on a residential lot for construction of a residence. There is a question about the alternatives proposed for sequencing. Also, no TEP was held. The appeal has been remanded for a TEP to be held and sequencing to be addressed.

File 05-17. This is an appeal of a replacement plan decision in the City of Holdingford in Stearns County. At issue is the denial of a replacement plan application relating to a residential development. Wetland impacts of 0.7 acres were proposed for construction of a road and multi-use trail. The TEP recommended approval of the application. The LGU denied the application on finding the development could proceed without wetland impacts. The Corps issued a permit for the project. The appeal has been accepted and is in abeyance pending settlement discussions.

File 05-1. This is an appeal of a replacement plan decision by the Rice Creek Watershed District. The District previously made a decision that was appealed which resulted in a remand for an expanded TEP. Now there is an appeal of the decision made under remand since the decision differed from the TEP report. At issue is a wetland delineation and the Comprehensive Wetland Protection and Management Plan that BWSR approved. The appeal has been accepted and pre-hearing conferences were held. The appeal was in abeyance to allow settlement discussions to continue. A briefing and hearing schedule is presently being established.

File 04-26. This is an appeal of a restoration order in Spring Lake Township, Scott County. At issue is the placement of 4,300 feet of fill in a wetland for a driveway. The approved plat showed access to the lot without wetland impacts. The appeal is in abeyance pending a decision on a replacement plan application.

File 04-23. This is an appeal of a forestry exemption decision in Kittson County. Unpermitted fill was placed in a Type 7 wetland for a road. A Cease and Desist Order was issued. Additional filling has recently occurred in violation of the CDO. Corps and DNR violations also exist. The appeal has been accepted and is in abeyance pending completion of a wetland delineation and submittal of a replacement plan application.

File 04-15. This is an appeal of a wetland boundary and type decision in Anoka County. At issue is the decision by the Rice Creek Watershed District to classify a site as effectively drained. Previously a wetland delineation report identified most of the site as wetland. The appeal has been remanded for a technical evaluation panel to meet onsite. The appeal remains in abeyance under the remand.

COMMITTEE RECOMMENDATIONS

Metro Water Planning Committee

1. Browns Creek Watershed District Watershed Management Plan – *DECISION ITEM*

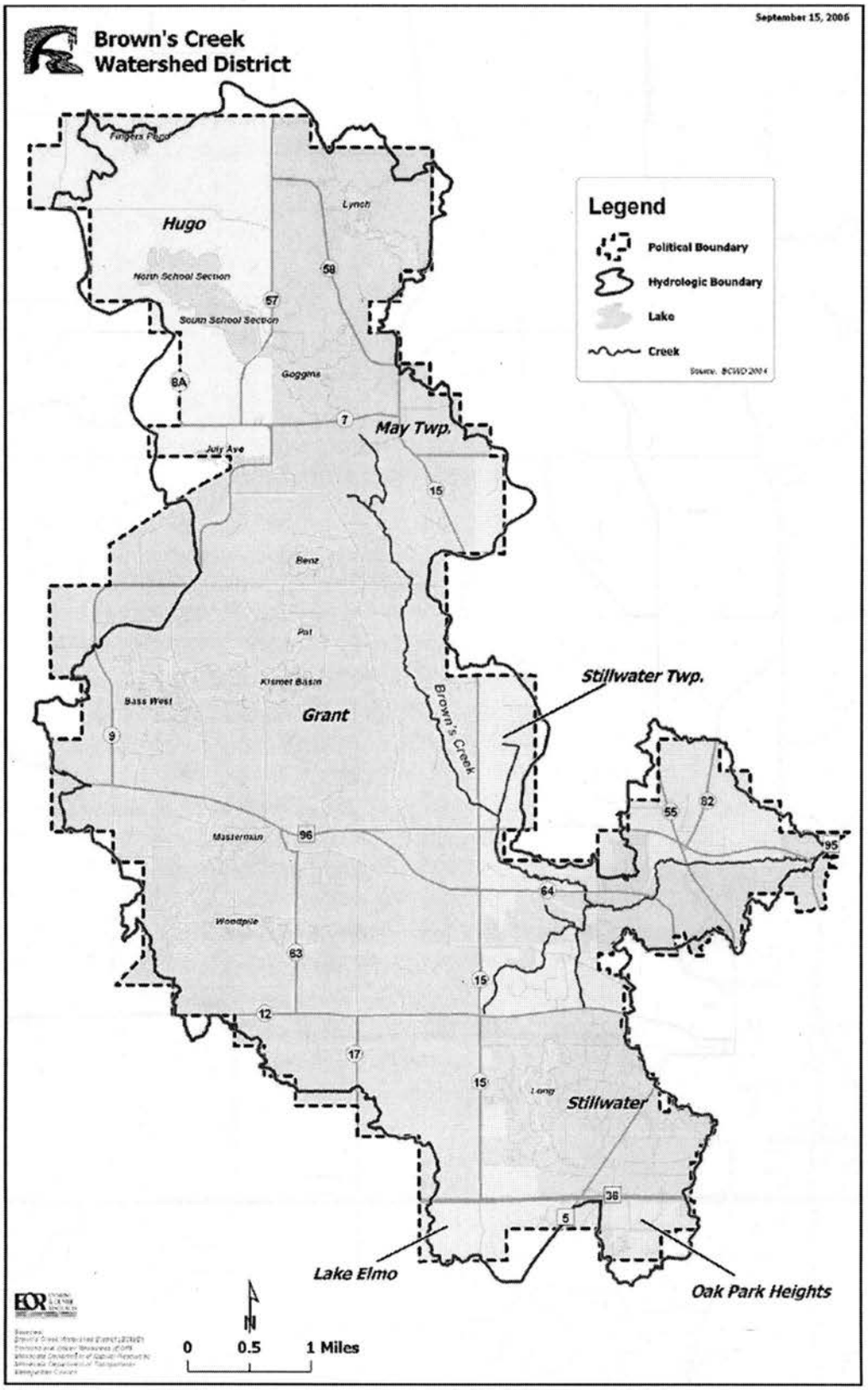
2. South Washington Watershed District Complaint of Failure to Implement – *DECISION ITEM*

3. Mississippi Watershed Management Organization Major Plan Amendment – *DECISION ITEM*

4. Nine Mile Creek Watershed District, Watershed Management Plan – *DECISION ITEM*

Minnesota Board of Water and Soil Resources
January 2007 Metro Subcommittee Meeting

Map and Fiscal Information
Brown's Creek Watershed District Plan 2007 – 2016



Fiscal Context and Implementation.

The table below reveals a decreasing trend with regards to expenditures of BCWD over the past several years of available data, with variations due mainly to expenditures for capital projects. BCWD expenditures appear to be comparable to other outer-ring Metro Watershed Districts. Expenditures for the BCWD implementation program are projected to vary from approximately $347,000 to $928,000 annually during the life of the Plan, with most years roughly in the $500,000 range.

Watershed District	Taxes Payable 2004 (TMV)	Area (sq mi)	Expenditures				
			2001	2002	2003	2004	2005
Browns Creek	1,118,882,500	28	1,035,814	536,531	403,906	320,385	503,935
Capitol Region	12,180,656,400	37	397,354	386,503	577,504	1,327,715	924,848
Carnelian-Marine	517,571,600	43	404,561	447,838	491,103	420,888	
Comfort Lake Forest Lake	1,289,010,500	49	77,716	301,143	206,157	287,058	243,511
Coon Creek	6,763,641,200	96	467,285	601,544	660,523	640,591	486,957
Lower Minnesota River	5,748,966,600	64	427,058	292,621	204,346	318,216	456,166
Minnehaha Creek	28,338,875,675	184	6,086,030	5,270,636	3,343,963	2,436,635	3,212,548
Nine Mile Creek	13,293,860,700	50	1,021,981	950,905	1,015,845	1,484,029	2,413,557
Prior Lake-Spring Lake	1,882,034,700	42	410,171	610,534	732,799	655,410	756,044
Ramsey-Washington Metro	9,197,769,100	53	3,048,986	3,329,310	3,370,862	2,350,399	1,945,645
Rice Creek	13,893,021,700	201	1,319,055	1,692,567	2,589,521	3,041,834	
Riley-Purgatory-Bluff Creek	9,434,538,700	47	480,471	772,593	2,366,737	2,245,286	
South Washington	6,070,592,700	53	2,356,478	2,323,327	5,771,911	1,921,135	1,252,877
Valley Branch	2,681,731,600	64	443,537	526,532	730,992	772,065	211,104

Executive Summary

This Watershed Management Plan is intended to be a ten-year planning document to guide District activities until superseded by adoption and approval of a subsequent plan. The plan identifies ten general issue areas and a number of policies, goals, and implementation items to address the specific concerns within each issue. These issues, policies, and goals were identified through a public and agency input process summarized in Chapter II: Issue Identification.

Through the input of the Citizens Advisory Committee and the Technical Advisory Committee, the BCWD has developed the following as its mission statement:

The Brown's Creek Watershed District works with the community to:

- Preserve and improve the quality of the District's water and natural resources;
- Educate residents about the value of this ecosystem and their potential impacts on its functions and values;
- Find and implement acceptable solutions to water-related issues; and
- Assure that the integrity of the watershed is preserved for future generations.

Land and Water Resource Inventory

A summary of the land, water, and natural resources of the District is given in Chapter III: Land and Water Resource Inventory. Information presented in this chapter of the Plan includes data collected within the BCWD studies and projects as well as other existing data on Brown's Creek, the lakes, the wetlands and the natural resources of the District.

Issue Areas

The ten identified issue areas and a short summary of each issue is given below. The issues are broken down into sub-issue areas and are described in more detail in Chapter IV: Watershed Issues, Policies, and Goals. Chapter IV also identifies the policies, goals and potential implementation items to address each goal.

1. Stormwater Runoff Management

Unless properly managed, impervious surfaces increase runoff rates, decrease the water quality of runoff, and reduce groundwater recharge. Urbanization and land-use changes often cause an increase in imperviousness, compact native soils, and remove existing vegetation. Unless land use changes are properly managed, these activities will increase the rate and volume of stormwater runoff generated in the watershed and will decrease the quality of surface water resources and the quantity of groundwater resources. Existing urbanized areas may already contribute additional runoff volume and increased runoff rates.

2. Erosion Prevention and Sediment Control

Unless properly managed, land-disturbing activities can increase erosion and lead to increased transport of sediment into surface waters. Increased erosion can also cause formation of gullies in areas with unstable soils.

3. Wetland Management

The District's wetland resources are at risk of degradation from land use practices that increase stormwater input, decrease wetland water quality, alter hydrologic pattern, and limit wildlife habitat within and adjacent to wetlands.

4. Lake Management

A number of lakes within the District have been impacted by land use changes that resulted in decreases in water quality and/or changes in water level. Other lakes have not seen dramatic changes in land use, but risk impacts to water quality, water level, fisheries, and recreational use if land use practices are not managed properly.

5. Stream Management

Alterations in land use disrupt the hydrology and ecology of stream ecosystems. For example, increased imperviousness in the contributing drainage area results in inhibited infiltration of rainfall and snowmelt resulting in reduced baseflow, larger and more frequent stormwater discharges, and increased temperature and pollutant loads. These factors contribute to channel enlargement, changes to instream habitat, decreased aquatic diversity and, in general, degrade the quality of the resource.

6. Floodplain Management

The BCWD risks losing flood storage areas through land and basin alterations. The loss of flood storage areas can increase the frequency, elevation, and duration of flooding causing increased impacts to infrastructure, property, and the natural environment.

7. Groundwater Management

Land-altering activities have the potential to impact groundwater resources as well as groundwater dependent natural resources. Without proper land-use and water resource management, the following impacts may occur: reduced groundwater recharge, reduced groundwater quality, alterations to drinking water supply and alterations to the function and value of groundwater dependent natural resources.

8. Education, Outreach, and Stewardship

Successful implementation of the watershed's goals will require the involvement of residents, businesses, and municipalities. These groups will be most interested in active participation in District projects, or in water and natural resource protection in general, if they understand the issues and the benefits of water resource management.

9. Land Conservation

Changes in land use threaten to degrade the quality of water resources and limit wildlife habitat through reductions in the area of land covered with native vegetation, increasing erosion and stormwater runoff, and breaking wildlife habitat into small disconnected areas unable to support the same types of populations.

10. Funding

Funding is necessary to operate the programs and to complete the projects that protect and improve the resources of the Brown's Creek Watershed District.

Implementation

A summary of the implementation program is included in Chapter V. The implementation program discusses funding, regulatory controls and enforcement, and impact on local units of government. Chapter V also lists priorities and estimated costs for each implementation item, identifies potential capital improvements, and summarizes expected District activities by year.

Strategies identified in the implementation plan are intended to serve as a road map for planning purposes. Information presented in the implementation table does not commit the BCWD Board of Managers to completing projects as they are laid out in the table. The Board of Managers has the flexibility to re-evaluate priorities and strategies.

Administration

The BCWD recognizes the need to amend the Plan to reflect changes in proposed land uses, updating of technical data as more accurate site information becomes available, and modifications in goals, policies, standards and implementation procedures which may be required as a result of future legislation or as enforcement or other problems become evident.

Significant changes involving goals, policies, standards, administrative procedures, or capital improvements will require a thorough review process as described in Minnesota Rules 8410.0140 and presented below.

Upon completion and adoption of the Plan and amendments, each municipality must amend an existing Local Water Management Plan to conform to the requirements of the Plan or prepare a new Local Plan which is in conformance with the BCWD Plan. The Local Plan must be submitted to the BCWD for approval within two years of the adoption of the BCWD Plan.

Minnesota Board of Water and Soil Resources
520 Lafayette Road North
St. Paul, Minnesota 55155

In the Matter of the review of the Watershed Management Plan for the **Brown's Creek Watershed District** pursuant to Minnesota Statues Section 103B.231, Subdivision 9

ORDER APPROVING WATERSHED MANAGEMENT PLAN

Whereas, the Board of Managers of the Brown's Creek Watershed District (BCWD) submitted a Watershed Management Plan (Plan) to the Minnesota Board of Water and Soil Resources (Board) pursuant to M.S. Section 103B.231, Subd. 9, and;

Whereas, the Board has completed its review of the Plan;

Now Therefore, the Board hereby makes the following Findings of Fact, Conclusions and Order:

FINDINGS OF FACT

1. **BCWD Establishment.** The Brown's Creek Water Management Organization (BCWMO) was established in the early 1980's as a joint powers agency. In 1990 it prepared and had approved the First Generation Watershed Management Plan for the BCWMO. Member organizations were: City of Stillwater, City of Oak Park Heights, City of Lake Elmo, Township and City of Grant, City of Hugo, Townships of May and Stillwater. This organization met monthly and remained a functional entity until the flooding events of 1995-1996. Failure to implement a comprehensive solution to the local flooding of the Kismet Basin in Grant and the School Section/Goggins Lake area in May Township and the City of Hugo led to the Board to declare the BCWMO to be non-functional and order Washington County to assume the responsibilities in January of 1997. The County in turn assigned the operation of the watershed to the Washington Soil and Water Conservation District and petitioned the Board to form a Brown's Creek Watershed District, which was then established in October of 1997.

2. **Requirement to Plan.** The Metropolitan Surface Water Management Act requires the preparation of a watershed management plan for the subject watershed area which meets the requirements of Minnesota Statutes Sections 103B.201 to 103B.251.

3. **Nature of the Watershed.** The BCWD is located exclusively in Washington County in the east-central portion of the Minneapolis – St. Paul seven county metropolitan area. It is bound by the Valley Branch Watershed District to the south, the Middle St. Croix

Watershed Management Organization to the southeast, the Carnelian Marine Watershed District to the northeast, and the Rice Creek Watershed District to the east. Member communities of the BCWD are the Cities of Grant, Hugo, Lake Elmo, Oak Park Heights, and Stillwater, and May and Stillwater Townships. The entire watershed is approximately 18,843 acres (29.4 square miles) in size. The main feature of this watershed is Brown's Creek, which flows from the upland portions of the watershed southeast to the St. Croix River. Approximately 72 percent of the District flows regularly overland to the St. Croix River. The remaining 28 percent of the watershed is composed of landlocked basins and semi-landlocked basins producing no regular overland flows to the St. Croix River. The watershed contains several land uses and is a developing watershed with a number of significant natural resources.

4. **Plan Development and Review.** Prior to submitting the Plan for formal review, the BCWD solicited input from review agencies and stakeholders through several meetings of both the Technical and Citizen's Advisory Committees. The draft Plan was submitted to BWSR, other state agencies, and local governments for the required 60-day review on May 22, 2006. A public hearing was held on September 11, 2006 and no comments were received. On September 21, 2006 the revised draft Plan was sent to the review agencies for the 45-day review period. Formal comments were relatively limited due to the early involvement of agency staff in the plan development process. The final draft Plan was submitted to BWSR on December 4, 2006.

5. **Local Review.** The BCWD circulated a copy of the draft Plan to local units of government for their review pursuant to Minnesota Statutes Section 103B.231, Subd. 7.

   Washington County. The County recommended additional language encouraging and directing local government units to improve groundwater protection efforts and include groundwater resource information in local plans. The County also recommended that BCWD coordinate with the Middle St. Croix Watershed Management Organization to develop a lake management plan for Lake McKusick in Stillwater. BCWD made the suggested changes to the Plan.

   City of Grant. The City noted that the arrangement with BCWD for permitting within the City has worked well, and requested information regarding wetland buffer width requirements.

6. **Metropolitan Council Review.** Met Council recommended that the prioritization of lake management plan development be based on the development potential of the lake, and noted that the Council also reviews local water management plans under the authority of Minnesota Statute 473. BCWD responded that the development potential of the lakes in the watershed are similar and that prioritization will be based on water quality and availability of long-term data.

7. **Department of Agriculture Review.** MDA did not provide comments on the BCWD Plan.

8. **Department of Health Review.** MDH did not provide comments on the BCWD Plan.

9. **Department of Natural Resources Review.** The DNR recommended that BCWD utilize Minnesota's Comprehensive Wildlife Conservation Strategy in their planning efforts. The DNR also provided BCWD with more accurate Ordinary High Water Level elevations for several lakes and provided a correction to the mapping of public watercourses. The DNR expressed concerns that some of the Plan goals and implementation actions may be too ambitious or extensive with limited staff. BCWD responded that they intend to utilize the Washington County shared educator position to accomplish many of the District's education goals and noted that the District can expend implementation efforts through other means if necessary.

10. **Pollution Control Agency Review.** PCA did not provide comments on the BCWD Plan.

11. **Department of Transportation Review.** DOT had numerous questions and requests for more specificity or clarification. DOT also recommended that BCWD's rules contain different standards and requirements for linear roadway projects than other land uses. BCWD answered DOT's questions, and responded that the rules have applied to all impervious surfaces since their development in 1999 and they have not been an issue for linear projects.

12. **Board Review.** BWSR commented that the Plan must contain specific enough information to provide a foundation for BCWD's rules and to signal the District's intent to its stakeholders, and that the Plan could benefit from more specificity in areas such as water quality standards and wetland protection. BCWD responded by adding a draft Statement of Need and Reasonableness for the proposed Rule changes as an appendix, which included additional and more specific information. BWSR also requested additional language concerning plan administration and permitting and implementation authorities, which was added to the Plan by BCWD. Finally, BWSR supported the annual cycle to review and update the implementation program and recommended a dialog with the South Washington Watershed District who is also planning a similar annual review process.

13. **Plan Summary and Highlights.** The District's Vision Statement is: "The Brown's Creek Watershed District is made up of communities interlaced with natural corridors. These natural corridors improve the function and value of the District's water resources and support a diverse population of plants, wildlife, and fish. The District brings people and the environment together to accommodate development that preserves the connection between surface water and groundwater and enhances the quality of these resources."

    The District's Mission Statement is as follows: "The Brown's Creek Watershed District works with the community to:

    - Preserve and improve the quality of the District's water and natural resources;
    - Educate residents about the value of this ecosystem and advise residents of their potential impacts on the functions and values of the District's water and natural resources;
    - Find and implement acceptable solutions to water-related issues; and
    - Assure that the integrity of the watershed is preserved for future generations."

The issues, policies, goals, and implementation items are clearly linked and will provide excellent direction for the District. Through the Plan development process, the District and its stakeholders identified ten issue areas relevant to the watershed. Each issue is broken down into sub-issue areas with corresponding policies stating the District's intent. The District then identifies specific and measurable goals for each policy with corresponding implementation items identified to accomplish those goals. The ten issue areas for which sub-issues, policies, goals, and implementation items were developed are as follows:

1. Stormwater Runoff Management
2. Erosion Prevention and Sediment Control
3. Wetland Management
4. Lake Management
5. Stream Management
6. Floodplain Management
7. Groundwater Management
8. Education, Outreach, and Stewardship
9. Land Conservation
10. Funding

The highlights of the plan include:

- Water quantity related project implementation and rule development was completed under the last plan, allowing this Plan to shift the focus to water quality maintenance and improvement.

- The Plan utilizes baseline monitoring data to create and implement lake management plans for all lakes in the District, including implementation of the high priority Long Lake management plan.

- BCWD will administer an ongoing Best Management Practices Cost-Share program directed specifically towards individual homeowners, and will develop a land conservation program that will define land protection priorities.

- BCWD will develop a Brown's Creek Stream Corridor Plan which will set specific water quality and habitat goals, and define regulatory and management actions and capital improvements necessary to attain those goals.

- BCWD will utilize the results of its ongoing monitoring program to continually measure the success of the implementation program in reaching the District's goals.

- The Plan provides for a periodic (annual or biennial) review of BCWD's accomplishments, rules, and implementation program by the technical and citizen advisory committees, including an assessment and prioritization of implementation activities. Rules will be revisited every 5 years or as needed.

- BCWD plans to work closely with its member communities to incorporate Plan policies into the local comprehensive plans.

14. **Metro Water Planning Committee Meeting.** On January 9, 2007, the Board's Metro Water Planning Committee and staff met with representatives from the BCWD in St. Paul to review and discuss the Plan. Those in attendance from the Board's Committee were Robert Burandt, Louise Smallidge, LuAnn Toliver, Jim Anderson, and Lisa Thorvig. Board staff in attendance were metro region supervisor Steve Woods and board conservationist Les Lemm. Representatives from the BCWD were Administrator Karen Kill and the District's Water Resources Engineer Lisa Tilman. Board staff recommended approval of the Plan. After discussion, the subcommittee unanimously voted to recommend approval of the Brown's Creek Watershed District 2007 - 2016 Watershed Management Plan to the full Board.

CONCLUSIONS

1. All relevant substantive and procedural requirements of law and rule have been fulfilled.

2. The Board has proper jurisdiction in the matter of approving a Watershed Management Plan for the Brown's Creek Watershed District pursuant to Minnesota Statutes Sections 103B.231, Subd. 9.

3. The Brown's Creek Watershed District Watershed Management Plan attached to this Order defines water and water-related problems within the BCWD boundaries, possible solutions thereto, and an implementation program.

4. The attached Plan is in conformance with the requirements of Minnesota Statutes Sections 103B.201 to 103B.251.

ORDER

The Board hereby approves the attached Plan dated December 4, 2006 as the Watershed Management Plan for the Brown's Creek Watershed District.

Dated at Saint Paul, Minnesota this 24th day of January 2007.

MINNESOTA BOARD OF WATER AND SOIL RESOURCES

BY: Randy Kramer, Chair

Minnesota Board of Water and Soil Resources
January 2007 Metro Subcommittee Meeting

OVERVIEW

South Washington Watershed District Implementation Investigation

Summary

On August 17, 2006, BWSR received a letter from Daniel Belka (attached), a resident of the City of Woodbury and the South Washington Watershed District, requesting that BWSR find the SWWD in failure to implement its watershed management plan. BWSR staff subsequently examined the request and conducted an investigation reviewing available information. This investigation resulted in a November 29, 2006 letter from Ron Harnack to Daniel Belka (attached) stating the findings of the investigation and the BWSR staff recommendation.

Rule Requirements

After receipt of a written complaint by a third party, Minnesota Rule 8410 requires Board staff to "initiate a preliminary investigation of the facts as they appear based on personal observation, review of all relevant documents, and discussions with involved parties." The results of this investigation are used to prepare a report of staff findings to ascertain whether a failure to implement exists. The attached 11/29/06 Harnack letter outlines the staff findings and recommendation. At this point, the Board's options are outlined below in the following excerpt from Minnesota Rule 8410.0180, Determinations of Failure to Implement:

Subp. 4. Board responsibilities.

A. On receipt of the board staff's report and recommendations, the board is required to do any or all of the following:

1) nothing further if the staff's investigation finds that the subject plan is being properly implemented, provided the board concurs;
2) advise board staff to conduct additional fact finding it considers necessary and report back to the board accordingly;
3) order the dispute resolution committee to convene to attempt to negotiate the matter and to advise the board further; or
4) issue findings of fact and conclusions of its investigation advising the affected organizations, county, or counties of the documented failure to implement the subject plan and advise the appropriate unit of government of its responsibility to implement the plan under Minnesota Statutes, section 103B.231, subdivision 3, paragraph (b), within a prescribed period of time.

Staff Recommendation

BWSR Board Conservationist Les Lemm recommends Board concurrence with the recommendation of the 11/29/06 Harnack letter per MN Rule 8410.0180 Subp. 4A (1), finding SWWD to be implementing its plan.

Minnesota Board of Water & Soil Resources

November 29, 2006

Daniel Belka
1556 Clippership Drive
Woodbury, MN 55125

Dear Mr. Belka,

This letter is in regards to your request for determination of failure of the South Washington Watershed District (SWWD) to implement its 1997 Watershed Management Plan (Plan). Specifically, page VI-4 of the plan lists an allowable peak flow rate of 35 cfs from Oakdale and Lake Elmo to Woodbury at I-94. In accordance with Minnesota Rule 8410.0180, my staff has reviewed relevant information (including approximately 20 documents), spoken with involved parties, and briefed me on three separate occasions. Through this staff investigation we have found the SWWD to be implementing its Watershed Management Plan. This matter will be discussed at the next meeting of our Metro Water Planning Review Committee, to which I am recommending no further action by our Board.

From past experience and annual reports filed by SWWD, we know that they are an active Watershed District. As you requested, our review was focused on specific activities relating to Wilmes Lake. You have done an excellent job of documenting what has been an evolving understanding of the hydrology of this sub-watershed.

Based on information provided to my staff, the 35 cfs rate cited was based on modeling activities that were part of the 1979 Woodbury Surface Water Plan, which was the best information available at that time. However, we understand that the SWWD has not been able to replicate that modeling effort. The 1997 Plan acknowledges the 35 cfs number may not be appropriate by indicating it "may be modified in the future during further analysis when more information is available." Your letter cites three different studies on the area, including the recent Stormwater Modeling Report completed by HDR Engineering, Inc. (HDR Report) for the Wilmes Lake Watershed, which includes an update to the current SWWD drainage model and options to reduce high water elevations during flood events. WSB & Associates, Inc. also recently completed an independent evaluation of the HDR Report for the City of Woodbury, which will be reviewed at the December 13th City Council meeting.

We are aware of communication between the City of Woodbury and SWWD concerning the October 2005 rainfall event and the Wilmes Lake sub-watershed. The City of Woodbury is also currently compiling and evaluating non-structural alternatives in addition to or complementing those identified in the HDR Report. In our conversations with Watershed District, City, and County staff, it is apparent that they are not only aware of the historical inaccuracy of the old Plan, but are reviewing the situation and exploring potential remedial options.

We understand the questions you raised regarding the specific model parameters and assumptions used by SWWD for the Wilmes Lake watershed. Watershed modeling is not an exact science, and technical disagreements on model details are not uncommon. Questions regarding specific model parameters are

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Suite 234
Bemidji, MN 56601
phone (218) 755-4235
fax (218) 755-4201

Brainerd
1601 Minnesota Drive
Brainerd, MN 56401
phone (218) 828-2383
fax (218) 828-6036

Duluth
394 S Lake Avenue
Room 403
Duluth, MN 55802
phone (218) 723-4752
fax (218) 723-4794

Fergus Falls
1004 Frontier Trail
Fergus Falls, MN 56537
phone (218) 736-5445
fax (218) 736-7215

Marshall
1400 E Lyon Street
Box 267
Marshall, MN 56258
phone (507) 537-6060
fax (507) 537-6368

New Ulm
261 Highway 15 S.
New Ulm, MN 56073
phone (507) 359-6074
fax (507) 359-6018

Rochester
2300 Silver Creek
Road N.E
Rochester, MN 55906
phone (507) 281-7797
fax (507) 285-7144

Saint Paul
520 Lafayette Road N.
Saint Paul, MN 55155
phone (651) 296-3767
fax (651) 297-5615

best addressed through the planning process and peer review of modeling assumptions by City and Watershed engineers and other technical staff.

Based on our review of the matter, the specific issue you raised does not rise to the threshold of non-implementation of the SWWD Plan. While the actual 35 cfs rate was not met, SWWD has acknowledged it may be an inappropriate number and is taking steps to address the issue. Additionally, while the 35 cfs rate was the focus of your complaint, we understand the ultimate concern of area residents is the High Water Level elevation of Wilmes Lake, and SWWD and the City of Woodbury are actively working towards a solution to address the High Water Level and reduce potential flood damages. This is a complex issue and as such, it is important that any potential actions be based on accurate information. It deserves continued attention by SWWD, and the best option is for the local governments to continue to work together to provide a long-term solution favorable to the cities, landowners, taxpayers, and downstream users.

The best opportunity to influence SWWD activities is through public and agency input during the current Watershed Management Plan review process. This is the time for local stakeholders to document their concerns relating to Wilmes Lake as we move forward. I have instructed our staff to remain engaged in this issue as the SWWD Plan progresses through the review process.

The current version of the draft plan does identify potential flooding risks and property damage in the Wilmes Lake drainage area as a continuing concern. While the current draft of the Plan only references it, we understand the SWWD intends to pursue the recommendations of the HDR Report. We believe the Plan can be strengthened by including more specificity about the District's intent. Staff comments for the 45-day plan review period will request greater clarity regarding goals and implementation actions for Wilmes Lake, which of the HDR Report recommendations the SWWD intend to pursue or analyze, and when it will happen.

Thank you for your interest in local water management and your commitment to efficient and effective local government. We encourage you to remain involved in the development and implementation of the District's new Plan. If you have any questions, feel free to contact Les Lemm of our staff at 651-296-6057.

Sincerely,

Ron Harnack
Executive Director

CC: Matt Moore, SWWD Administrator
Jack Lavold, SWWD President
Klayton Eckles, City of Woodbury
Les Lemm, BWSR
Steve Woods, BWSR
BWSR Water Planning Review Committee

Daniel Belka
1556 Clippership Drive
Woodbury, MN 55125

August 2, 2006

Minnesota Board of Water and Soil Resources
520 Lafayette Road North
St Paul , MN 55155

Attn : Ron Harnack, Executive Director

Dear Sir:

By this letter I am filing a complaint and request a determination of failure of the South Washington Watershed District (SWWD) to implement its 1997 Watershed Management Plan as revised on November 1, 2002 (the plan) pursuant to Minnesota Statutes § 103B.231, subdivision 13, and Minnesota Rules part 8410.0180. As a resident of the water shed, I seek your assistance in assuring that storm water flows are managed as the plan prescribes.

I submit that the following item of the plan has not been implemented:

- Water Quantity Standards Table VI-I Allowable Peak Flow Rates for Full Development Flow Mgm't No. 3 (Page VI-4 of the plan)

This provision specifies an allowable peak flow rate during a 24 hour, 100 year event (design event) of 35 cubic feet per second (CFS) from Oakdale and Lake Elmo to Woodbury. As of this date, the regional pond proposed to limit this flow rate to 35 CFS has not been build

Furthermore the plan calls for the SWWD to implement modifications to infrastructure if the allowed flow rate is changed. No infrastructure improvements have been implemented to address the higher flow rate that occurs during the design event. While Hudson Road has been raised recently and can now impound storm water from Oakdale and Lake Elmo, all of the added storage capacity is used to pond the additional storm water drained from the new Woodbury Lakes Development.

The effects of the high flow rates from Oakdale and Lake Elmo have been studied and documented in several studies including.

- A 1998 study by Bonnestroo, Rosene, Anderlik & Associates conducted for the SWWD entitled "I-94 Ponding Study" predicts the design event would raise the Wilmes Lake high water level (HWL) to 910.2 feet

- A 2003 study by HDR Engineering Inc (HDR) entitled "Flood Damage Reduction Report Wilmes Lake Subwatershed" predicts a design event would raise the Wilmes Lake HWL to 909 feet. The report also predicts that 18 – 25 homes would be threatened and yard damage would result from by the design event

- A 2006 HDR Study by HDR that predicts a Wilmes Lake HWL of 908.6 feet for the design event

It is worth noting that the HWL predictions for the 100 yr design events trend downward with each successive study. SWWD attributes this to more accurate topographical information. However, it seems just as likely that the presumptions about the antecedent conditions of the watershed, infiltration rates, or other variables account for the differences in the HWL predictions. In addition it is not clear that HDR properly accounted for the overflow stop logs that are present at the outflow of Wilmes Lake in their latest study

Our neighborhood was built on the assumption that the Wilmes Lake 100 year HWL was 906 5 feet The City of Woodbury requires a 3 foot freeboard so the minimum openings in homes had to be 909 5 feet The egress window in my basement has an elevation of about 911 9 feet and is located only a few feet from Wilmes Lake emergency overflow After the October 4, 2005 storm. Wilmes Lake overflowed over land just south of my house next to the egress window 90 % of my backyard was covered in water. Several of my neighbors faired worse than us SWWD's failure to implement its plan substantially increases the risk of my house flooding

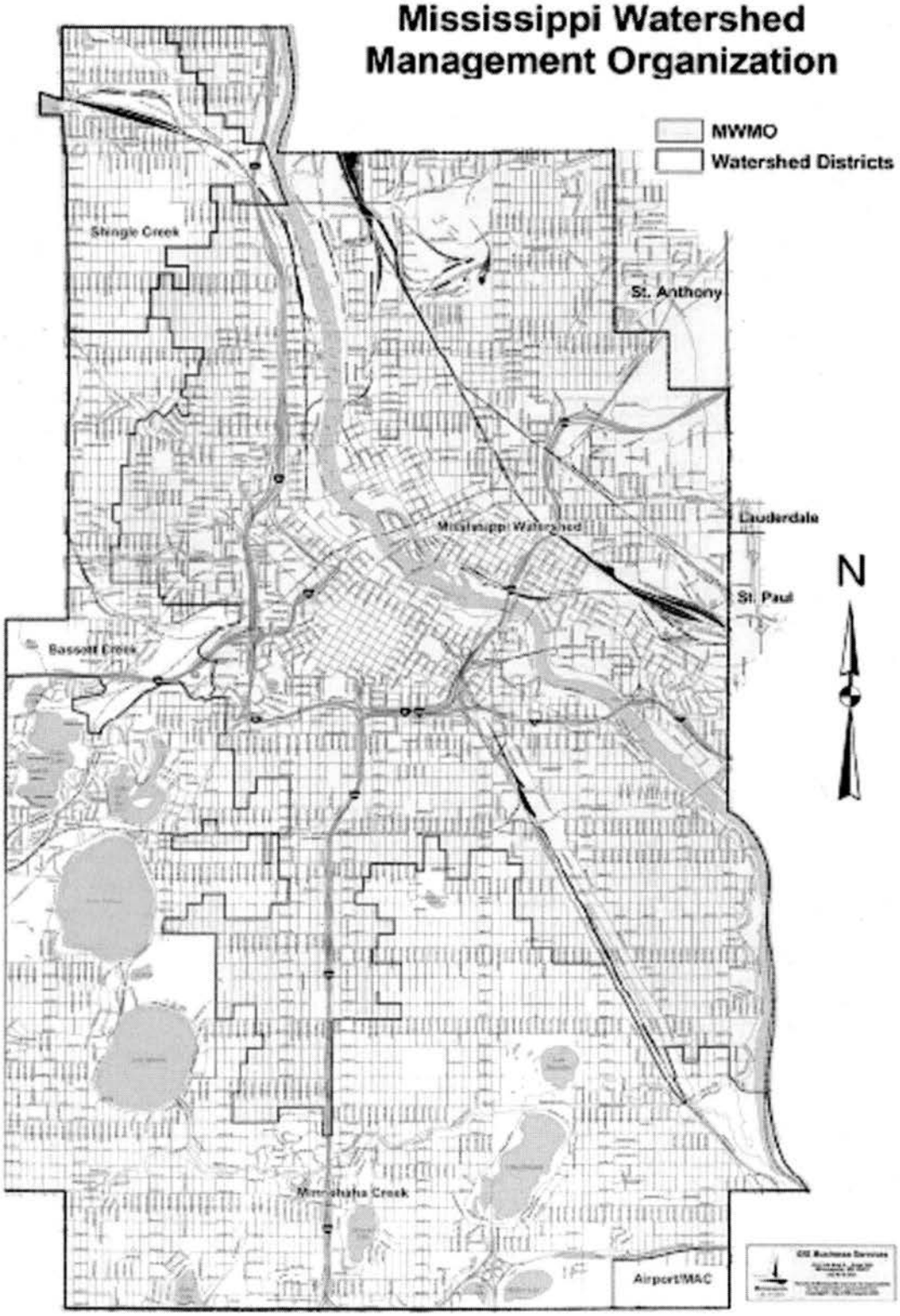
I have attended meetings on 12/13/2005, 1/10/2006, 2/14/2006, 3/14/2006, 4/14/2006, and 5/9/2006 with the SWWD and have participated on the Citizens Advisory Council to update the SWWD WMP in an attempt to advance concerns about the item in dispute, without avail I look forward to hearing from you and will be happy to meet with you or members of your staff if you need additional information from me about this complaint

Sincerely,

Daniel Belka

Minnesota Board of Water and Soil Resources
January 2007 Metro Water Planning Committee Meeting

MAP AND FISCAL INFORMATION
Mississippi Watershed Management Organization (MWMO)
Major Plan Amendment 2007-2010



Watershed Description

The Mississippi Watershed Management Commission (MWMO) is located in Hennepin and Ramsey Counties in the heart of the Minneapolis – St. Paul seven county metropolitan area. It is bound by the Six Cities WMO to the north, on the west by the West Mississippi / Shingle Creek Watershed Management Organizations and Bassett Creek WMO, on the south by Minnehaha Creek Watershed District, and on the east by the Capitol Region and Rice Creek WDs. The Mississippi Watershed Management Organization encompasses 13,602 acres (31.5 square miles) of fully developed urban lands and waters within the Minneapolis/St. Paul metropolitan area. The Mississippi Watershed Management Organization consists of portions of the cities of Lauderdale, St. Paul, St. Anthony, and Minneapolis including property owned by the Minneapolis Park and Recreation Board (MPRB). It is important to note that 94.3% of the watershed is within the City of Minneapolis. Over the course of the next ten years, the Minneapolis is proposing significant redevelopment and anticipating potential changes in land use. The Mississippi River is the primary water resource in the MWMO.

Fiscal Context and Implementation

In 2001 the MWMO received the authority to levy from the state legislature (MS 275.066, Subd. 21) an ad valorem tax for the implementation of its Watershed Management Plan. From 2002 to 2006 the levy ranged from $3.5 – 4 million annually. This is clearly a small watershed area with a huge tax base. The MWMO divides its budget into three main areas: Capital Projects, Programs, and Administrative expenses. Since 2002 these three primary budget areas have averaged 74%, 18% and 8% respectively. The newly proposed "Greening for Water Quality Program" has had $200,000 annually allocated to this fund since 2005.

Fiscal activities are an approximate barometer of influence within a watershed only. The table below reveals a significant trend with regards to increasing expenditures of MWMO. MWMO appears to be in the upper bracket of expenditures per area in comparison with adjacent WMOs. An average of $2.8 million annually has been allocated to CIP's since 2003.

The table below reveals financial information for adjacent WMOs.

WMO	Area (sq mi)	Year 02	03	04	05	Expend/Area
Mississippi WMO	**31**	**$239,658**	**$487,438**	**$722,226**	**-**	**$15,584**
Bassett Creek WMO	40	$390,653	$318,823	$1,176,382	$270,230	$8,164
Shingle Creek WMO	44	$353,581	$374,809	$349,990	$330,445	$8,170
Six Cities WMO	21	$9,810	$6,317	-	$13,764	$474
West Mississippi WMO	24	$67,834	$83,385	$125,104	-	$3,838
Capitol Region WD	41	$386,503	$577,504	$1,327,715	$924,848	$19,613
Minnehaha Creek WD	184	$5,270,636	$3,343,963	$2,436,635	$3,212,548	$19,380
Rice Creek WD	201	$1,692,567	$2,589,521	$3,041,834	-	$12,146

" – " indicates incomplete data.

Because this is a new program with an unknown number of funded recipients, we are unable to provide solid, measurable outcomes. The Metro Water Planning Committee may want to recommend that MWMO tabulate their outcomes/accomplishments for this program in their annual reports and strive to list measurable outcomes in their next plan update.

Executive Summary

> *"The segment of the Mississippi [River] flowing through the Minneapolis/St. Paul metropolitan area has always been of major significance as a resource, a boundary, a transportation corridor, a source of sustenance and energy, a place for recreation, an artistic inspiration, and a tourist attraction. It has been a home and work place, a source of water, and a sometime sewer. Demands upon it have often been in conflict, and attempts to manage its resources have frequently challenged state agencies, local governments, organizations, and area citizens."*
>
> *-Minnesota National River and Recreation Area (MNRRA) Comprehensive Management Plan, 1995*

Introduction

In January 1997, a Joint and Cooperative Agreement (JCA) was entered into by the cities of Minneapolis, St. Paul, Lauderdale, Falcon Heights, St. Anthony, and the Minneapolis Park and Recreation Board. This agreement added a new business name to the organization: the Mississippi Watershed Management Organization (MWMO) and replaced the agreement executed in 1985 that created the original organization. In 1999 the MWMO's legal boundary and subsequent levy area was redrawn to exclude the city of Falcon Heights. Falcon Heights is now a part of the Capitol Region Watershed District. Within this document the term "Watershed" will refer to the geographic area associated with the Mississippi Watershed Management Organization's legal boundary.

As part of their legal requirements, the MWMO is required to develop a Watershed Management Plan. This Plan is intended to meet and, whenever possible, exceed the water resource protection requirements under Minnesota Statutes 103A through 103G in conformance with Minnesota Rules Chapters 8410 and 8420. These requirements include protection of surface waters, groundwater, wetlands, and related natural resources. The Mississippi Watershed Management Organization is committed to the optimum utilization of geographic information systems (GIS), remote sensing, the Internet, and other innovative technologies in its

management of the watershed. These technologies offer great potential to inform citizens, elected officials, and watershed staff.

The essential purpose of the Mississippi Watershed Management Organization is to provide for the wise, long-term management of the water and associated land resources within the Watershed through implementation measures that realize multiple objectives, respect ecosystem principles, and reflect community values. The Mississippi Watershed Management Organization will protect, enhance and restore the surface and groundwater resources within its jurisdiction through education, management and enforcement.

The Mississippi River is the common focus of the Mississippi Watershed Management Organization. Within the boundary of the Watershed, all surface water either directly or indirectly drains to the river. The river itself provides a wide range of functions and activities such as: hydroelectricity; barge access; recreational water-related amenities; industrial, commercial and residential land uses; public drinking water; and, storm water and municipal wastewater discharge. The Mississippi Watershed Management Organization encompasses 13,602 acres (31.5 square miles) of fully developed urban lands and waters within the Minneapolis/St. Paul metropolitan area. As seen on Map 1, the Mississippi Watershed Management Organization consists of portions of the cities of Lauderdale, Minneapolis, St. Anthony, and St. Paul as well as property owned by the Minneapolis Park and Recreation Board (MPRB). It is important to note that 94.1% of the watershed is within the City of Minneapolis. The Mississippi Watershed Management Organization is the home of significant industrial, commercial, and residential activities in the Twin Cities, including river-related recreation.

The first draft of Mississippi Watershed Management Organization Watershed Management Plan was published in December 1986. The 1986 Plan was prepared to meet the then current Minnesota Chapter 509 requirements. The 1986 Plan addressed surface water quality and quantity, land use, and storm sewer drainage but was never approved by the existing Commission. The 1986 Plan identified significant point and non-point source pollution in the Watershed and it noted significant groundwater pollution problems from past industrial and commercial practices. Since the writing of the first draft, there have been several significant changes in state and federal rules and regulations. These changes have made it necessary to create a new document.

This current Plan expands the water resource management issues to include groundwater quality protection and improvement, in addition to the goals of surface water protection and water quality improvement. This Plan uses information and data from past studies and actions

to address a variety of issues determined as significant by the Mississippi Watershed Management Organization's Task Force, Citizens Advisory Committee (CAC), Technical Advisory Committee (TAC), and the Board of Commissioners. This Plan is subdivided into several sections, each addressing the items required by Minnesota Rules Chapter 8410.

Minnesota Board of Water and Soil Resources
520 Lafayette Road North
St. Paul, Minnesota 55155

In the Matter of the review of the Watershed Management Plan Amendment for the **Mississippi Watershed Management Organization** pursuant to Minnesota Statues Section 103B.231, Subdivision 9

ORDER APPROVING WATERSHED MANAGEMENT PLAN AMENDMENT

Whereas, the Board of Commissioners of the Mississippi Watershed Management Organization (MWMO) submitted a Watershed Management Plan Amendment (Amendment) to the Minnesota Board of Water and Soil Resources (Board) pursuant to M.S. Section 103B.231, Subd. 9, and;

Whereas, the Board has completed its review of the Amendment;

Now Therefore, the Board hereby makes the following Findings of Fact, Conclusions and Order:

FINDINGS OF FACT

1. **MWMO Establishment.** The [Middle] Mississippi WMO (MWMO) was established in 1985 and included the University of Minnesota. The first Watershed Management Plan was published in December 1986. In 1997, a Joint and Cooperative Agreement, more commonly entitled "Joint Powers Agreement" across the metro region, was entered into by the cities of Minneapolis, St. Paul, Lauderdale, Falcon Heights, St. Anthony, and the Minneapolis Park and Recreation Board. This agreement added the new MWMO business name to the organization, formerly the Middle Mississippi WMO, and replaced the agreement executed in 1985 that created the original organization. In 1999, the MWMO's legal boundary was redrawn to exclude the city of Falcon Heights, which is now a part of the Capitol Region Watershed District.

2. **Requirement to Plan.** The Metropolitan Surface Water Management Act requires the preparation of a watershed management plan for the subject watershed area which meets the requirements of Minnesota Statutes Sections 103B.201 to 103B.251.

3. **Nature of the Watershed.** The MWMO is located in Hennepin and Ramsey Counties in the heart of the Minneapolis – St. Paul seven county metropolitan area. It is bound by the Six Cities Watershed Management Organization to the north, on the west by the West Mississippi / Shingle Creek Watershed Management Organizations and Bassett Creek

Watershed Management Organization, on the south by Minnehaha Creek Watershed District, and on the east by the Capitol Region and Rice Creek Watershed Districts. The MWMO encompasses 13,602 acres (31.5 square miles) of fully developed urban lands and waters. The MWMO consists of portions of the cities of Lauderdale, St. Paul, St. Anthony, and Minneapolis including property owned by the Minneapolis Park and Recreation Board. It is important to note that 94.3% of the watershed is within the City of Minneapolis. Over the course of the next ten years, the Minneapolis is proposing significant redevelopment and anticipating potential changes in land use. The Mississippi River is the primary water resource in the MWMO.

4. **Plan Development and Review.** The draft Amendment was submitted to BWSR, other state agencies, and local governments for the required 60-day review on June 13, 2006. The main components of the Amendment include: 1) Clearer, more accurate program descriptions, 2) Addition of the "Greening for Water Quality Program", 3) Expansion of scope for several programs, and 4) Modification of the scoring system for funding individual projects (CIP). The MWMO received 60-day review comment letters from BWSR, DNR, MNDOT, MPCA, Met Council, and the Minneapolis Park and Recreation Board. MWMO held a public hearing on September 18, 2006, with five citizens in attendance. No new suggested changes were offered during the meeting. On September 22, 2006, all review agencies had received the revised draft Amendment for the required 45-day review period. The Commissioners received comment letters from the BWSR, DNR, and Met Council. The final draft Amendment was submitted to BWSR on December 7, 2006.

5. **Local Review.** The MWMO circulated a copy of the draft Amendment to local units of government for their review pursuant to Minnesota Statutes Section 103B.231, Subd. 7.

   Minneapolis Park and Recreation Board had several concerns regarding the future funding of capital improvement projects on Park property and the revised project scoring system. MWMO responded by stating that they will continue to consider funding elements of Park projects that directly improve water quality and natural resources of the watershed. MWMO stated that the revised project scoring system is more qualitative, revealing true substantive differences between proposed projects. Other minor additions were incorporated into the Amendment.

6. **Metropolitan Council Review.** Met Council was highly supportive of the amendment and offered recommendations for the next plan update, which will begin in early 2007.

7. **Department of Agriculture Review.** MDA did not provide comments on the MWMO Amendment.

8. **Department of Health Review.** MDH did not provide comments on the MWMO Amendment.

9. **Department of Natural Resources Review.** The DNR asked for several minor clarifications/additions, which were incorporated into the Amendment. DNR also

provided numerous suggestions regarding the Mississippi River Corridor for the next plan update.

10. **Pollution Control Agency Review.** MPCA offered comments related to TMDLs, stormwater management, and water quality data acquisition that the MWMO intends to address in the next plan update.

11. **Department of Transportation Review.** DOT submitted comments that MWMO will address in the next plan update.

12. **Board Review.** BWSR had no major concerns related to the Amendment.

13. **Plan Summary and Highlights.** The main goal of the major plan amendment is the addition of the "Greening for Water Quality Program". Objectives of the program include:

- Reduce the volume, slow the rate and treat runoff leaving the land by using plants to:
  - Reduce the amount and continuity of impervious surfaces
  - Mitigate erosion
  - Conserve and reuse water
  - Increase capacity of the watershed to intercept precipitation and infiltrate and store water
  - Lower temperatures and reduce water loss and heat stress associated with drought
- Pilot innovative ideas and techniques for local conditions
  - Improve techniques, refine standards and identify limitations
  - Create highly visible demonstration sites to inform and educate the watershed community
- Advance the development of water quality standards for landscape and building design
  - Learn from and work with other groups and efforts
  - Modify ordinances and variances
  - Identify research questions
- Restore and protect habitat, native plant and animal communities
  - Protect, enhance and restore natural areas by planting native species
  - Actively seek opportunities to vegetate urban landscape and link green spaces

14. **Metro Water Planning Committee Meeting**. On January 9, 2007, the Board's Metro Water Planning Committee and staff met with representatives from the MWMO in St. Paul to review and discuss the Amendment. Those in attendance from the Board's Committee were Robert Burandt, Louise Smallidge, LuAnn Tolliver, Jim Anderson, and Lisa Thorvig. Board staff in attendance were Metro Region Supervisor Steve Woods and Board Conservationist Brad Wozney. The representative from MWMO was Program Manager Dan Kalmon. Board staff recommended approval of the Amendment. After discussion, the subcommittee unanimously voted to recommend approval of the Mississippi Watershed Management Organization Watershed Management Plan Amendment to the full Board.

CONCLUSIONS

1. All relevant substantive and procedural requirements of law and rule have been fulfilled.

2. The Board has proper jurisdiction in the matter of approving a Watershed Management Plan Amendment for the Mississippi Watershed Management Organization pursuant to Minnesota Statutes Sections 103B.231, Subd. 9.

3. The Mississippi Watershed Management Organization Watershed Management Plan Amendment attached to this Order defines the need and purpose of the program changes, their relation to the WMO's goals, and the method of financing.

4. The attached Plan Amendment is in conformance with the requirements of Minnesota Statutes Sections 103B.201 to 103B.251.

ORDER

The Board hereby approves the attached Plan Amendment dated December 7, 2006, to the Watershed Management Plan for the Mississippi Watershed Management Organization.

Dated at Saint Paul, Minnesota this 24th day of January 2007.

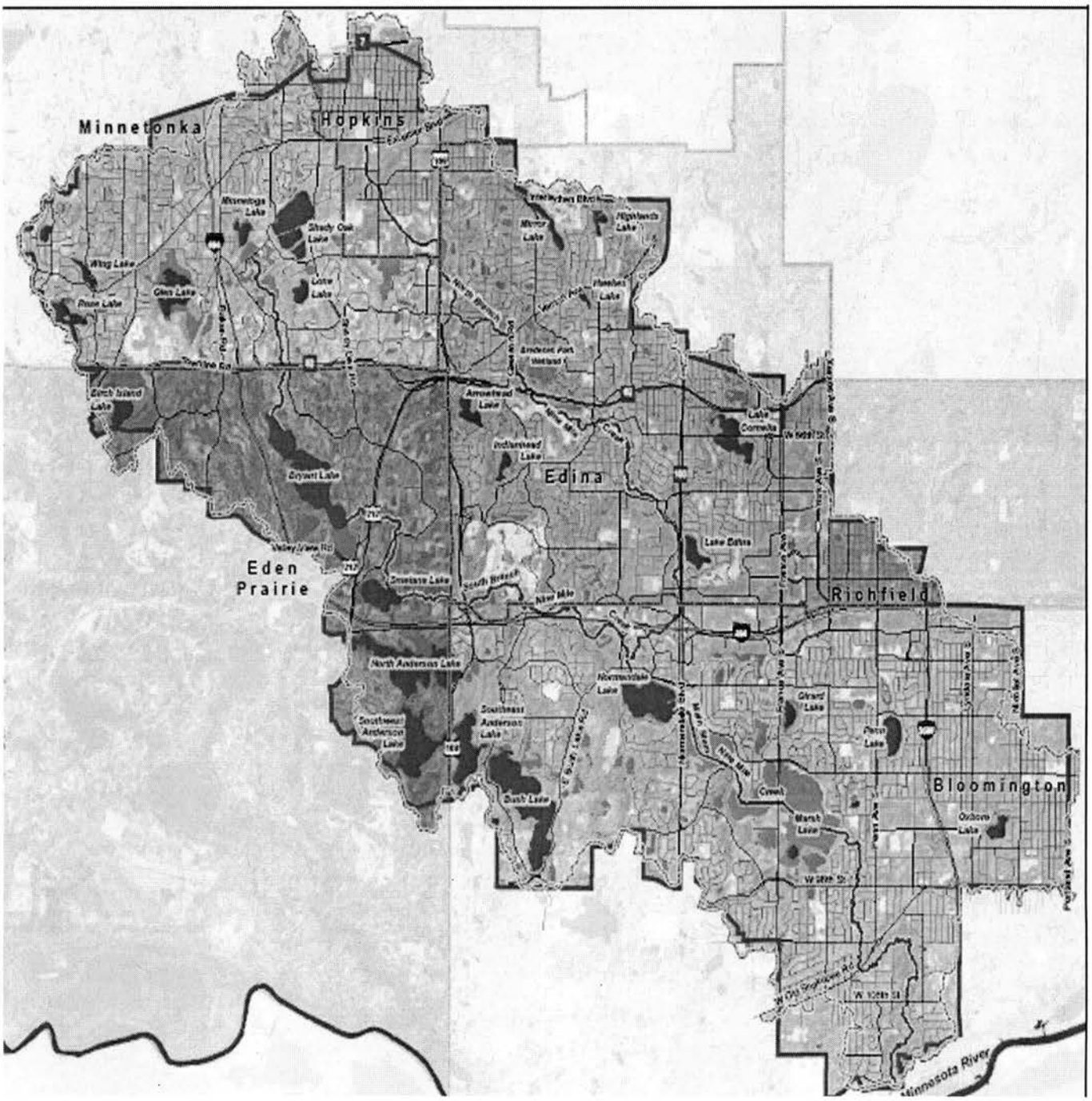
MINNESOTA BOARD OF WATER AND SOIL RESOURCES

BY: Randy Kramer, Chair

Minnesota Board of Water and Soil Resources
January 2007 Metro Water Planning Committee Meeting

MAP AND FISCAL INFORMATION

Nine Mile Creek Watershed District (NMCWD) Plan 2007-2017



Nature of the Watershed.

The NMCWD is located in the south central portion of Hennepin County. The District encompasses approximately 50 square miles in southern Hennepin County and it includes portions of the cities of Bloomington, Eden Prairie, Edina, Hopkins, Minnetonka, and Richfield. The entire NMCWD is within the Metropolitan Urban Service Area (MUSA) and is completely urbanized. Redevelopment pressure in the watershed will likely increase over the next ten years. 15 square miles of the watershed are landlocked. The watershed ranges from relatively flat topography in the upper and middle portions of the watershed, to the steep lower valley that descends to the Minnesota River at the downstream portion of the watershed. Nine Mile Creek originates as two branches: a north and a south fork. There are 18 lakes and many miles of stream.

The District is bound by the Minnesota River and the Lower Minnesota River Watershed District to the south, on the west by Riley Purgatory Bluff Creek Watershed District, on the north by Minnehaha Creek Watershed District, and to the east by Richfield Bloomington Watershed Management Organization.

Fiscal Context and Implementation.

The table below reveals a significantly increasing trend with regards to expenditures of NMCWD over the past four years. NMCWD expenditures appear to be comparable to adjacent Metro Watershed Districts in the middle-to-upper spending bracket. Expenditures for their Capital Improvement Program are projected to be approximately $28,156,000 (and $47,000 for operations and maintenance of those projects) during the life of the Plan. NMCWD will continue to implement its projects (CIPs) primarily through the project petitioning process (MS 103D.705) to ensure strong coordination and partnerships with the affected municipalities. The "administration and programs budget" is projected to range from $508,000 to $733,500 annually throughout the Plan.

The table below reveals financial information for adjacent WMOs.

WMO	Area (sq mi)	Year				Expend/Area
		02	03	04	05	
Bassett Creek	40	$390,653	$318,823	$1,176,382	$270,230	$8,164
Black Dog	26	$181,628	$159,941	$114,637	$82,685	$5,182
Carver County	280	$69,447	$104,573	$138,255	-	$372
Gun Club Lake	33	$28,125	$18,451	$32,237	$22,958	$771
Scott County	323	$145,029	$194,985	$440,661	$475,208	$972
Nine Mile WD	**50**	**$386,503**	**$577,504**	**$1,327,715**	**$924,848**	**$16,083**
Lower MN WD	64	$292,621	$204,346	$318,216	$456,166	$4,966
Minnehaha Creek WD	184	$5,270,636	$3,343,963	$2,436,635	$3,212,548	$19,380
Riley Purgatory Bluff Creek WD	47	$772,593	$2,366,737	$2,245,286	-	$38,189

" – " indicates incomplete data.

1.0 Executive Summary

This Nine Mile Creek Watershed District (NMCWD) Watershed Management Plan (Plan) sets the vision, guidelines, and proposed tasks for managing surface water within the boundaries of the NMCWD. This Executive Summary summarizes highlights of the Plan, including introductory information, the NMCWD vision statement, goals, policies to achieve goals, and actions that will be implemented to achieve objectives.

1.1 Introductory Information

The NMCWD was established on September 30, 1959 in response to a citizen's petition to the State of Minnesota to address water resource issues.

Like all watershed districts, the NMCWD is a special purpose unit of local government that manages water resources on a watershed basis (a watershed is an area of land that drains to a given lake, river, stream or wetland). Watershed district boundaries generally follow natural watershed divides, rather than political boundaries.

The NMCWD is located in the south-central region of Hennepin County, and covers approximately 50 square miles. Figure 2-1 shows the location of the NMCWD and the communities that lie within, or partially within the NMCWD. The following is a list of these communities:

- Bloomington
- Edina
- Eden Prairie
- Hopkins
- Minnetonka
- Richfield

Watershed districts are governed by a local Board of Managers who are appointed by the boards of the counties with the land in the watershed district. In the NMCWD, the Board of Managers has five members appointed by the Hennepin County Board. The appointments are for staggered three-year terms.

The regularly scheduled meetings of the NMCWD Board of Managers are held on the third Wednesday of each month. The meetings are open to the public and are held at the District Administrative Office located at 7710 Computer Drive, in Edina.

The NMCWD employs a full-time Administrator. Other services, including engineering, legal, accounting, and secretarial assistance are provided by part-time consultants. The NMCWD has a

website (www.ninemilecreek.org), which includes NMCWD permitting information, manager and consultant information, agendas, and minutes from Managers' meetings, and other pertinent information.

Watershed districts within the Twin Cities metropolitan area come under the guidance of both the Watershed Act (Minnesota Statues 103D) and the Metropolitan Surface Water Management Act (Minnesota Statutes 103B). Minnesota Statutes 103B and 103D require watershed districts to prepare watershed management plans. In addition to the plan requirements given in statute, watershed districts in the Twin Cities metropolitan area must also follow the detailed plan requirements of Minnesota Rules 8410. This watershed management plan (Plan) is the fourth NMCWD Plan approved by the Minnesota Board of Water and Soil Resources (BWSR), or its predecessor. Previous plans were published in 1961, 1973, and 1996.

1.2 Watershed District Purposes

1.2.1 General Watershed District Purposes

The general purposes of a watershed district are to conserve natural resources through land use planning, flood control, and other conservation projects to protect the public health and welfare and for the wise use of the natural resources (Minnesota Statues 103D.201).

Watershed districts can be involved with a number of issues, including protection or enhancement of water quality, prevention and alleviation of flood damage, prevention and alleviation of soil erosion and sedimentation, regulation of streams, lakes and water courses for domestic, recreational and pubic use, and protection and regulation of groundwater uses.

In addition, the purposes of watershed management organization water management programs in the metropolitan area (quoted from Minnesota Statutes 103B.201) are as follows:

1. Protect, preserve, and use natural surface and groundwater storage and retention systems.
2. Minimize public capital expenditures needed to correct flooding and water quality problems.
3. Identify and plan for means to effectively protect and improve surface and groundwater quality.
4. Establish more uniform local policies and official controls for surface and groundwater management.
5. Prevent erosion of soil into surface water systems.
6. Promote groundwater recharge.
7. Protect and enhance fish and wildlife habitat and water recreational facilities.
8. Secure the other benefits associated with the proper management of surface and groundwater.

1.2.2 Historical NMCWD Purposes and Past Successes

For its first 15 to 20 years, the NMCWD Board of Managers focused primarily on how to solve the flooding problems in the watershed. This major effort resulted in the construction of six major flood prevention projects, including: Marsh Lake Dam, Normandale Lake Improvement, Bredesen Park flood storage area, Bush Lake Outlet, Smetana Lake Outlet, and Hopkins Culvert improvements. Also, a major streambank stabilization project in the lower valley reach of Nine Mile Creek was completed to reduce erosion and sediment export to the Minnesota River.

The NMCWD rules and regulations have been an essential tool in preventing problems. In 1973, the District adopted rules and regulations and began reviewing proposed developments and other projects in the watershed through its permit program. The NMCWD rules and regulations have always addressed the water quantity impacts of stormwater (e.g. flooding, rate control). At first, the NMCWD rules only indirectly addressed the water quality impacts of stormwater, but since 1997 they have directly addressed water quality impacts (upon implementation of the 1996 NMCWD Plan).

The NMCWD has been concerned about water quality since its formation. Since 1968 the NMCWD and other authorities have been monitoring the water quality of streams in the watershed. Lakes have been monitored by the District since 1997.

Since 1997, the NMCWD has concentrated on solving remaining flooding problems and conducting water quality studies. Between 1997 and 2005 the NMCWD completed 12 diagnostic-feasibility studies (termed *Use Attainability Analyses*, or *UAAs*) for lakes within the NMCWD. Three additional lake UAAs are on-going, scheduled for 2006 completion.

Additionally, the NMCWD has implemented several programs and projects over the years to improve the quality of life in the watershed. Some of the more significant programs and projects include:

- Collecting monthly water levels on more than a dozen lakes.
- Collecting groundwater levels from nearly a dozen NMCWD groundwater observation wells.
- Collecting water quality data, cooperating with other organizations (e.g. Metropolitan Council (MC)) in collecting water quality data from almost every surface water body with the NMCWD.
- Completing water quality studies to determine if a water body's quality is achieving its goal and developing water management plans to improve or protect a water body's quality.
- Cooperating with constituent cities, other agencies and organizations in studies and capital projects to address water quality and flooding issues of mutual interest.
- Reviewing and/or permitting about 40 development proposals per year.

Since the adoption of the District's Water Management Plan in 1996, the District has completed the Bush Lake Outlet, Smetana Lake Outlet and the Minnetonka Lakes Water Quality Improvement

Basic Water Management projects. The Minnetonka Lakes Water Quality Improvement Project implemented the recommendations presented in the Glen Lake, Lone Lake, Minnetoga Lake and Shady Oak Lake Use Attainability Analyses. The District has received a petition from the city of Eden Prairie for the implementation of the recommendations presented in the Use Attainability Analyses completed for Anderson Lakes, Bryant Lake and Birch Island Lake. It is anticipated that the project will commence in 2007. The District has also received a petition from the city of Hopkins for the stabilization of Nine Mile Creek from Excelsior Boulevard to T.H. 169. The recommendation was presented in the Nine Mile Creek Use Attainability Analysis, March 2004.

As previously stated, the 1996 Water Management Plan concentrated on solving the remaining flooding problem within the District and began conducting water quality studies of 15 lakes within the District. This was an orderly transition between water quantity and water quality management that received the support of the municipalities within the District and the regulatory review agencies. The accomplishments of the 1996 Plan provided the foundation for the programs/objectives of the 2006 Water Management Plan. The Managers noted that this resulted in additional administrative activities for the District, thereby resulting in the hiring of an administrator to guide the activities of the District. To establish greater public involvement and interaction the Managers opened a District Office in 2005. A possible shortfall of the District's accomplishments over the past 10 years was that the Rules and Regulations of the District that have been in place since 1973 were not revised during this time period. The District has identified revision of the District's Rules and Regulations as a primary objective in 2007.

1.2.3 NMCWD Vision Statement

The NMCWD Managers adopted a vision statement to guide them through this planning process, and in its future day-to-day operations.

Nine Mile Creek Watershed District (NMCWD)—Vision Statement

It is the NMCWD Board of Managers' vision and intent to manage water resources within the District in a manner that will attain and preserve their highest and best intended beneficial uses. Intended use designations have been made in keeping with records of historical use, applicable state and federal water laws, and in consultation with the District's constituent cities, state and regional resource management agencies, and the general public.

The District seeks a proactive role in watershed runoff regulation that anticipates ultimate watershed land use development. The District also seeks to provide its residents with protection against both flood damage and water quality degradation by conducting diagnostic-feasibility studies of watershed runoff-related problems. Where these studies indicate the need for implementation of remedial measures to mitigate current or likely future problems that interfere with attainment of beneficial use goals, the District will

sponsor reasonable cost cooperative projects in response to project petitions from its constituent cities.

Throughout all of its water management planning activities, the District will encourage increased stakeholder involvement in its decision-making, especially by public officials and concerned citizens.

1.3 NMCWD Plan Organization and Summary

This NMCWD Plan sets the course for future management of the water resources within the watershed. The NMCWD Plan provides data and other background information, outlines the applicable regulations, assesses specific and watershed-wide issues, sets goals and policies for the NMCWD and its resources, and lists planned actions to achieve the goals. The NMCWD Plan also discusses the financial considerations of implementing programs and actions, and funding sources that may be available to the District. The NMCWD Plan is organized into ten major sections, summarized as follows:

Section 1.0 Executive Summary—Summarizes the highlights of the NMCWD Plan, including introductory information, the District's Vision Statement, Goals, Policies, Objectives, and planned Actions.

Section 2.0 Land and Water Resource Inventory—Provides background information about the NMCWD and provides a brief history of the District. It also provides technical information describing the surface and subsurface conditions of the Watershed, including: precipitation, land cover, soils, topography, geology, groundwater, surface water resources, unique features and scenic areas, and pollutant sources. This section also includes a number of maps and summary tables, such as a map of major and minor sub watersheds and a table of drainage areas.

Section 3.0 Impact on Other Units of Government—The NMCWD has used various methods to involve and inform its constituent municipalities and the general public about preparation of this Plan. This has included numerous public meetings, meetings with municipal Engineering and Public Works Department staffs (the District's Technical Advisory Committee (TAC)) and use of the District's website (www.ninemilecreek.org), principal among other efforts. The NMCWD will continue expanding these involvement efforts to increase awareness of the NMCWD, coordinate and cooperate with other groups (including its Citizens Advisory Committee (CAC)) to educate the public, recruit (and recognize) volunteers for monitoring efforts and involvement in NMVWD programs, promote positive behaviors that have a positive impact on water resources, and to use its advisory committees in meaningful ways. Through these efforts, the District will increase the public's understanding of water resource management and issues in the watershed, and foster long-term public commitment to protecting these resources.

Section 4.0 Statement of Goals and Policies—Presents the issues, goals, and policies that pertain generally to the NMCWD. Section 4.0 contains an introductory preamble, plus nine subsections. These subsections, in tabular format, are organized around major topics, as follows:

4.1 Stormwater Management	4.6 Land Use Management
4.2 Surface Water Quality	4.7 Floodplain Management
4.3 Open Spaces and Recreational Uses	4.8 Education and Outreach
4.4 Wetlands Management	4.9 Administration
4.5 Groundwater Protection	

These nine subsections are all organized in the same manner, with a summary table that describes:

- The importance of the topic area
- General issues related to the topic area
- Management goals of the NMCWD
- Policies adopted and followed to achieve these goals
- Specific management objectives, including planned actions of the District.

Section 5.0 Assessment of Problems—Discusses identified water quality problems associated with lakes, streams, wetlands, drainage ditches, recreational use opportunities, and fish and wildlife resources.

Lake Water Quality Problems

Lake water quality problems have been diagnosed for major recreational lakes within the NMCWD through the UAA process, as outlined by the Water Environment Research Foundation (WERF). This process involves the following seven basic steps intended to achieve or maintain water quality conditions that support beneficial uses such as swimming, fishing, esthetic viewing, and wildlife habitat:

1. Determine current and historic water quality conditions.
2. Set water quality goals that support intended uses.
3. Assess attainment or nonattainment of goals for current watershed land-use conditions.
4. Estimate annual runoff water and pollutant inputs to water bodies.
5. Calibrate a computer simulation model to predict observed lake- or stream-water quality conditions from annual runoff inputs.
6. Using the calibrated lake- or stream-model, assess water quality goal attainment for current and ultimate watershed land-use conditions and range of climatic conditions.

7. If necessary, recommend feasible alternative remedial measures (i.e., best management practices (BMPs)) to achieve desired water quality.

UAAs are intended to be "Total Maximum Daily Load (TMDL) Equivalent" studies and implementation of their recommendations should result in removal of the subject water bodies from the Minnesota Pollution Control Agency's (MPCA's) Sec. 303(d.) Impaired Waters list. The following tabulation (Table 1-1) summarizes the findings and conclusions of the lake UAAs completed to date. A wide variety of water quality problems typical of lakes within urban watersheds were identified. These include, generally, pollutant loads from both external and internal sources and various biological imbalances in plant and fish communities. UAA Project synopses are included in Section 5.1 of the Plan and discuss diagnosed problems and recommended remedial measures in greater detail.

Table 1-1 UAA-Identified Water Quality Problems in NMCWD Lakes

Lake	Water Quality Problems		
	Watershed Runoff Pollution	Internal P Recycle	Exotic Plant Species
Bush			✓ - CLP, EWM & PL
Bryant	✓	✓	✓ - CLP, EWM & PL
Smetana		✓	✓ - CLP & PL
Anderson	✓	✓	✓ - CLP & PL
Normandale	✓	✓	✓ - CLP & PL
Penn (Lower)			✓ - PL
Mirror	✓	✓	✓ - CLP & PL
Cornelia	UAAs In-Process		
Indianhead			
Arrowhead			
Birch Island	✓		✓ - PL
Glen	✓		✓ - PL
Minnetoga	✓		✓ - PL
Lone	✓		✓ - PL
Shady Oak	✓		✓ - EWM & PL

* CLP = Curlyleaf Pondweed, EWM = Eurasian Watermilfoil, and PL = Purple Loosestrife

Stream Water Quality Problems

Nine Mile Creek experiences many water quality problems characteristic to urban streams. These all relate to the increased quantity and degraded quality of watershed runoff reaching the creek. In diagnosing Nine Mile Creek water quality problems, the entire creek was surveyed and classified according to the Rosgen Physical Classification system, using stream measurements of

- Entrenchment ratio
- Flood-prone area
- Width/depth ratio
- Bankfull discharge capacity
- Sinuosity
- Channel materials
- Water surface slope

Stream reach segments were then rated as to their sensitivity to disturbance, recovery potential, and actual condition. In this process numerous problems were identified that will require remedial attention in the future.

Results of the Nine Mile Creek physical classification were subsequently used in combination with biological and water quality survey information to perform Ecological Use Classification (EUC) assessments of Nine Mile Creek stream reaches. These assessments identified the potential suitability of the stream for aquatic life, including benthic macroinvertebrates and fish. In general, these assessments indicated biological impairments were related to habitat destruction caused by the scouring effects of the increased frequency of bankfull or greater flows in the creek. Desirable remedial measures were identified along with the need for further detailed surveys in the future.

Other Assessed Problems

Urban stormwater runoff has the potential to cause numerous other problems to resources and pursuits, including:

- County ditches
- Runoff rate control and flooding
- Recreational opportunities
- Fish and wildlife resources
- Soil erosion
- Land use practices
- Regulatory controls to mitigate adverse impacts on public waters and wetlands

These and other potential future problems are assessed in Section 5.0, along with the adequacy of current Capital Improvement Programs to deal with these problems.

Section 6.0 Implementation Program—Discusses responsibilities of the NMCWD, its constituent cities, and other state and regional governmental agencies for managing water resources within the District. Included are:

- **Regulatory Controls**
  - Wetlands Conservation Act
  - Erosion and sediment control
  - Shoreland and floodplain ordinances
  - Water quality nuisances
- **Stormwater and Drainage Design Performance Standards**
  - Target in-lake nutrient concentrations
  - Maximum permissible runoff rate and volume
  - Flooding impact standards
  - Stormwater outlet structure design criteria
  - Water quality basin design methodology
  - Pollutant load limitations
  - Variances
  - Information Program
- **Data Collection**
  - Lake monitoring
  - Stream monitoring
  - Assessment and reporting
- **Management Programs**
  - Municipal Comprehensive Stormwater Management Plans
- **Potential Structural Solutions to Problems**
  - Capital Improvement projects
  - Financing

All of the above programs involve some level of shared responsibility between the NMCWD and others, as is discussed in Section 6.0.

Section 7.0 Impact on Local Government—This section outlines how the NMCWD's implementation program will affect local government in terms of cost and administrative issues.

The NMCWD's intention is to work cooperatively with its municipalities and to limit additional requirements imposed upon local units of governments as much as possible while still accomplishing the NMCWD's purposes and implementing its Plan.

The District will work with the Cities on the initial stages of the permitting process to address District goals and objectives. The Cities may have to update and/or adopt ordinances or other regulatory controls to meet the goals and objectives of this Plan.

Section 8.0 Implementation Priorities—The NMCWD prefers to undertake Basic Water Management Projects on a cooperative basis in response to petitions from its constituent cities, but reserve the right to initiate projects itself. The District is now shifting its focus onto implementation of the recommended BMPs from the 15 lake/watershed UAAs completed during the past 10 years. No prioritization of projects has yet been made. The order in which projects

are undertaken will depend, to some degree on the receipt of petitions, but will likely concentrate on lakes with the highest perceived public value (e.g. Level I swimming lakes) first. The District also reserves the right to initiate projects with a compelling need, even without a petition. Other flood control or water quality management projects not currently foreseen by this Plan may also be undertaken following the Plan Amendment process.

In addition to pending water quality improvement projects recommended by UAA reports, the District intends to be actively involved in TMDL studies and other programs that may lead to future capital improvement projects.

Section 9.0 Implementation Components—The NMCWD is ultimately responsible for implementation of all aspects of this Plan.

Each municipality within the NMCWD, in its local comprehensive stormwater management plan, must provide for the adoption of necessary regulatory controls, stormwater design standards, education programs, data collection programs, and maintenance programs that are identified in this Plan within 2 years from the adoption of the last Watershed District/Water Management Organization Water Management Plan. The District will work with the municipalities in achieving a coordinated effort between the requirements of the NPDES Permit/MS4 requirements and the statutory requirements of the Metropolitan Surface Water Management Act. As part of that plan, each municipality must develop a qualifying local wetlands management plan and assess the adequacy of specified management programs. Municipalities and other State Agencies designated as local units of government pursuant to the Wetlands Conservation Act (WCA) must also enforce that Act. Hennepin County is responsible for groundwater planning in accord with the BWSR-approved plan.

Where WCA duties have been assumed by municipalities, assistance and responsibilities of the District are limited to providing technical assistance as requested by local governmental units. For those municipalities that have chosen not to assume WCA responsibilities, the District has assumed those duties.

Local governmental units must adopt regulatory controls that, at a minimum, incorporate BMPs and best available technologies as promulgated by the MPCA.

Local governmental units must adopt regulatory controls that address erosion and sedimentation for projects not subject to grading and land alteration requirements of the District. This requirement includes an obligation to consider single-family residential lot permitting.

Local governmental units will be responsible for enforcement of adopted floodplain and shoreland ordinances. The District will only undertake enforcement when the failure of the local governmental unit to act leads to conditions that independently constitute a violation of the rules

and regulations of the District or other governing law by which the District possesses a right of action.

The NMCWD has adopted a Capital Improvement Plan as part of their Water Management Plan (see Section 8.0)

Section 10.0 Amendment to the Plan—The NMCWD has established a procedure whereby this Plan may be amended.

Any amendment to this Plan must be made in accord with the procedure described in Section 10.0. This Plan extends for ten (10) years following the year in which it is approved and adopted as provided by law. This Plan shall remain in effect pending adoption and approval of any succeeding plan. Any person may propose to the Board of Managers, an amendment to the Plan. The Board of Managers may then initiate the amendment procedure.

Minnesota Board of Water and Soil Resources
520 Lafayette Road North
St. Paul, Minnesota 55155

In the Matter of the review of the Watershed Management Plan for the **Nine Mile Creek Watershed District** pursuant to Minnesota Statues Section 103B.231, Subdivision 9

ORDER APPROVING WATERSHED MANAGEMENT PLAN

Whereas, the Board of Managers of the Nine Mile Creek Watershed District (NMCWD) submitted a Watershed Management Plan (Plan) to the Minnesota Board of Water and Soil Resources (Board) pursuant to M.S. Section 103B.231, Subd. 9, and;

Whereas, the Board has completed its review of the Plan;

Now Therefore, the Board hereby makes the following Findings of Fact, Conclusions and Order:

FINDINGS OF FACT

1. **NMCWD Establishment.** The NMCWD was established in 1959 by order of the Minnesota Water Resources Board under the authority of the Minnesota Watershed Act (Minnesota Statutes, Chapter 112) in response to a citizen's petition to the State of Minnesota to address water resource issues. The first water resources management plan for the NMCWD was adopted in 1961. The Plan was revised again and approved by the Board in 1973. The Board of Water and Soil Resources (BWSR) approved the "second generation" watershed management plan on September 25, 1996.

2. **Requirement to Plan.** The Metropolitan Surface Water Management Act requires the preparation of a watershed management plan for the subject watershed area which meets the requirements of Minnesota Statutes Sections 103B.201 to 103B.251.

3. **Nature of the Watershed.** The NMCWD is located in the south central portion of Hennepin County. It encompasses approximately 50 square miles including portions of the cities of Bloomington, Eden Prairie, Edina, Hopkins, Minnetonka, and Richfield. The entire NMCWD is within the Metropolitan Urban Service Area (MUSA) and is completely urbanized. Redevelopment pressure in the watershed will likely increase over the next ten years. 15 square miles of the watershed are landlocked. The watershed ranges from relatively flat topography in the upper and middle portions of the watershed, to the steep lower valley that descends to the Minnesota River at the downstream portion of the watershed. Nine Mile Creek originates as two branches: a north and a south fork.

There are 18 lakes and many miles of stream within the watershed. NMCWD is bound by the Minnesota River and the Lower Minnesota River Watershed District to the south, on the west by Riley Purgatory Bluff Creek Watershed District, on the north by Minnehaha Creek Watershed District, and to the east by Richfield - Bloomington Watershed Management Organization.

4. **Plan Development and Review.** Prior to submitting the draft Plan for official review, the NMCWD solicited input from review agencies and stakeholders through numerous meetings and hearings, resulting in relatively limited, formal comments . The draft Plan was submitted to BWSR, other state agencies, and local governments for the required 60-day review on May 8, 2006. Comments were received from BWSR, DNR, Met Council, PCA, and the Cities of Bloomington and Eden Prairie. A public hearing was held on August 17, 2006 and no comments were received. On September 13, 2005, all review agencies had received the revised draft Plan for the required 45-day review period. The NMCWD received comments from BWSR, DNR, PCA, Met Council, and MNDOT. The final draft Plan was submitted to BWSR on November 28, 2006.

5. **Local Review.** The NMCWD circulated a copy of the draft Plan to local units of government for their review pursuant to Minnesota Statutes Section 103B.231, Subd. 7.

   City of Bloomington. The City had concerns regarding the following: the two year deadline for local water plan/wetland management plan compliance, intended shoreland use classifications, wetland buffer requirement, and flexibility regarding regulatory controls. NMCWD reiterated that the municipalities have two years to have local water plan and wetland management plans approved by the NMCWD, but will provide guidance and assistance to meet that deadline. All concerns were sufficiently addressed with the exception that the wetland buffer requirements and other water quality standard details will be worked out during the NMCWD rule making process. Regarding ordinance requirements for municipalities, more flexibility has been incorporated into the Plan to allow for suitable policies or other regulatory controls that the municipalities see fit in achieving the objectives and MS4 requirements.

   City of Eden Prairie – Eden Prairie commented on the draft Plan's recommended actions within the "Project Synopses (Use Attainability Analyses)" for their lakes. NMCWD incorporated all recommended modifications into the Plan.

6. **Metropolitan Council Review.** The Council commended NMCWD for producing a model Plan. The Council had a minor comment related to a district-wide wetland management plan, which was addressed by NMCWD. The Council found the Plan to be consistent with their *Water Resources Management Plan*.

7. **Department of Agriculture Review.** MDA did not provide comments on the NMCWD Plan.

8. **Department of Health Review.** MDH did not provide comments on the NMCWD Plan.

9. **Department of Natural Resources Review.** DNR stated that the Plan was very well developed, thorough, and well organized, but noted several items regarding shoreland and floodplain ordinances, and missing wildlife habitat information. These concerns were adequately addressed and incorporated into the Plan.

10. **Pollution Control Agency Review.** PCA focused both of their comment letters on water quality standards used by the NMCWD, their preliminary "use attainability analyses" as equivalent TMDLs for the major lakes, and water quality data management. BWSR staff met with PCA and NMCWD staff separately after the 60-day comments to achieve consensus on the disparity between ecoregion-based vs. NMCWD-proposed lake water quality goals. As a result, agreeable language was incorporated into the Plan. In addition, NMCWD has included the conversion of "use attainability analyses" to TMDLs in the implementation activities listed in Table 8-3. PCA also mentioned that "the Plan is well done and should provide a solid framework for water protection and restoration" activities.

11. **Department of Transportation Review.** DOT recommended numerous minor additions and clarifications. Major comments related to the Plan's definition of non-degradation, a CIP to restore a wetland, requesting alternative standards/rules for road maintenance projects, and a clarification on what is meant by "watershed-based approach to NPDES Phase II MS4 permitting" as an action item. NMCWD responded by referring "non-degradation" to water quality goals as listed in the Plan. NMCWD intends to restore the wetland in question, and will include MNDOT as a stakeholder to address their concerns in the rule making process. The "watershed-based approach to NPDES…permitting" is explained as a cooperative effort between NMCWD and the municipalities assessing the regulatory stormwater requirements of the state and Watershed District.

12. **Board Review.** BWSR comments centered around completing a self assessment, a more frequent review of the long term implementation program, clarification on the required wetland management plans by municipalities, and for providing an adequate foundation in the Plan for components of future stormwater rules. NMCWD satisfactorily addressed these comments and incorporated the changes into the final draft. Stormwater standards and other regulatory details will be developed during the rule making process.

13. **Plan Summary and Highlights.** The following are some of the highlights of the Plan:

- NMCWD completed an exemplary upfront stakeholder input process with the municipalities.

- BWSR recommended the NMCWD complete a self assessment of the success of the previous plan. The following is their synopsis:

As previously stated, the 1996 Water Management Plan concentrated on solving the remaining flooding problem within the District and began conducting water quality studies of 15 lakes within the District. This was an orderly transition between water quantity and water quality management that received the support of the municipalities within the District and the regulatory review agencies. The accomplishments of the 1996 Plan provided the foundation for the programs/objectives of the 2006 Water Management Plan. The Managers noted that this resulted in additional administrative activities for the District, thereby resulting in the hiring of an administrator to guide the activities of the District. To establish greater public involvement and interaction the Managers opened a District Office in 2005. A possible shortfall of the District's accomplishments over the past 10 years was that the Rules and Regulations of the District that have been in place since 1973 were not revised during this time period. The District has identified revision of the District's Rules and Regulations as a primary objective in 2007.

- Provides for the conversion of the "Use Attainability Analyses (UAAs)", completed under the previous plan, into a product that can be incorporated into TMDLs and TMDL implementation plans for all impaired lakes and creeks. The UAAs are the foundation for all of NMCWD's water quality improvement projects. A strong emphasis is given to the Creek UAA and stabilizing and restoring the banks of Nine Mile Creek.

- Establishes a biennial review of the implementation program.

- The Goals and Policies of the plan focus heavily on stormwater management, particularly stormwater maintenance and a desire to achieve a net reduction in runoff volume.

- Establishes an effective coordination role assisting the municipalities to meet NPDES / MS4, non-degradation, and MR 8410 requirements.

- The Plan has a proactive public involvement and education/outreach program, including encumbered funding for the NEMO coordinator position, which is funded by a partnership between the League of Minnesota Cities, the University of Minnesota Extension Service, and others.

- Establishes a significant BMP program for technical assistance and cost-share for low impact development demo projects, shoreland and streambank restorations, and innovative BMPs that exceed rule requirements.

14. **Metro Water Planning Committee Meeting.** On January 9, 2007, the Board's Metro Water Planning Committee and staff met with representatives from the NMCWD in St. Paul to review and discuss the Plan. Those in attendance from the Board's Committee were Robert Burandt, Louise Smallidge, LuAnn Tolliver, Jim Anderson, and Lisa Thorvig. Board staff in attendance were Metro Region Supervisor Steve Woods and Board Conservationist Brad Wozney. Representatives from the NMCWD were Administrator Kevin Bigalke and Manager Bob Kojetin. Board staff recommended approval of the Plan. After discussion, the subcommittee voted 4-0, with Committee Member Tolliver abstaining, to recommend approval of the Nine Mile Creek Watershed

District 2007 - 2017 Watershed Management Plan to the full Board. The Committee commended NMCWD for developing a very good Plan.

CONCLUSIONS

1. All relevant, substantive and procedural requirements of law and rule have been fulfilled.

2. The Board has proper jurisdiction in the matter of approving a Watershed Management Plan for the Nine Mile Creek Watershed District pursuant to Minnesota Statutes Sections 103B.231, Subd. 9.

3. The Nine Mile Creek Watershed District Watershed Management Plan attached to this Order defines water and water-related problems within the NMCWD boundaries, possible solutions thereto, and an implementation program.

4. The attached Plan is in conformance with the requirements of Minnesota Statutes Sections 103B.201 to 103B.251.

ORDER

The Board hereby approves the attached Plan dated November 28, 2006 as the Watershed Management Plan for the Nine Mile Creek Watershed District.

Dated at Saint Paul, Minnesota this 24th day of January 2007.

MINNESOTA BOARD OF WATER AND SOIL RESOURCES

BY: Randy Kramer, Chair

COMMITTEE RECOMMENDATIONS

Northern Water Planning Committee

1. Hubbard County Comprehensive Local Water Management Plan – *DECISION ITEM*

2. Mille Lacs County Local Water Management Plan – *DECISION ITEM*

DATE: January 2, 2007

TO: BWSR North Region Water Plan Review Subcommittee

FROM: Dan Steward, BWSR Board Conservationist

SUBJECT: Review of Hubbard County Final Local Water Management Plan (LWMP)

On May 25, 2005, BWSR and the other state review agencies received the Priority Concerns Scoping Document (PCSD) from Hubbard County. The North Region Review Subcommittee (Committee) met November 30, 2005, in Fergus Falls to discuss state review comments, the content of the PCSD and recommendations for the final plan.

BWSR's August 24, 2005 letter pursuant to M.S.section 103B.313, subdivision 5, communicated the State's official comments pertaining to the priority concerns chosen by Hubbard County. BWSR commended Hubbard County for the process used to select the concerns and did not require any changes to the PCSD.

Hubbard County's three priority concerns are:

1. Ground Water-Based Drinking Water Protection
2. Surface Water Quality and Quantity Protection
3. Wetlands and Habitat Protection

The final draft of the updated Hubbard County Water Plan was submitted on October 30, 2006, for review by state agencies. Agency comments were due to Ron Shelito by December 6, 2006. Hubbard County held the required public hearing on September 6, 2006, as part of a regular County Board meeting.

The duration of the LWP is from January 2007 to January 2012.

The following agencies provided these comments:

- November 20, 2006, the Minnesota Environmental Quality Board, in its comments, noted that the JOBZone in the county appears to be located in a sensitive area for groundwater, and is also adjacent to an impaired water. The EQB suggested checking with the MPCA on how to reduce the risk to groundwater or impaired waters. The EQB also noted that population estimates from the State Demographic Center do not substitute for more detailed projections based on local knowledge and plans.

- November 30, 2006, the Minnesota Department of Natural Resources, in its comments, stated that the plan appears to be consistent with DNR priorities, and suggested the update be approved as submitted.

- On December 1, 2006, the Minnesota Pollution Control Agency, in its comments, stated that the plan does not violate any statutory or rule requirements administered by PCA, and recommended BWSR approve the plan as submitted.

- On December 8, 2006, the Minnesota Department of Agriculture, in its comments, stated that the plan does not violate any statutory or rule requirements administered by the MDA, and recommended BWSR approve the plan as submitted.

- On January 2, 2007, the Minnesota Department of Health, in its comments, stated that the plan does not violate any statutory or rule requirements administered by the MDH, and recommended BWSR approve the plan as submitted. The MDH also commended Hubbard County for its recognition of the importance of protecting groundwater quality and quantity.

Michelle Prosser, the Hubbard County Water Planner and other county representatives will attend the January 10th meeting in Brainerd, and make a short presentation on the final plan.

After reviewing the final plan, I find it contains all requirements of M.S. 103B.314 for content, and is consistent with the previously reviewed PCSD. The state agencies have recommended approval. I recommend the subcommittee approve the Hubbard County Local Water Management Plan at their January 10th meeting prior to the Board approval January 24, 2007. Hubbard County would then adopt the Plan in February, 2007.

HUBBARD COUNTY LOCAL WATER MANAGEMENT PLAN DEVELOPMENT AND EXECUTIVE SUMMARY

The Hubbard County Local Water Management Plan focuses on water and related land resource issues within the county. The county has gathered and studied available information relating to the physical environment, including, but not restricted to, the surface and groundwater resources, and their related land use.

Problems were analyzed within the context of watershed units and groundwater systems where appropriate. The LWM plan applies to the entire area within the county. It is also based on key economic and environmental principles, and is consistent with other plans that exist for Hubbard County, including appropriate, Soil and Water Conservation District, Environmental Service office, and appropriate state and federal agencies.

The 2007 Hubbard County LWM plan will apply for a period of five years from the date of State approval. In each subsequent fifth year, the County will examine the LWM plan and update it for the next five-year planning period.

The Hubbard County SWCD, with authority delegated by Hubbard County, is responsible for the LWM plan. The original LWM plan date was 1990 and has been updated in 1995, 1998 and now in 2007. The expiration date of the current plan is December 2006. The Water Resources Advisory Committee oversees the Hubbard County LWM plan. This task force is a diverse group of individuals from private and government sectors that establish the goals and objectives of the plan and oversees the implementation of local projects and plans.

The purpose of this plan is to identify existing and potential problems and opportunities for the protection, management and development of water and related land resources; and develop objectives and carry out a plan of action to promote sound hydrologic management of water and related land resource, effective environmental protection, and efficient management.

Through the LWM plan update process, three priority concerns were identified to focus water management efforts in 2007 through 2011; Groundwater-based Drinking Water Protection, Surface Water Quality and Quantity Protection, and Wetlands and Habitat Protection. The process through which these priority concerns were identified is further detailed in the Priority Concerns Scoping Document contained in Appendix H. These concerns and their objectives are summarized in the following paragraphs.

Priority Concern 1: Groundwater-based Drinking Water Protection
Many of the Hubbard County residents get their drinking water from the surficial aquifers. These aquifers are shallow and can be easily contaminated if the proper measures are not followed. Plan objectives for this priority area are to:

- Coordinate with State and Local entities to provide information and technical support for drinking water well testing
- Continue working with Federal, State and Local agencies to provide information and technical assistance for irrigation users

Potential Total Cost: $4,358

Priority Concern 2: Surface Water Quality and Quantity Protection
Surface water quality protection is very important to Hubbard County since 19% of its area is covered by water. Lakeshore and river front development is the biggest threat to all of our water resources especially to our many trout streams. Water quantity issues arise with development pressures. Plan objectives for this priority area are to:

- Work with State and Local agencies to provide support and input for the County-wide Land Use Planning process
- Coordinate with the communities of Park Rapids, Nevis, Akeley, Laporte and Hubbard County to develop Stormwater Management Plans
- Continue working with State, County, SWCD, and Private entities for water quality and quantity monitoring
- All Lake Belle Taine information should be collected, documented and managed by a single entity which will serve as the "clearinghouse" for easy access

Potential Total Cost: $6,510

Priority Concern 3: Wetlands and Habitat Protection
Many of Hubbard County's wetlands are adjacent to rivers and lakes that are being developed for residential use. Since wetlands play an important role in the environment, Hubbard County is taking an active role in the protection of this diverse and unique natural resource. Development pressures in the urban areas, recreational use of public lands, noxious weed control and invasive species are just some of the ongoing issues that will continue to be addressed in the future. Plan objectives for this priority area are:

- Collaborate with Federal, State and Local government agencies in developing a Comprehensive Wetland Protection & Management Plan
- Educate and promote the importance of BMPs

Potential Total Cost: $1,200

Clean Water Legacy Addition:

This update of the Hubbard County Local Water Management Plan was completed after the legislature passed one year start-up funding for the Clean Water Legacy, but just before they took action to make the CWL permanent in the 2007 session. The county recognizes that most of the county's surface waters are in a protection mode as they relate to the CWL. For the surface waters currently in the protection mode, the county's objective is to preserve them from further degradation. For the surface waters currently listed as impaired, the county's objective is to work to improve their quality and remove them from impaired status (recognizing that some impairments, such as those resulting from mercury, are difficult to address from the local level).

The county sees the Clean Water Legacy as an opportunity to continue to work to improve the quality of its lakes and rivers, and at the very least, protect the county's valuable surface waters from degradation, especially if the program is made permanent. The county also recognizes that the sandplain that includes most of the county's lakes, goes a long way to protect lake water quality by maximizing water infiltration, and minimizing runoff. The county's forest cover and wetlands also provide protection by further buffering runoff. The water plan recognizes the need to work on stormwater issues in developing areas, and lake related wastewater issues, especially non-conforming septic systems. Shoreland revegetation is another important component in the county's protection strategy. Although not an exhaustive list, these issues represent the core of the county's effort to protect water quality in cooperation with the Clean Water Legacy. The North Central Lakes Project can serve as a useful forum for working to develop additional strategies for protecting lake and stream water quality.

Minnesota Board of Water and Soil Resources
520 Lafayette Road North
St. Paul, Minnesota 55155

In the Matter of Reviewing the Local Water Management Plan Update for Hubbard County (Minnesota Statutes , Section 103B.311, Subdivision 4 and Section 103B.315, Subdivision 5.)

ORDER APPROVING LOCAL WATER MANAGEMENT PLAN UPDATE

Whereas, the Hubbard County Board of Commissioners submitted a Local Water Management Plan Update (Plan Update) to the Board on October 30, 2006, pursuant to M.S. Section 103B.315, Subd. 5, and

Whereas, the Board has completed its review of the Plan Update;

Now Therefore, the Board hereby makes the following Findings of Fact, Conclusions, and Order:

FINDINGS OF FACT

1) On May 25, 2005, the Minnesota Board of Water and Soil Resources received a Priority Concerns Scoping Document from Hubbard County, pursuant to M.S. Section 103B.312.

2) On August 10, 2005, the BWSR North Region Water Plan Review Committee met with representatives of Hubbard County to review the Priority Concerns Scoping Document.

3) On August 24, 2005, the Board of Water and Soil Resources approved official comments on the Hubbard County Priority Concerns Scoping Document, which were mailed to the county on August 24, 2005.

4) The priority concerns, in no particular order of importance, the local water management plan addresses include:

- Ground Water-Based Drinking Water Protection.
- Surface Water Quality and Quantity Protection.
- Wetlands and Habitat Protection.

5) On October 30, 2006, the BWSR received the **Hubbard** County Plan Update, a record of the public hearing, and copies of all written comments pertaining to the plan update to the Board for final State review pursuant to M.S. Section 103B.315, Subd. 5.

6) On January 10, 2007, the North Region Water Plan Review Committee of the board reviewed the recommendation of the state review agencies regarding final approval of the Hubbard County Plan Update. Recommendations of the state review agencies were:
   A) Minnesota Environmental Quality Board; made some general comments related to the JOBZone in the county, and population estimates from the State Demographers Office.

B) Minnesota Department of Natural Resources: recommended approval;
C) Minnesota Pollution Control Agency: recommended approval;
D) Minnesota Department of Health: recommended approval, and commended the county for its recognition of the importance of protecting groundwater quality and quantity.
E) Minnesota Board of Water and Soil Resources regional staff recommended approval;
F) Board Water Plan Review Committee Meeting recommended approval.

7) This update will be in effect for a five year period until January 24, 2012.

CONCLUSIONS

1. All relevant requirements of law have been fulfilled. The Board has proper jurisdiction in the matter of approving a Local Water Management Plan Update of Hubbard County pursuant to Minnesota Statutes, 103B.315, Subd. 5.

2. The Hubbard County Plan Update attached to this Order states water and water-related problems within the county; possible solutions; general goals, objectives, and actions of the county; and an implementation program. The attached Plan Update is in conformance with the requirements of M.S. Section 103B.301.

ORDER

The Board hereby approves the attached update of the Hubbard County Local Water Management Plan – January 24, 2007 to January 24, 2012.

Dated at St Paul, Minnesota, this twenty-fourth day of January 2007.

MINNESOTA BOARD OF WATER AND SOIL RESOURCES

_____

BY: Randy Kramer, Chair

DATE: 12/27/2006

TO: BWSR NORTHERN REGION AD HOC COMMITTEE

FROM: JASON WEINERMAN

RE: REVIEW OF MILLE LACS COUNTY FINAL LOCAL WATER MANAGEMENT PLAN (LWMP)

Mille Lacs County submitted their Local Water Management Plan to the Brainerd office of the BWSR. During my participation with the plan development and my review of the final plan, I came to the conclusion that the local water management plan meets the guidelines established by BWSR, as well as the requirements of 103B.313-103B.314. I recommend that BWSR approve the updated LWMP for Mille Lacs County.

During the Priority Concerns Scoping phase, the County did an excellent job of contacting state and local agencies and partners to solicit input and developed the following concerns, which were approved by the BWSR on August 24, 2005.

1. The cumulative effects of development on Surface and Groundwater.
2. Development of TMDLS for Impaired Waters in Mille Lacs.

On October 19, 2006 the plan was routed to the reviewing state agencies who returned the following comments.

MDA: The plan does not violate any statutory or rule requirements administered by our agency and approves the entire plan as submitted with no additional comments.
DNR: The Department extends their support for this plan as it creates a framework for protected and conserving Mille Lacs water resources over the next ten years. They look forward to working with the County during implementation.
EQB: They appreciated the opportunity to review the plan and were interested in reviewing the strategies to protect and restore the county's water resources. EQB provided the following comments and recommendations:

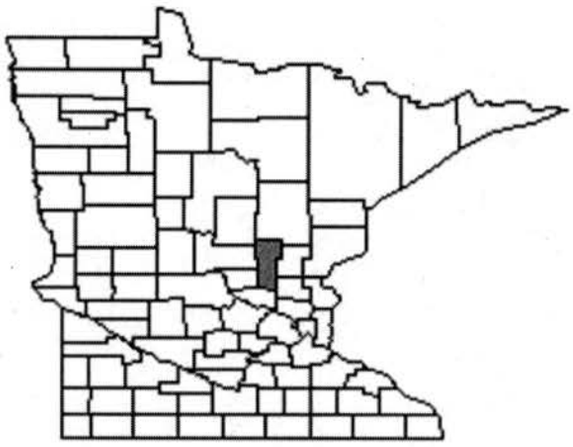
- Work with the PCA and the local SWCD or watershed district to reduce the risk of ground water contamination associated with developments in sensitive areas.
- Work with PCA to plan for developments contemplated in or near impaired waters.
- Provided information on MCD population extrapolations for Mille Lacs County.

PCA: The plan does not violate any statutory or rule requirements administered by our agency and approves the entire plan as submitted. The PCA offered the following comments:

- Consider developing prioritization strategies or phasing strategies for some of the tasks that involve expanded labor needs and larger budgets
- Text change on page 28 to complete a sentence. Correct the citation to reflect the correct title of the document "Final Report and Recommendations of the Mille Lacs Lake Watershed Management Group-Phase 1 Clean Water Partnership Watershed Management Project."
- Encourage the county to use the MPCA's Environmental Data Access to find information that may be useful in future water management efforts.

During the public hearing, several county commissioners asked detailed questions and requested further information. In meeting these requests and addressing concerns from citizens, the local water management plan advisory committee further refined the plan and strengthened several areas, particularly those focused on water quality. This high level of public concern and involvement with the local water management plan bodes well for the future implementation of activities and the water quality in Mille Lacs County.

Mille Lacs County
Location Map



Mille Lacs County is located in east central Minnesota 70 miles north of St. Paul, 115 miles southwest of Duluth and 29 miles east of St. Cloud. Sherburne County lies to the south, Aitkin to the north, Benton and Morrison to the west, and Kanabec and Isanti to the east. Mille Lacs County has a total area of 574 square miles and encompasses 367,360 acres.

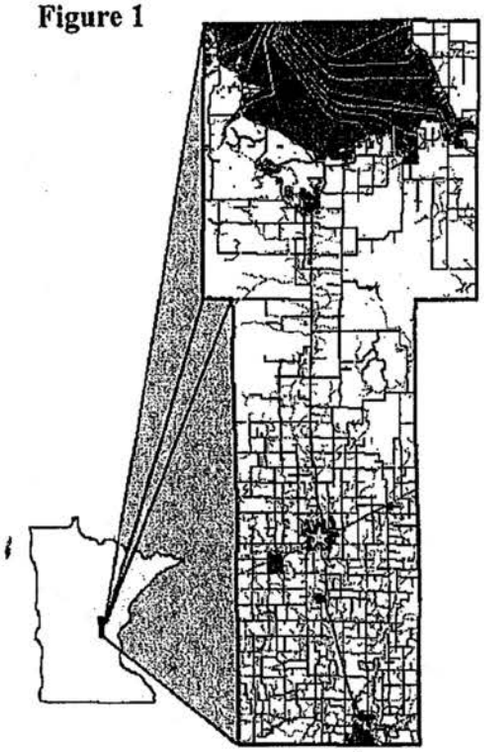
A. Executive Summary:

Introduction

Mille Lacs County is located in east central Minnesota 70 miles north of St. Paul, 115 miles southwest of Duluth and 29 miles east of St. Cloud. Sherburne to the south, Aitkin to the north, Benton and Morrison to the west, and Kanabec and Isanti counties on the east border it. Mille Lacs County has a total area of 574 sq miles (367,360 acres). **Figure 1** shows the location of Milaca, the County seat, and the geographic location of the County in Minnesota.

Mille Lacs County

Figure 1



Local Water Resource Management Plan Background

The Mille Lacs County water management planning process began in the fall of 1989 when the Mille Lacs County Board of Commissioners voted unanimously to begin the process of creating a Comprehensive Water Management Plan for the county.

This event was the first purposeful comprehensive planning, preparation and designing done for the protection for all types of water to all residents in Mille Lacs County.

From that time forward, the lakes, streams, rivers, public and private well water, all groundwater, wetlands, precipitation and even run-off were recognized for the significance and meaning they provided to the quality of life in the county.

The Mille Lacs Soil & Water Conservation District has been charged with development and implementation of the Local Water Management Plan with the assistance of other county departments since its inception.

By February of 1990, the Mille Lacs Comprehensive Water Management Task Force was established with 39 members representing townships, municipalities, industry, private sector, farming and single family home ownership. Federal, state and county employees were ad hoc members to the committee. An aggressive 24 month timeline from March, 1990 through March, 1992 was established to develop the county wide plan. The first update of the Comprehensive Water Management Plan was completed in 1995.

The 2006 update is the second update and the third Water Management Plan for Mille Lacs County. This plan continues the tradition of promoting good planning and management of shared resources and will serve as a guide for resource protection through the year 2016.

Purpose

The Rum River Watershed and significant tributaries of the Snake River Watershed begin in Mille Lacs County. What occurs in these watersheds not only affects the water resources used by the citizens of

Mille Lacs County, but also affects the water resources of other Minnesotans living downstream in the Mississippi and St. Croix River corridors.

Mille Lacs County recognizes that without a long term mechanism for managing water resources, the opportunity will be lost to make intelligent local choices that anticipate or prevent water resource problems before the costs escalate and options are limited.

The Mille Lacs County Local Water Management Plan is a plan for the entire County and covers all municipalities within Mille Lacs County.

The Mille Lacs County Local Water Management Plan (LWMP) is developed and written under the legislative authority of the "Comprehensive Local Water Management Act" (M.S. 103B.301-103B.355) and is meant to function as a long term planning document. The plan seeks to identify existing and potential problems, opportunities for protection, management and development of water and related land resources in the County. Problems or opportunities identified through the planning process are prioritized and addressed within the context of watershed units and groundwater systems. Objectives and action steps to address identified priorities are based upon principles of sound hydrologic management of water, effective environmental protection, and efficient management of activities that impact these resources.

The Mille Lacs Soil & Water Conservation District's role in the development and implementation of the Local Water Management Plan is to act as the catalyst for the water management planning process, and the integration of local initiatives with funding sources. Through involvement with the Water Management Plan Advisory Committee, local citizens, representatives from local organizations, associations and agency staff, work together to achieve efficient management and local ownership of water management initiatives.

Accomplishments from the 1995 Water Management Plan

Since the adoption of the Mille Lacs County Local Water Management Plan many local resource projects have been implemented. The plan has sponsored annual private well water nitrate testing clinics, and many land and water treatment projects and educational activities.

One notable educational activity was a project partnering with Mille Lacs Academy students to rear Purple Loosestrife leaf eating beetles. Purple Loosestrife had been a major natural threat to wetlands in the county. An aggressive biological control program using the Purple Loosestrife leaf-eating beetles (*Galerucella* spp.) was very successful. The project was accomplished through cooperative efforts between the Minnesota Department of Natural Resources (DNR), Mille Lacs Band of Ojibwe, Mille Lacs County Agricultural Inspector, and volunteers. The Mille Lacs Band of Ojibwe began a biological control effort using the leaf-eating beetles provided by the Minnesota DNR. Once the loosestrife on Whitefish Lake was successfully controlled by the beetles they were harvested and shared with the Mille Lacs County Agricultural Inspector student volunteer group and released onto Purple Loosestrife infestations throughout Mille Lacs County.

Other successful educational programs sponsored through the water management plan have been the Area III Envirothon and 5th Grade Education Days. Both events provide an opportunity for students to participate in outdoor educational learning experiences.

Many local resource concerns have received attention following identification through the water planning process. A large water quality improvement project was undertaken with assistance from the Resource Conservation & Development to address the City of Bock's failing, 1930's era, wastewater treatment system. Discharge from that failing system was impacting Bogus Brook, a tributary of the Rum River.

The improvement was completed in 2003 by piping waste water from the City of Bock to the City of Milaca's treatment facility.

Funding assistance was received through a Clean Water Partnership grant to do a three year water quality study of Mille Lacs Lake. Mille Lacs County has also partnered with the Snake River Watershed Management Board to implement land and water projects within that watershed. Additional information on the results of the Mille Lacs Lake water quality study and Snake River watershed activities are included in the surface water assessments.

Summary Description of Priority Concerns, Goals and Objectives

As Mille Lacs County began the process of updating the Local Water Management Plan, input was sought from the public. A public input survey was made available to citizens through the Mille Lacs SWCD website and advertised in the local papers to be returned to the SWCD. Three public input meetings were conducted during the Local Water Management Plan update process. They were held near Princeton, Milaca and Onamia, the three main geographic areas of Mille Lacs County. An example of surveys used and a summary of the responses received have been included in the Priority Concerns Scoping Document found in the **Appendix H.**

Priority Concern 1: The Cumulative Effects of Development on Surface and Groundwater

Mille Lacs County is experiencing increased development pressure on the County's lakes, rivers and agricultural resources. To respond to this development pressure, the County has established the following goals:

1) To seek the protection of surface and groundwater quality in Mille Lacs County, and
2) Enhance surface and groundwater quality where degradation has already occurred.

To achieve these goals, three objectives have been identified:

Objective A Encourage development patterns that protect, enhance, maintain or restore surface and groundwater quality.

Objective B Improve stormwater runoff quality throughout the county.

Objective C Maintain or improve groundwater quality throughout the county.

Priority Concern 2: Development of TMDLs for Impaired Waters

Total Maximum Daily Loads (TMDLs) determine if water resources can meet their designated uses. The goal of the water plan is to determine the status of TMDLs of the various water resources and protect those that currently support their designated uses, and where needed, improve those that do not.

To achieve this goal two objectives have been identified.

Objective A Assess the ability of water resources in Mille Lacs County to meet their designated uses.

Objective B Work with land managers, land owners and operators in Mille Lacs County, regardless of land use, to encourage best management practices.

Action steps identified to achieve these Objectives are found within this document under **Section B, Priority Concerns.**

Organizations and Associations

There are a number of organizations and associations in Mille Lacs County working to protect, preserve, repair or enhance water quality. Some of these entities and the assistance programs they provide include:

ORGANIZATION	CONTACT INFORMATION
DNR Wildlife Division Private Lands Program	Tim Pharis-Private Lands Specialist
▪ Wildlife habitat, native grassland development, wetland restoration	(763) 689-7110
U.S. Fish and Wildlife Service	Lori Wolff-Wildlife Biologist
▪ Wetland Restoration - Partners for Fish and Wildlife Program	(320) 253-4682
Friends of the Rum River	RumRiverWatershedNews-owner@yahoogroups.com
Lake Mille Lacs Association	www.mnlakes.org/SubAssociations
Mille Lacs Band of Ojibwe	www.millelacsojibwe.org
Mille Lacs County Zoning/Environmental Services	www.co.mille-lacs.mn.us
Mille Lacs County Public Health	(320) 983-8318
Mille Lacs Lake Watershed Management Group	www.millelacswatershed.com
Mille Lacs Soil & Water Conservation District (SWCD)	www.millelacsSWCD.org
▪ Erosion & water quality – State Cost Share Program	(320) 983-2160
▪ Low interest financing for water quality improvement – Agricultural Best Management Practices Loan Program (AgBMP)	
Natural Resources Conservation Service (NRCS)	(320) 983-2154
Soil & Water Quality Assistance for Agricultural Producers	
▪ Environmental Quality Incentive Program (EQIP)	
▪ Conservation Security Program (CSP)	
▪ Grassland Reserve Program (GRP)	
▪ Continuous Conservation Reserve Program (CCRP)	
Soil & Water Quality Assistance for Ag & Non-Ag Landowners	
▪ Wildlife Habitat Incentive Program (WHIP)	
Snake River Watershed Management Board	(320) 679-6310

Consistency with Other Plans

During development of the original comprehensive local water management plan, previous updates, and now the 2006 update, the most recent plans available from surrounding counties and watershed management organizations were examined to ensure consistency with their goals and objectives. Every attempt has been made to ensure that the plans were compatible with all existing local, state and regional plans and controls, and no conflicts or problems were identified.

Plans reviewed were the Mille Lacs County Comprehensive Plan of 1990, Rum River Management Plan of 1978, Wetland Guidance for the Anoka Sand Plain of September 2000, Snake River Watershed Annual Plan for 2002, Mille Lacs Lake Clean Water Partnership Report of 2003, Forest Resource Management Plan of 2005 and Water Management Plans from adjacent Counties.

Recommendations to Other Plans and Controls

Mille Lacs County is currently starting the process to revise several county ordinances and update its development code. Action items in this document encourage ordinance changes that would address issues of development impacts, stormwater management and sensitive ground and surface water concerns.

Improved protection of wetland resources could occur through a Local Comprehensive Wetland Management Plan. A community-based revision of the 1978 Rum River Management Plan which acknowledges current development pressures and patterns may improve the protection of the Rum River corridor while balancing the need for economic development in the County.

Minnesota Board of Water and Soil Resources
One West Water Street
Suite 200
St. Paul, Minnesota 55107

In the Matter of Reviewing the Local Water Management Plan Update for **Mille Lacs County** (Minnesota Statutes , Section 103B.311, Subdivision 4 and Section 103B.315, Subdivision 5.)

ORDER APPROVING LOCAL WATER MANAGEMENT PLAN UPDATE

Whereas, the **Mille Lacs** County Board of Commissioners submitted a Local Water Management Plan Update (Plan Update) to the Board on **October 16, 2006** pursuant to M.S. Section 103B.315, Subd. 5, and

Whereas, the Board has completed its review of the Plan Update;

Now Therefore, the Board hereby makes the following Findings of Fact, Conclusions, and Order:

FINDINGS OF FACT

1) On **May 19, 2005,** the Minnesota Board of Water and Soil Resources received a Priority Concerns Scoping Document from **Mille Lacs** County, pursuant to M.S. Section 103B.312.

2) On **August 24, 2005,** the Board of Water and Soil Resources approved official comments on the **Mille Lacs** County Priority Concerns Scoping Document, which were mailed to the county on **August 25, 2006.**

3) The priority concerns the local water management plan addresses include:

   A) The Cumulative Effects of Development on Surface and Groundwater
   B) Development of TMDLs for Impaired Waters

4) On **October 16, 2006,** the BWSR received the **Mille Lacs** County Plan Update, a record of the public hearing, and copies of all written comments pertaining to the plan update to the Board for final State review pursuant to M.S. Section 103B.315, Subd. 5.

5) On **January 10, 2007,** the regional Water Planning Committee of the board reviewed the recommendation of the state review agencies regarding final approval of the **Mille Lacs** County Plan Update . Recommendations of the state review agencies were:
   A) Minnesota Department of Agriculture recommends Approval
   B) Minnesota Department of Health recommends no recommendation received
   C) Minnesota Department of Natural Resources recommends Approval
   D) Minnesota Pollution Control Agency recommends Approval
   E) Minnesota Environmental Quality Board recommends Approval
   F) Minnesota Board of Water and Soil Resources regional staff recommends Approval
   G) Board Water Plan Review Committee Meeting recommends Approval

6) This update will be in effect until **December 31, 2016.**

CONCLUSIONS

1. All relevant requirements of law have been fulfilled. The Board has proper jurisdiction in the matter of approving a Comprehensive Water Plan Update of **Mille Lacs** County pursuant to Minnesota Statutes , 103B.315, Subd. 5.

2. The **Mille Lacs** County Plan Update attached to this Order states water and water-related problems within the county; possible solutions; general goals, objectives, and actions of the county; and an implementation program. The attached Plan Update is in conformance with the requirements of M.S. Section 103B.301.

ORDER

The Board hereby approves the attached update of the **Mille Lacs** Local Water Management Plan **January 1, 2007 to December 31, 2016 with** the Goals, Objectives and Action Items being amended prior to December 31, 2011.

Dated at **St. Paul,** Minnesota, this **twenty fourth day of January, 2007.**

MINNESOTA BOARD OF WATER AND SOIL RESOURCES

_____

BY: Randy Kramer, Chair

COMMITTEE RECOMMENDATIONS

Southern Water Planning Committee

1. Steele County Local Water Management Plan Update – *DECISION ITEM*

2. Wabasha County Priority Concerns Scoping Document – *DECISION ITEM*

Minnesota Board of Water & Soil Resources

DATE: November 21, 2006

TO: Jeff Nielsen, BWSR Southern Region Supervisor

FROM: Dave Peterson, Board Conservationist

SUBJECT: Steele County Local Water Management Plan Final Review

I have completed my review of the Steele County Local Water Management Plan 2007-2016 and recommend approval.

The Steele County Local Water Management Plan (LWM) meets the requirements of water management planning under M.S. 103B and BWSR Local Water Management Plan Guidance.

The Steele County LWM Plan:

- Identifies five priority concerns included in the Priority Concerns Scoping Document, approved August 24, 2006. The priority concerns for soil erosion and agricultural fertilizers and pesticides were combined in the plan, reflecting the common nature of pollutant delivery to surface waters in the two priority concerns.
- Adequately assesses the priority concerns and sets out appropriate goals and objectives.
- Includes updated assessment information relevant to the priority concerns.
- Organizes the plan into sections addressing the five priority concerns and on-going water management activities.
- Lays out priority water resources as those identified on the impaired waters lists.

The plan has a detailed implementation program with measurable actions, timeline, and budget.

Steele County understands and follows the LWM program requirements effectively using available resources to develop a LWM plan that responds to the interests and needs of Steele County. Steele County makes good use of the Water Planning Advisory Committee. The committee helps guide LWM planning and implementation ensuring effective public input.

The Steele County LWM Plan 2007-2016 reflects the work and commitment of the staff, committee, and boards in Steele County to effective local water management and is recommended for approval.

c: Scott Golberg, Steele County

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Steele County

Local Water Management Plan
2007 - 2016

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Frequently Used Acronyms and Abbreviations

AG	Agricultural
BMP	Best Management Practice
BWSR	Minnesota Board of Soil & Water Resources
CRWP	Cannon River Watershed Partnership
CREP	Conservation Reserve Enhancement Program
CRP	Conservation Reserve Program
CWI	County Well Index
DNR	Minnesota Department of Natural Resources
EQIP	Environmental Quality Incentive Program
LWM	Local Water Management
MDH	Minnesota Department of Health
NPDES	National Pollutant Discharge Elimination System
NRBG	Natural Resources Block Grant
NRCS	Natural Resource Conservation Service
MPCA	Minnesota Pollution Control Agency
Reach	Extends from one significant tributary to another and is typically less than 20 miles in length
RIM	Reinvest in Minnesota
SWCD	Steele County Soil & Water Conservation District
TMDL	Total Maximum Daily Load
WCA	Wetland Conservation Act Administration
WRP	Wetland Reserve Program
WREP	Wetland Reserve Enhancement Program

Executive Summary

Steele County is located in southeastern Minnesota approximately 65 miles south of Minneapolis/St. Paul. It is bordered on the north by Rice County, Minnesota; on the east by Dodge County, Minnesota; on the west by Waseca County, Minnesota; and by Freeborn County, Minnesota on the south. It contains 276,480 acres or 432 square miles, which includes four cities and 13 townships. The county seat is the city of Owatonna, which contains the largest population settlement and is located in the north central section of the county at the intersection of two major transportation routes: State Highway 14 and Interstate 35. Two of the smaller cities, Blooming Prairie and Ellendale serve as trade centers for the rural population, while the city of Medford contains a large retail center along Interstate 35 that draws transient visitors.

Steele County contains a predominance of rich agricultural land with about 85% of the land area in cropland. In addition, there is a diversity of businesses and industries in the county.

Steele County contains portions of four major watersheds within its boundaries: Cannon River Watershed, LeSueur River Watershed, Zumbro River Watershed, and Cedar River Watershed. Approximately 84% of the land area in Steele County is in the Cannon River watershed, which includes the area drained by the Straight River and its tributaries: Turtle Creek, Maple Creek, Crane Creek, Medford Creek, and Rush Creek. The southeastern corner of the county lies within the Cedar River watershed. The eastern and northeastern edge of Steele County lies within the Zumbro River watershed and the southwestern part of the county lies within the LeSueur River watershed

Steele County officially began the comprehensive water planning process in August, 1987, when the County Board authorized the development of a County Comprehensive Water Resources Management Plan by resolution. The Steele

County Board of Commissioners formally adopted the original water plan on August 14, 1990. The original water plan was updated in the mid-1990's to serve the period from 1997-2006.

Purpose of the 2007-2016 Local Water Management Plan

The purpose of this updated Local Water Management (LWM) Plan for Steele County is:

1. To provide a framework and schedule for implementing activities that address priority water management concerns.
2. To qualify the county for water resource management project funding from federal, state, and other sources.

Description of Priority Concerns

Through the Water Plan update process, six priority concerns were identified to focus water management efforts on from 2007 through 2016: Soil Erosion, Fertilizer and Pesticides from Agricultural Fields into Surface Waters, Sewage from Rural Septic Systems into Surface Waters, Urban Stormwater Runoff, Animal Feedlot Manure into Surface Waters, and Clandestine Waste Dumps affecting Drinking Water. The process through which these priority concerns were identified is further detailed in the Priority Concerns Scoping Document contained in Appendix A.

Summary of Goals

Because soil erosion is, in effect, the transport mechanism for fertilizers and pesticides to flow into surface waters, these two priorities will be combined into one priority in the implementation plan. The following is a summary of goals that have been established for the identified priority concerns:

1) **Soil, Fertilizers, and Pesticides from Agricultural Fields Flowing into Surface Waters** – Protect surface waters from sedimentation and ag field pollutant runoff
2) **Sewage from Rural Septic Systems into Surface Waters** – Protect surface waters and groundwater from rural wastewater contamination
3) **Urban Stormwater Runoff** – Protect surface water and groundwater resources from pollutants in urban stormwater runoff
4) **Animal Feedlot Manure into Surface Waters** – Protect surface water resources from open lot runoff and surface applied manure from animal feedlots
5) **Clandestine Waste Dumps affecting Drinking Water** – Protect groundwater resources from clandestine dump site pollutants

Consistency of the Plan with Other Pertinent Local, State & Regional Plans

In the process of the LWM plan update, Steele County examined the plans and official controls of local government units, contiguous counties, and State Agencies to ensure consistency with other water resource management efforts. The Steele County LWM plan is consistent with other local, state, and regional plans and controls. Implementation actions include working with other local and state agencies and programs to accomplish water resource protection and improvement.

Recommended Amendments to Other Plans

Steele County does not see the need for any amendment to other plans and official controls.

STEELE COUNTY PRIORITY CONCERNS
Assessments and Implementation Plan

1. Soil, Fertilizers, and Pesticides from Agricultural Fields Flowing into Surface Waters

Agriculture is essential to the economic vitality of Steele County. Eighty-five percent of the land area in Steele County (or approximately 235,000 acres) is used for growing crops. The practice of growing row crops such as corn and soybeans leaves the land vulnerable to water and wind soil erosion for seven to eight months out of the year. As a result, our streams and ditches see high sediment loads.

Soil erosion and sedimentation are the greatest nonpoint source and surface water pollution problems in the county that affect both water quality and quantity in lakes, streams, and ditches. Soil erosion is the primary mechanism for the transport of sediment, nutrients, and pesticides from ag land, urban areas, and construction sites to the drainage ditches and streams in Steele County.

The 1972 Federal Clean Water Act requires states to adopt water quality standards to protect the nation's waters. The Total Maximum Daily Load (TMDL) process is currently being used to bring impaired waters into compliance with water quality standards. One of the steps in the TMDL process is to develop a TMDL study to identify the maximum amount of any given pollutant that a water body can handle and still meet water quality standards. Many of Minnesota's water resources cannot currently meet their designated uses because of pollution problems from a combination of point and nonpoint sources.

Steele County has 376 miles of streams that includes 224 miles of public and private open drainage ditches. The 2006 Impaired Water List includes the following four stream reaches in Steele County (within the Cannon River watershed) that are listed as impaired for **turbidity**, an indicator of soil erosion and sedimentation:

Reach	Assessment Unit ID	Affected Use
Rush Creek: Headwaters To Straight River	07040002-505	Aquatic Life
Straight River: CD #25 To Turtle Creek	07040002-517	Aquatic Life
Straight River: Turtle Creek To Owatonna Dam	07040002-535	Aquatic Life

The Steele County Soil Survey indicates that 79,000 acres in the county have a potential toward slight to moderate water erosion and that 32,000 acres have a potential of moderate to severe erosion by water. Wind erosion is most severe in the 26,000 acres of sandy and peat soils in the county.

Most agricultural producers use pesticides and fertilizers to protect crops and increase yields. Because some pesticides and fertilizers can leach through the soil to groundwater, or be lost from fields in surface water runoff, it is critical that Ag BMP's be implemented to protect water quality. In addition, a reduction in the amount of fertilizers and pesticides used will ultimately reduce the level of contamination in surface and groundwater.

Conservation practices, source reduction of pollutants, and other control measures are needed throughout the county to protect water quality in both urban and rural areas where much of the original cover and vegetation has been replaced with cropland, roads, buildings, and other development.

Goal: Protect surface waters from sedimentation and agricultural field pollutant runoff

Objective 1 **Develop and Administer a Soil Erosion Ordinance**

Action/Implementation

A. Work with the SWCD office on the development of a soil erosion ordinance

B. Work with farmers to implement and enforce the soil erosion ordinance program to achieve acceptable soil loss

Timeline: 2007-2008 – ordinance development
2009-2016 – ongoing administration and enforcement

Agency: SWCD, County Planning & Zoning, County Environmental Services

Cost: $7,500 a year - NRGB Grant

Benefiting Watershed or Groundwater Unit: All watersheds, but priority given to watersheds that are on the impaired waters list for turbidity.

Objective 2 **Educate the public on best management practices to control soil erosion**

Action/Implementation

Develop and implement a 5 year marketing/education plan to inform landowners of best management practices for controlling erosion

Timeline: 2008-2013

Agency: SWCD & NRCS

Cost: $5,000 - SWCD funding

Benefiting Watershed or Groundwater Unit: All watersheds, but priority given to watersheds that are on the impaired waters list for turbidity

Action/Implementation

Develop and implement a 5-year action plan for increasing riparian buffer and filter strip enrollment through Continuous CRP, CREP, and other programs

Timeline: 2008– 2013

Agency: SWCD & NRCS

Cost: $35,000 per year - SWCD/BWSR funding

Benefiting Watershed or Groundwater Unit: All watersheds, but priority given to watersheds that are on the impaired waters list for turbidity

Objective 3 **Seek funding sources for soil erosion control projects**

Action/Implementation

Apply for 319 grant funds and other federal and state funding to create new erosion control projects or to enhance existing programs

Timeline: 2007-2016

Agency: SWCD, County Environmental Services, CRWP

Cost: $50,000-100,000 per year - 319 Grant, BWSR funding, Other

Benefiting Watershed or Groundwater Unit: All watersheds, but priority given to watersheds that are on the impaired waters list for turbidity

Objective 4: Promote Ag BMP's for pesticide and fertilizer use

Action/Implementation

Promote MDA's Best Management Practices for pesticide and fertilizer use

Timeline: 2009-2011

Agency: County Extension Office, County Environmental Services

Cost: $5,000

Benefiting Watershed or Groundwater Unit: All

Action/Implementation

Develop and implement a BMP training program for dealers, crop consultants, agronomists, SWCD and NRCS staff, and pesticide users

Timeline: 2010-2016

Agency: County and State Extension Office

Cost: $10,000 per year

Benefiting Watershed or Groundwater Unit: All

Objective 5: **Participate in the farm program policymaking process**

Action/Implementation

Work with federal legislators on developing environmentally and economically sustainable farm program policies

Timeline: 2007-2016

Agency: SWCD, NRCS, County Environmental Services, CRWP

Cost: In-kind

Benefiting Watershed or Groundwater Unit: All

2. Sewage from Rural Septic Systems into Surface Waters

The Lower Mississippi River Basin Fecal Coliform TMDL study identified septic systems as a major contributor of fecal coliform bacteria pollution to surface water. The Clean Water Act Section 303 (d) List of Impaired Waters contains the following stream reaches in Steele County for **fecal coliform bacteria** (all of these reaches are in the Cannon River Watershed):

Reach	Assessment Unit ID	Affected Use
Rush Creek: Headwaters To Straight River	07040002-505	Aquatic recreation
Straight River: CD #25 To Turtle Creek	07040002-517	Aquatic recreation
Turtle Creek: Headwaters To Straight River	07040002-518	Aquatic recreation
Maple Creek: Headwaters To Straight River	07040002-519	Aquatic recreation
Straight River: Turtle Creek To Owatonna Dam	07040002-535	Aquatic recreation
Crane Creek: Headwaters To Straight River	07040002-516	Aquatic recreation
Rush Creek: Headwaters To Straight River	07040002-505	Aquatic recreation

Steele County has approximately 3000 rural residences that are served by some type of an onsite septic system. It is estimated that one-half or about 1,500 of those residences have septic systems that are nonconforming or an imminent threat to public health.

The Steele County Planning and Zoning office issues 50-100 individual sewage treatment systems (ISTS) permits each year for new and replacement septic systems. The county sewage and wastewater treatment ordinance requires failing or nonconforming ISTS to be brought into compliance when a transfer of property occurs or when a living space addition is constructed on an existing home.

Ensuring that sewage from rural septic systems is properly treated will help in the prevention and control of waterborne disease, lake and stream degradation, groundwater contamination, and public health nuisance conditions.

Goal: To protect surface and ground water resources from rural wastewater contamination

Objective 1 **To educate the public on the proper use and maintenance of individual sewage treatment systems**

Action/Implementation

Conduct annual or semiannual homeowner sewage treatment workshops and distribute ISTS information to homeowners periodically

Timeline: 2007-2016

Agency: County Extension, County Planning & Zoning

Cost: $4,000 workshops per year
$5,000 mailings

Benefiting Watershed or Groundwater Unit: All

Objective 2 **To eliminate direct discharges of sewage to surface or ground water by identifying and repairing or replacing nonconforming sewage treatment/disposal systems.**

Action/Implementation

Identify potential failing and imminent public heath threat (ITPHS) systems by comparing a list of all developed properties with the existing list of sewage treatment system permit records/installations in Steele County.

Timeline: 2007-2008

Agency: County Planning & Zoning

Cost: $5,000

Benefiting Watershed: All

Action/Implementation

Develop and implement a strategic plan to bring nonconforming ISTS into compliance through publicity, enforcement, and financial incentives

Timeline: 2007 – 2016

Agency: County Planning & Zoning, County Environmental Services

Cost: $20,000 per year

Benefiting Watershed or Groundwater Unit: All watersheds with priority given to impaired waters for fecal coliform bacteria

Action/Implementation

Provide planning and technical assistance for small communities with inadequate wastewater treatment in the county

Timeline: 2007 – 2016

Agency: County Planning & Zoning, SE MN Water Resources Board

Cost: $20,000 per year - NRBG, 319 Grant

Benefiting Watershed or Groundwater Unit: All watersheds with priority given to impaired waters for fecal coliform bacteria

Action/Implementation

Provide financial assistance to homeowners to replace nonconforming systems through the Clean Water Partnership (CWP) loan program, AgBMP loan program, and other funding sources

Timeline: 2007 – 2016

Agency: County Environmental Services, County Planning & Zoning

Cost:	$250,000 per year	CWP and AgBMP Loan Programs
Benefiting Watershed or Groundwater Unit:	All watersheds with priority given to impaired waters for fecal coliform bacteria	

3. Urban Stormwater Runoff

When rain falls on land and impervious surfaces in urban areas such as paved streets, parking lots, and building rooftops, it can wash away soil and sediment. Stormwater runoff can change both water quality and quantity affecting our water resources physically, chemically, and biologically.

Stormwater from impervious surfaces and sediment from construction sites and other areas without vegetative cover can greatly increase floodwater potential and deliver large amounts of sediment to receiving waters.

Mankato State University completed a stormwater drainage contaminant study of Owatonna and Medford in 1993. The purpose of this study was to determine the contaminants associated with stormwater drainage in these two communities and their potential direct and indirect impact on groundwater and surface water. The results of this study showed that a large number of organic pollutants along with heavy metals, sediment, and nutrients are being transported with urban stormwater runoff and deposited into surface waters.

Nonpoint pollution sources that are associated with urban stormwater runoff include:

- Vehicular traffic
- Lawn and garden maintenance
- Municipal maintenance activities
- Industrial and commercial activities
- Improper disposal of household hazardous wastes
- Pet and wildlife feces and litter
- Construction activity
- Runoff from residential driveways and parking areas

As impervious surfaces increase, more water flows off of urban surfaces and is delivered faster to receiving waters. The increased activity on these surfaces means that more polluting material is available, as well. Minimizing the mobilization of this material and its impact is the goal of good runoff management practices.

Goal: To Protect Surface Water Resources from Pollutants in Urban Stormwater Runoff

Objective 1: Develop storm water runoff management and quality standards to use in local ordinances and plans

Action/Implementation

Develop best management practices and permit requirements for the City of Owatonna to comply with MPCA permit requirements

Timeline: 2007

Agency: City of Owatonna

Cost: $25,000

Benefiting Watershed: Cannon River Watershed

Action/Implementation

Update existing stormwater management standards as needed for development projects in Steele County in an effort to minimize the impact that post development runoff will have on water resources

Timeline: 2007 – 2009

Agency: County Planning & Zoning, SWCD, and Steele County Engineer

Cost: $5,000

Benefiting Watershed: All

Objective 2 Administer and enforce stormwater runoff controls during construction activities

Action/Implementation

Require all NPDES plans be implemented as part of local permits for construction sites and other areas without permanent vegetative cover

Timeline: 2008 – 2016

Agency: County Planning & Zoning, Municipalities, MPCA

Cost: $15,000 per year

Benefiting Watershed: All

Action/Implementation

Inspect sites or require self-certification of stormwater control implementation during and after construction

Timeline: 2008 – 2016

Agency: MPCA, Municipalities, County Planning & Zoning

Cost: $20,000 per year

Benefiting Watershed: All

Objective 3 Provide public education about stormwater management

Action/Implementation

Implement stormwater education as required for Owatonna under the MS4 permit

Timeline: 2007 – 2012

Agency: City of Owatonna, CRWP, County Environmental Services

Cost: $5,000 per year - State or Federal sources

Benefiting Watershed: All

4. Animal Feedlot Manure Runoff into Surface Waters

The Lower Mississippi River Basin Fecal Coliform TMDL Study identified surface applied manure and open feedlot runoff as contributors of fecal coliform bacteria pollution to surface waters. The 2006 Impaired Waters List includes seven stream reaches in Steele County (within the Cannon River Watershed) that are listed as impaired for fecal coliform bacteria (see page 10).

According the Steele County feedlot inventory there were 403 animal feedlots in Steele County in 2005. Manure that is generated from animal feedlots is typically stored or contained near the feedlot until it can be surface applied on land.

There are about 20 open feedlots in the county where animals congregate in an outside area and vegetation cannot be maintained due to their presence. Manure runoff from open feedlots can reach streams, ditches, and lakes through conveyances such as surface tile intakes, road ditches, and overland runoff during storm events.

Confined animal feedlot manure can pollute surface waters during storm water runoff events after the manure has been land applied.

Implementing manure management BMP's will reduce the impact that animal feedlot manure can have on surface water quality.

Goal: To Protect Surface Water Resources from Open Lot Runoff and Surface Applied Manure from Animal Feedlots

Objective 1 Address open lot feedlot manure runoff problems

Action/Implementation

Provide technical and financial assistance to open lot owners to make improvements that reduce runoff

Timeline:	2007-2016	
Agency:	County Planning & Zoning, SWCD, SE MN Water Resources Board	
Cost:	$50,000 per year	319 Grants, Ag BMP Loan Program

Benefiting Watershed: All watersheds with priority given to impaired waters for fecal coliform bacteria

Objective 2 Minimize the impact that surface applied manure from animal feedlots will have on surface water quality

Action/Implementation

Work with local agronomists and agronomy centers to ensure that manure is included in the overall farm nutrient management plan

Timeline: 2007-2016

Agency: County Planning & Zoning, SWCD, County Extension

Cost: $5,000 per year

Benefiting Watershed: All watersheds

Action/Implementation

Provide information and education about manure management BMP's and modern equipment technology to producers who apply their own feedlot manure

Timeline: 2007-2016

Agency: County Planning & Zoning, SWCD, County Extension

Cost: $5,000 per year

Benefiting Watershed: All watersheds

Action/Implementation

Provide financial assistance to producers and commercial applicators for manure application equipment and manure storage facilities

Timeline: 2007-2016

Agency: County Environmental Services, SE MN Water Resources Board, CRWP

Cost:	$100,000 per year	Ag BMP Loan Program
Benefiting Watershed:	All watersheds	

5. Clandestine Waste Dumps Affecting Drinking Water

There are approximately 3,000 rural households in Steele County that manage the waste that they generate in a variety of ways. Some rural residents contract with a commercial hauler to collect and haul all of their waste to a permitted landfill. Other rural farm and nonfarm residents choose to burn and/or burying all of their waste onsite or self-haul a portion of the waste to the county landfill. In addition to burning and burying waste onsite or having it hauled to an offsite landfill, some rural residents conduct recycling and composting activities.

Closed landfill records indicate that there are 10 closed township or municipal dump sites located throughout the county. These closed solid waste dumps operated prior to the siting of the county sanitary landfill in 1972.

Most of the current clandestine farm and nonfarm dumps, as well as the closed municipal/township dumps, have been located, designed, and operated without much consideration given for protecting groundwater and surface water resources. The drinking water that is most likely to be impacted by the onsite dumps is the well water serving the farm or nonfarm residence.

Goal: To protect groundwater resources from clandestine waste dump site pollutants

Objective 1 Provide education and safe waste management opportunities to rural residents for waste materials that can impact water resources

Action/Implementation

Continue to educate the public on reasons to recycle used oil and the locations where used oil can be brought for recycling

Timeline:	1997-2006
Agency:	County Environmental Services
Cost:	$2,000 per year - county service fee
Benefiting Watershed or Groundwater Unit:	All

Action/Implementation

Continue to provide a public education program on proper management of household hazardous waste products, promote the use of less hazardous products, and provide a facility and program to accept these waste products from residents

Timeline: 1997-2006

Agency: County Environmental Services

Cost: $25,000 per year - county service fee, state grant

Benefiting Watershed or Groundwater Unit: All

Action/Implementation

Provide a waste pesticide collection program for unwanted/unusable pesticides

Timeline: 2007-2016

Agency: County Environmental Services, Rice County

Cost: $2,000 per year MDA pesticide tax fund
$1,000 per year NRBG Grant

Benefiting Watershed or Groundwater Unit: All

Objective 2 Locate and address clandestine dump sites

Action/Implementation

Compile an inventory of old township and municipal dump sites and consider developing a monitoring program for nearby wells and surface water

Timeline: 2009-2016

Agency: County Environmental Services, Township Officials

Cost:	$5,000 for monitoring program	NRBG
Benefiting Watershed or Groundwater Unit:	All	

Action/Implementation

Inventory farm clandestine dump sites to determine compliance with regulations

Timeline:	2009-2016
Agency:	County Environmental Services, Township Officials
Cost:	In-kind
Benefiting Watershed or Groundwater Unit:	All

IMPLEMENTATION PROGRAM FOR ONGOING WATER MANAGEMENT ACTIVITIES

Steele County has implemented numerous programs and activities as part of its comprehensive water planning effort since the first plan was adopted in 1990. Some of the water management programs and activities that have been instituted for several years include the feedlot program, shoreland program, septic system program, and Wetland Conservation Act administration. This section of the water plan lists some of the ongoing activities that are planned for the 2007-2016 timeline of this plan.

Administration and Coordination

1. The County Environmental Services Department will provide the overall administration and coordination of the Local Water Plan including annual planning and reporting, staffing, and collaborating with other local, state, and federal agencies, as well as watershed organizations, joint powers boards, businesses and individuals.

Groundwater Monitoring

1. Provide a well water testing program for residents with private wells and maintain a database of test results and well information.
2. Coordinate a monitoring program that includes testing of private wells for an extended list of parameters such as pesticides.

Surface Water Monitoring

1. Maintain a surface water monitoring program to record baseline water quality information and water quality trends data for the Straight River Watershed.

Education and Technical Assistance

1. Annually summarize well water test results for the public and state and local agencies.
2. Annually summarize surface water quality test results for the public and state and local agencies.
3. Support the SWCD's long range plan for soil and water conservation practices.
4. Advertise and publicize information related to water and waste management activities and programs, including regulations, services, and technical and financial assistance.

5. Provide technical assistance upon request for information related to existing regulations and incentive programs.
6. Provide updated information on the County's Web Page.
7. Support and encourage enrollment in local, state, and federal programs that protect and improve water quality and resources such as CRP, CREP, RIM, WREP, and WRP.
8. Provide information and education to landowners and contractors about wetland regulations and wetland conservation and preservation programs.
9. Support education efforts to promote Ag BMP's including nutrient management, riparian and tile intake buffers, pesticide application, etc.
10. Support the needs of public water suppliers in their wellhead protection plan programs.

Financial Assistance

1. Provide an opportunity for landowners to obtain an AgBMP low interest loan for water quality protection or improvement projects such as erosion control projects, conservation tillage equipment, manure storage structures, and manure application equipment.
2. Provide an opportunity for landowners to obtain a Clean Water Partnership low interest loan to replace a noncompliant septic system.
3. Provide an abandoned well sealing cost-share program for landowners to help defray the cost to seal abandoned wells.
4. Seek funding for local or watershed-based projects which protect or improve water resources.

Research, Mapping, and Inventorying

1. Utilize aerial photography and computer technology to create accurate inventories and maps that can be used to educate the public, provide technical assistance, and enforce regulations.
2. Initiate and participate in research work related to water resources
3. Develop and implement TMDL projects to identify and address impaired waters in the county.

Regulation, Ordinances, Planning

1. Regularly update plans and ordinances such as the County Water Plan, Comprehensive Land Use Plan, Solid Waste Management Plan, Zoning Ordinance, Subdivision Ordinance, Feedlot Ordinance, Solid Waste Ordinance, and Sewage and Wastewater Treatment Ordinance.
2. Administer and enforce the county zoning ordinance.
3. Administer and enforce the county feedlot ordinance.
4. Administer and enforce the county shoreland and floodplain regulations.

5. Administer and enforce the county solid waste ordinance.
6. Administer and enforce the county sewage and wastewater ordinance.
7. Administer the state Wetland Conservation Act rules.

APPENDIX A

STEELE COUNTY
WATER MANAGEMENT PLAN UPDATE
2007 - 2016

PRIORITY CONCERNS SCOPING DOCUMENT, MAY 2006

Introduction

Steele County is located in Southeast Minnesota approximately 65 miles south of Minneapolis/St. Paul. The county has a land area of 432 square miles or approximately 276,480 acres, which includes four cities and 13 townships. The county seat is the City of Owatonna, which contains the largest population settlement. The interpolated population of the county in the year 2006 is 34,567. The projected population in the year 2015 is 37,580. The predominant land-use in the county is agriculture with about 85% of the total land area cultivated.

Local Water Management Plan

The County of Steele is the local government unit responsible for the Comprehensive Local Water Management Plan authorized by MN Statute, Section 103B. The County's Environmental Services Department is responsible for the administration of the Water Management Plan. The County's original Water Management Plan was adopted in 1990. The Plan was updated in 1997 and will expire at the end of 2006.

List of Priority Concerns

1. Soil erosion carrying pollutants into surface waters.
2. Sewage from rural septic systems that drain to field tile, ditches, streams, or rivers.
3. Chemicals from urban streets and storm sewers flowing into rivers and streams.
4. Fertilizers and pesticides from agricultural fields flowing into rivers and streams.
5. Land applied manure and manure runoff from animal feedlots flowing into rivers and streams.
6. Chemicals from buried waste and open dumps on private land seeping into drinking water.

Priority Concern Identification

The Water Planning Advisory Committee gathered input from the following:

1. Written questionnaire sent by mail to local and state governments returned by November 1, 2005.
2. Written questionnaire sent by mail to special interest groups returned by November 30, 2005
3. Written questionnaire sent by mail to 15% of the county's households and businesses returned by November 15, 2005.
4. Public input meeting held at the County Administration Center on March 2, 2006.

Attached are summaries of survey responses and the minutes from the public input meeting.

Priority Concern Selection

The Water Planning Advisory Committee identified water-related concerns based on known scientific data about the county's resources as well as from the information received from the surveys and the public meeting. Most of Steele County's priority concerns were the same issues identified by local, state, and regional agencies.

Priority Concerns not Addressed by the Plan

Due to limited staff resources and water planning funds, the other concerns that were identified in the planning process will not be addressed in this plan update. Some of the other concerns that ranked below the six priority concerns include:

1. Fertilizers and pesticides from urban lawns flowing into rivers and streams
2. Surface pollutants going down old wells into drinking water
3. Fertilizers and pesticides from agricultural fields seeping into drinking water
4. Need more enforcement of current regulations that protect our water
5. Inadequate municipal wastewater treatment systems
6. Loss of natural vegetation and habitat

Minnesota Board of Water and Soil Resources
520 Lafayette Road North
St. Paul, Minnesota 55155

In the Matter of Reviewing the Local Water Management Plan Update for **Steele County** (Minnesota Statutes, Section 103B.311, Subdivision 4 and Section 103B.315, Subdivision 5)

ORDER APPROVING LOCAL WATER MANAGEMENT PLAN UPDATE

Whereas, the Steele County Board of Commissioners submitted a Local Water Management Plan Update (Plan Update) to the Board of Water and Soil Resources (Board) on November 3, 2006, pursuant to M.S. Section 103B.315, Subd. 5, and

Whereas, the Board has completed its review of the Plan Update;

Now Therefore, the Board hereby makes the following Findings of Fact, Conclusions, and Order:

FINDINGS OF FACT

1. On June 6, 2006, the Board received a Priority Concerns Scoping Document from Steele County, pursuant to M.S. Section 103B.312.

2. On August 24, 2006, the Board approved official comments on the Steele County Priority Concerns Scoping Document, which were mailed to the County on August 24, 2006.

3. The priority concerns the local water management plan addresses include:
    1. Soil, fertilizers and pesticides from agricultural fields flowing into surface waters
    2. Sewage from rural septic systems into surface waters
    3. Individual sewage treatment systems
    4. Animal feedlot manure runoff into surface waters
    5. Clandestine waste dumps affecting drinking water

4. On November 3, 2006, the Board received the Steele County Plan Update, a record of the public hearing, and copies of all written comments pertaining to the Plan Update to the Board for final State review pursuant to M.S. Section 103B.315, Subd. 5.

5. On January 10, 2007, the regional Water Planning Review Committee of the Board reviewed the recommendations of the state review agencies regarding final approval of the Steele County Plan Update. Recommendations of the state review agencies were:

a. Minnesota Department of Agriculture: recommends approval;
b. Minnesota Department of Health: recommends approval;
c. Minnesota Department of Natural Resources: recommends approval;
d. Minnesota Pollution Control Agency: recommends approval;
e. Minnesota Environmental Quality Board: recommended inclusion of additional information in Steele County Plan Update.
f. Minnesota Board of Water and Soil Resources regional staff: recommends approval;
g. Board regional Water Planning Review Committee: recommends approval.

6. This update will be in effect until **December 31, 2016.**

CONCLUSIONS

1. All relevant requirements of law have been fulfilled. The Board has proper jurisdiction in the matter of approving a Local Water Management Plan Update of Steele County pursuant to Minnesota Statutes 103B.315, Subd. 5.

2. The Steele County Plan Update attached to this Order states water and water-related problems within the county; possible solutions; general goals, objectives, and actions of the county; and an implementation program. The attached Plan Update is in conformance with the requirements of M.S. Section 103B.301.

ORDER

The Board hereby approves the attached update of the Steele County Local Water Management Plan with a required update to the Implementation section (Goals, Objectives and Action) by December 31, 2011.

Dated at St. Paul, Minnesota, this 24th day of January 2007.

MINNESOTA BOARD OF WATER AND SOIL RESOURCES

_____

BY: Randy Kramer, Chair

Minnesota Board of Water & Soil Resources

DATE: December 22, 2006

TO: Jeff Nielsen, BWSR Southern Regional Supervisor

FROM: Mary Kells, Board Conservationist

SUBJECT: BWSR Staff Final Comments on Wabasha County's PCSD

Wabasha County has submitted their Priority Concerns Scoping Document (PCSD) for the 2007 Local Water Management Plan Update to BWSR and other state agencies. BWSR received this document on November 13, 2006. State agency coments were received from MDA, EQB, MPCA and MDNR. All agencies concurred with priority concerns identified. MPCA, MDA and EQB offered comments for including more specific information in the final Local Water Management (LWP) Plan that addresses the suggestions and comments provided to the County in their Priority Concerns Input documentation.

Representing BWSR staff, I have completed my review of the Priority Concerns Scoping Document for Wabasha County and recommend the BWSR concur with the priority concerns identified. The BWSR priority concerns input documentation is on file with the County. It is anticipated that the County will consider these comments when developing the final LWP Plan.

I look forward to working with the County officials, residents, and technical staff as the Plan Update moves forward. If you have questions or need additional information, please contact me at 507-280-2873.

C: Byron Evers, Wabasha County Water Planner

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January 24, 2007

Wabasha SWCD Board of Supervisors
C/o Bryon Evers, Water Plan Coordinator
Wabasha Soil and Water Conservation District
611 Broadway
Wabasha, MN 55981

Dear Wabasha SWCD Board of Supervisors:

RE: Official Comments Pertaining to the State Review of the Wabasha County Priority Concerns Scoping Document

Pursuant to Minnesota Statutes 103B.313, subdivision 5, this letter communicates the State's official comments pertaining to the priority concerns Wabasha County has chosen to address in the update of their Local Water Management (LWM) Plan. The Board of Water and Soil Resources (BWSR), along with the state review agencies, received the Wabasha County Priority Concerns Scoping Document (PCSD) on November 13, 2006.

Wabasha County has reviewed the identified concerns raised during the public input process and from comments received from MPCA, EQB, BWSR, MDA and MDNR. Wabasha County selected the following priority concerns for inclusion in the update of the LWM Plan.

1. **Soil Erosion:** Erosion from farm fields, soil lost from construction sites and improper management of stream banks cause an increase in sediments loads.
2. **Nutrient and Manure Management**: Nutrient contribution to bodies of water from farm fields, feedlots and urban lawns is a major factor to the impairment of local waters.
3. **ISTS/Ground Water Protection**: Inadequate treatment of human waste adds excess nutrients to the water and causes a direct human health threat.
4. **Forest and Pasture Land**: Wabasha County's most sensitive land is managed as forest and pasture land. Improperly managed forest and pastureland can cause erosion and impact water quality.
5. **Impaired Waters**: Water listed as impaired will receive priority and efforts will be made to improve the water quality.

Agency comments on the PCSD were received from the MDA, EQB, MPCA, MDNR and BWSR. All agencies concurred with priority concerns identified. MPCA, MDA, and BWSR offered comments and suggestions for more specific activities to be considered in the development of the final LWP plan and offered their support.

The BWSR southern region water planning review committee (hereinafter referred to as Committee) met on January 10, 2007, to discuss any state review agency coments, the content of the PCSD, and recommendations for the content of the final plan.

The Committee commends the County for the program reassessment they conducted as part of this planning process, for the process they used to select the concerns, including soliciting input from local government, citizens, and state agencies, and incorporating that information into the five priority concerns. The priority concerns to be address in the LWM Plan are deemed to be appropriate; and the Committee recommends approval of the Wabasha County PCSD.

Sincerely,

Randy Kramer, Chair
Minnesota Board of Water and Soil Resources

c: Eugene McNallan, Wabasha County Commissioner Chair
Becky Balk, MDA
John Wells, EQB
Art Persons, MDH
Cheryl Heide, DNR
David L. Johnson, MPCA
Joe Martin, MDA
Dan Wilson, MDH
Dana Allen, BWSR Board
Brian Kletscher, BWSR Board
Paul Langseth, BWSR Board
Jeff Nielson, BWSR Southern Region Supervisor
Mary Kells, Board Conservationist

NEW BUSINESS

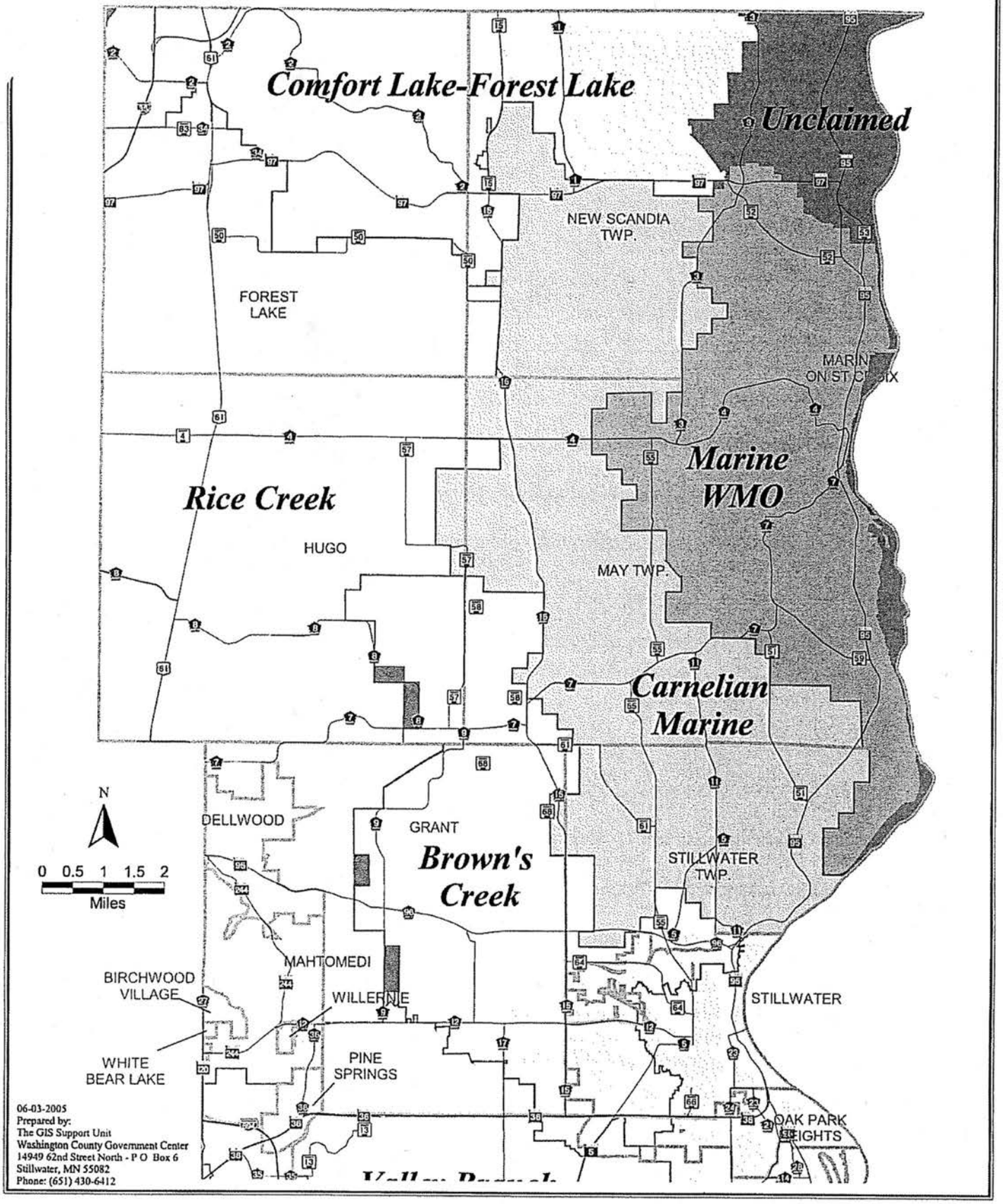
1. Public Hearing on Petition for Enlargement and Increase Number of Managers of Carnelian-Marine Watershed District – Jim Haertel - *DECISION ITEM*

2. WCA Appeal of a Wetland Boundary and Replacement Plan Decision, Rice Creek Watershed District, File 05-1 Jim Haertel – *DECISION ITEM*

3. Request to Release 12.5 Acres from Perpetual RIM Reserve Conservation Easement 76-15-01-01, Swift County – Tim Fredbo – *DECISION ITEM*

4. '07 Non-Point Engineering Assistance Challenge Grant – Wayne Zellmer – *DECISION ITEM*

Exhibit A
Washington County
Enlargement of Carnelian Marine Watershed District



06-03-2005
Prepared by:
The GIS Support Unit
Washington County Government Center
14949 62nd Street North - P O Box 6
Stillwater, MN 55082
Phone: (651) 430-6412

Minnesota Board of Water and Soil Resources
520 Lafayette Road North
Saint Paul, Minnesota 55155

In the Matter of the Enlargement and Increasing the Number of Managers Petition for the Carnelian-Marine Watershed District in Washington County pursuant to Minn. Statutes §§ 103D.261 and 103D.305

ORDER HEARING FOR CARNELIAN-MARINE WATESHED DISTRICT

Whereas, Washington County filed a Petition dated December 1, 2006, with the Board of Water and Soil Resources (Board) on December 22, 2006, to enlarge the Carnelian-Marine Watershed District (District) pursuant to Minn. Stat. § 103D.261, and to increase the number of managers pursuant to Minn. Stat. § 103D.305, and;

Whereas, the Board has completed its review of the Petition;

Now Therefore, the Board hereby makes the following Findings of Fact, Conclusions, and Order.

FINDINGS OF FACT

1. **Petition Signatures.** The enlargement and increase number of managers petition dated December 1, 2006, was filed with the Board on December 22, 2006 by Washington County. Washington County contains all of the area in the current District and all of the territory proposed to be added to the District. Minn. Stat. §§ 103D.205, Subd. 3, item 3, and 103D.261, Subd. 1, item a, allow an enlargement petition to be signed by counties having 50 percent or more of the area within the territory proposed to be added. Minn. Stat. §103D.305, Subd. 2, item 1 allows an increase in number of managers petition to be signed by one-half or more of the counties within the District.

2. **Property Description.** The territory proposed to be added to the District is depicted in Exhibit A of the Petition and is an area in Washington County, approximately 38 square

miles in several communities, which includes land in the Cities of Marine on St. Croix and Scandia, and the Towns of May and Stillwater. The proposed enlarged watershed district consists of a total of 81.48 square miles, of which 27.33 square miles are located within the City of Scandia, 4.18 square miles are located within the City of Marine on St. Croix, 0.74 square miles are located within the City of Hugo, 34.58 square miles are located within the Town of May, 0.25 square miles are located within the City of Grant, and 14.40 square miles are located within the Town of Stillwater.

3. **Necessity for Enlargement and Increase Number of Managers.** The Petition states the enlargement and increase number of managers is necessary due to the large number and diversity of water-related natural resources, significant high value resources, heavy use of the resources for recreational and aesthetic purposes, recharge of drinking water supplies, increased development pressures, fiscal capacity, and manager appointments to fairly represent the area.

4. **Water Governance Study.** In May 1998, the Washington County Board of Commissioners authorized a Water Governance Study to identify and evaluate the best governance structure for water management for the county. In April 2002, the county developed a plan defining the expectations of watershed management organizations for actively managing the water resources of the county. Washington County has worked with representatives of each of the water management units to develop recommendations for key issues related to the enlargement, renaming and increase the number of managers of the District, such as financing policies, coordination of water management plans, water management name and board representation. Goals from the Revised Implementation Plan for Water Governance are as follows:

a. To create a water management structure that will provide long term protection for surface and groundwater resources.

b. To create local water management units with the fiscal capacity and authority to govern efficiently and effectively.

c. To identify financing mechanisms that are fair and adequate to meet the needs of the county.

d. To coordinate surface water, groundwater, land use, and natural resources management to provide for a more comprehensive approach to resource management.

e. To adopt a proactive rather than a reactive approach to countywide water resources.

f. To increase the accountability of the water management structure.

5. **District Name.** The Petition states the name of the proposed enlarged district shall be the Carnelian-Marine-St. Croix Watershed District.

6. **Number of Managers.** The Petition requests the number of managers be increased from five (5) to seven (7).

7. **Filing.** The Petition was filed with the District and the Board as required by Minn. Stat. § 103D.261, Subd. 1, item c.

8. **Hearing Panel.** The Metro Water Planning Committee should preside over the public hearing and meet as necessary in order to bring a recommendation to the Board.

9. **Hearing Time.** The public hearing should be held on Thursday, February 22, 2007, starting at 7:00 PM.

10. **Hearing Location.** The public hearing should be held at the Marine on St. Croix City Hall located at 121 Judd Street in Marine on St. Croix, Minnesota. The facility is located within the area proposed to be added to the District and is handicap accessible.

CONCLUSIONS

1. The Petition for the enlargement and increase the number of managers of the Carnelian-Marine Watershed District is valid in accordance with Minn. Stat. §§ 103D.261 and 103D.305.

2. All relevant substantive and procedural requirements of law and rule have been fulfilled.

3. The Board has proper jurisdiction in the matter of ordering a watershed district enlargement and increase number of managers hearing.

4. The public hearing on the Petition for the enlargement and increase the number of managers of the Carnelian-Marine Watershed District should be presided over by the Metro Water Planning Committee.

5. The public hearing should be held on Thursday, February 22, 2007, starting at 7:00 PM at the Marine on St. Croix City Hall located at 121 Judd Street in Marine on St. Croix, Minnesota.

ORDER

The Board hereby orders the public hearing on the enlargement and increase number of managers Petition for the Carnelian-Marine Watershed District be presided over by the Metro Water Planning Committee on Thursday, February 22, 2007, starting at 7:00 PM at the Marine on St. Croix City Hall located at 121 Judd Street in Marine on St. Croix, Minnesota.

Dated at Saint Paul, Minnesota this 24th day of January, 2007.

MINNESOTA BOARD OF WATER AND SOIL RESOURCES

By: _____
Randy Kramer, Chair

Minnesota Board Of Water And Soil Resources

520 Lafayette Road North
St. Paul, Minnesota 55155

BWSR File No. 05-1

In the Matter of the Wetland Conservation Act Appeal of a Wetland Boundary and Replacement Plan Decision for the Joe Preiner Property, Rice Creek Watershed District, City of Blaine, Anoka County.

ORDER

This is an appeal by a member of the Technical Evaluation Panel ("TEP"), who is staff of the Board of Water and Soil Resources ("BWSR staff"), of a decision by the Rice Creek Watershed District, Anoka County ("RCWD"), determining that Joe Preiner correctly delineated the wetland boundary and submitted a sufficient wetland replacement plan application in connection with the proposed rough grade plan for his property in anticipation of future development.

The Board of Water and Soil Resources ("Board") remanded a previous decision of the RCWD, the local government unit ("LGU") administering the Wetland Conservation Act ("WCA"), and ordered RCWD to provide notice to the Technical Evaluation Panel and others of a complete replacement plan application, convene an expanded TEP with additional wetland expertise, and develop an adequate record. Subsequent to that remand, on December 15, 2004, the RCWD reaffirmed its approval of Joe Preiner's wetland delineation and replacement plan over the objections of the TEP and RCWD staff. The BWSR staff appealed as a TEP member.

The BWSR staff's appeal was supported by the TEP member of the Anoka Conservation District (written submission) and by amicus Minnesota Center For Environmental Advocacy. Joe Preiner and the Rice Creek Watershed District argued in support of the permit grant.

By consent of the parties, the appeal was held so that settlement could be explored. When settlement was not reached, written arguments were submitted to the Board's Dispute Resolution Committee ("DRC"). On December 13, 2006, the DRC heard oral arguments and commenced deliberation. On January 11, 2007, the DRC resumed deliberation with counsel for

the parties present. At that time the DRC heard additional comment on behalf of the parties. At that time the DRC was informed that pursuant to Minnesota Statute § 103G.2242, subd. 2a(d) and Minnesota Rule 8420.0225 (D), the Rice Creek Watershed District had withdrawn its approval of the wetland delineation on January 10, 2007.

Jill Schlick, Assistant Attorney General, appeared on behalf of Appellant BWSR staff. Attorney Ronald J. Riach appeared on behalf of applicant Joe Preiner. Attorney Charles B. Holtman appeared on behalf of RCWD.

At the completion of deliberations, the DRC by a 3-1 vote adopted a recommendation to remand the case to the RCWD, consistent with the RCWD January 10, 2007 decision, for a new wetland delineation pursuant to Minnesota Statute § 103G.2242, subd. 2a(d) and Minnesota Rule 8420.0225 (D) and for a new, complete replacement plan.

Based upon the entire record of this proceeding, BWSR makes the following:

ORDER

1. The December 15, 2004, decision of the Rice Creek Watershed District approving a wetland delineation is remanded to the RCWD, consistent with the RCWD January 10, 2007 decision, for a new wetland delineation pursuant to Minnesota Statute § 103G.2242, subd. 2a(d) and Minnesota Rule 8420.0225 (D).

2. The decision of the RCWD approving the replacement plan is remanded to the RCWD for a new, complete replacement plan following the new wetland delineation determination.

2. The attached Memorandum is incorporated by reference and made a part of this Order.

Dated: January 24, 2007

Board of Water and Soil Resources

_____

Its Chair

MEMORANDUM

The standard of review for appeals to BWSR is established in Minn. R. 8420.0250, subp. 3 (2005). The Rule provides:

> The board will affirm the local government unit's decision if the local government unit's findings of fact are not clearly erroneous; if the local government unit correctly applied the law to the facts, including this chapter; and if the local government unit made no procedural errors prejudicial to a party. Otherwise, the board will reverse the decision, amend it, or remand it with instructions for further proceedings.

Regarding the wetland delineation, we determine that it was within the jurisdiction of the RCWD to withdraw its existing wetland delineation pursuant to Minnesota Statute 103G.2242, subd. 2a(d) and Minnesota Rule 8420.0225 (D) based upon the TEP's determination that changes to the hydrology of the area have been sufficient to alter the wetland boundary or type. Because the delineation is withdrawn, the appeal of that delineation is either moot or the existing delineation is no longer a final determination on which this Board need rule.

Regarding the replacement plan, Joe Preiner did not submit a signed application for a replacement plan and his submissions did not contain various required components of a replacement plan pursuant to Minnesota Statute 103G.2242, subd. 4 and Minnesota Rule 8420.0530. Although it has been argued that the RCWD decision was consistent with the Comprehensive Wetland Protection and Management Plan and there were "understandings" regarding some missing elements, that some missing elements were not consequential, and/or that missing elements would be determined by the RCWD during implementation, the submitted materials were so lacking that one would not be able to determine if the Applicant's restoration activities did, or did not, comply with the replacement plan. The restoration plan was therefore clearly deficient.

January 10, 2007

TO: Board Members

THRU: Kevin Lines, Easement Section Administrator

FR: Tim Fredbo, Conservation Easement Specialist

RE: Alteration Request for Conservation Easement 76-15-01-01, Gary Wehrer

BACKGROUND:

Gary Wehrer, through the Swift SWCD, has requested the BWSR to approve removing 12.5 acres of land currently in a perpetual RIM Reserve conservation easement. This includes 7.5 acres that were donated to the State and 5 acres paid for at non-crop rates, all 12.5 acres were not cropland at the time of enrollment. The land is located in Sections 4 and 9, T122N, R37W, (Kerkhoven Township), of Swift County. This easement is immediately adjacent to the Big Slough Waterfowl Production Area, which is owned and managed by the US Fish and Wildlife Service. Mr. Wehrer is proposing to pay the State back for release of the 5 acres that he was compensated for at whatever price we would require. The original easement on Mr. Wehrer's property for 62.5 acres (50 acres cropland, 12.5 acres non-crop) was recorded on January 14, 2002. The State paid $29,425.40 for this easement. The easement area was eligible as a RIM Reserve riparian area and was taken as part of the MN River CREP. The acres proposed for release are not subject to the USDA CRP contract on the 50 acres of cropland.

Mr. Wehrer is requesting this release because he has a purchase agreement to sell the entire 62.5 acre CREP easement parcel that is contingent on the prospective purchaser being able to construct a hunting cabin on the non-crop acres. Mr Wehrer claims that he never understood that he was donating 7.5 acres as part of the RIM easement he was agreeing to.

Mr. Wehrer has been a very active participant in our RIM Reserve easement program as he currently has 5 easements on 325 acres in Swift and Pope Counties. This is the first time he has requested a change in an easement.

MN Statute Section 84C.02, and RIM Reserve rule section 8400.3610 allows the Board to alter, release or terminate an easement after consultation with the commissioners of agriculture and natural resources. An easement may only be altered, released or terminated if the Board determines that the public interests and general welfare are better served by the proposed action. To assist the Board in making it's decision the rule also states that the following items must be submitted before the Board will consider a request to alter, release or terminate an easement:

A) A letter from the landowner to the SWCD Board requesting the change.
B) A letter or minutes from the SWCD recommending either approval or disapproval of the proposed change.
C) A letter from the DNR area wildlife manager recommending either approval or disapproval of the proposed change.

The above listed items have been received and are attached for your review. The photo was prepared by easement staff to show the area for release, both donated and non-crop RIM acres.

The BWSR Board has also adopted a policy to address easement alteration requests. It was approved by the BWSR on 5/24/2006. It is included as an attachment for your reference. This policy basically prohibits releases of easement areas such as this one being proposed by Mr. Wehrer. This was explained to Mr. Wehrer early on in this process, and a copy of the adopted policy provided to him, but he chose to proceed with his request.

SUMMARY OF INFORMATION PROVIDED TO SUPPORT REQUEST:

A copy of Gary and Carol Wehrer's October 20, 2006 letter to Thomas Orr at the Swift SWCD is attached for your review. The Wehrer's also submitted a second letter to the Swift SWCD Board dated November 6, 2006. This letter is also submitted for your review. In these letters the Wehrer's claim that they were misinformed, and didn't understand what they were getting in to, and that this now causes them some problems with their ability to utilize their land as they had hoped for their retirement planning.

The Swift SWCD Board considered the Wehrer request at their November meeting and sent a letter to the BWSR dated November 15, 2006 that explains the action taken. The Swift SWCD Board approves of the release of the 7.5 acres of donated land, plus approval for the release of the 5 acres of RIM if the landowner pays the state back.

Mr. David Soehren, DNR Area Wildlife Manager has also reviewed this proposal. Mr. Soehren has submitted two letters outlining his opposition to the Wehrer's proposal. He is opposed to the release because he believes that the proposed development would have a negative impact on the wildlife habitat values of the easement and adjacent Big Slough Waterfowl Production Area. Both letters are attached for review.

In keeping with the Easement Alteration Policy that has been adopted the Wehrer's have sent in a check for $500.00. The November 20, 2006 letter from the Wehrer's to Tim Fredbo accompanied the check. A copy is attached.

FINDINGS:

This release request, as proposed, would release 12.5 acres from a perpetual conservation easement that lies directly adjacent to a 400+ acre lake/wetland complex that is in a US Fish and Wildlife Service Waterfowl Production Area (WPA). The Wehrers have a purchase agreement to sell the entire 62.5 acre easement parcel to Troy and Victoria Lankenau, which is contingent on the Lankenau's being able to build a small hunting cabin on the non-crop acres proposed for release. I have discussed this situation with Mr. Lankenau and made him aware of the situation. Mr. Lankenau has a great interest in the property and has plans on making improvements for wildlife, but he wants the ability to build a small hunting cabin on the site. He proposes to use the existing field road to access the property. This field road is part of the easement area and he has no plans to improve it, or run any power into the site.

Mr. Wehrer claims that he was unaware of this 7.5 acres of donated land being part of the easement. These donated acres are clearly spelled out in both the agreement and easement documents that have been signed by the Wehrer's as part of the State's legal process to secure the easement that has been recorded and paid for. I have also discussed this situation with Tom Orr, Swift SWCD Technician, and he has assured me that he explained the donation situation to Mr. Wehrer during the easement process.

I have been in touch with Mr. Wehrer many times about his request. At a minimum, he is interested in getting the donated acres out of this easement because he claims he was never informed and did not understand. Mr. Wehrer explains this in his October 20, 2006 letter to Tom Orr. He has told me that if he does not get this land removed by the BWSR that he plans on hiring a lawyer and suing the State.

STAFF RECOMMENDATION:

The Board should, in my opinion, deny the Wehrer's request to release any acres from this easement. It very clearly does not meet the criteria in our recently adopted easement alteration policy. The land released would be used for development and that is not allowable under our policy. The donated acres were clearly spelled out in both the Agreement and Easement documents that were both signed by Gary and Carol Wehrer.

Conservation Easement Alteration Requests and Board Policy

RIM Reserve Rule Affecting Alteration Requests
8400.3610 Alteration, Release or Termination of Conservation Easements

The state board may alter, release, or terminate a conservation easement after consultation with the commissioners of agriculture and natural resources. The board may alter, release, or terminate an easement only if the state board determines that the public interests and general welfare are better served by the alteration, release, or termination.

The state board must be provided the following information at least 30 days prior to a state board meeting, before the state board will consider a request to alter, release, or terminate a conservation easement:

A. a copy of the letter from the landowner to the district board justifying the change and identifying how the public interest and general welfare will be better served;
B. a letter from the district board recommending either approval or disapproval of the proposed change;
C. a letter from the Department of Natural Resources area wildlife manager recommending either approval or disapproval of the proposed change; and
D. other supporting documents, including:
    1) an aerial photo identifying the requested change;
    2) a soil survey map of the area;
    3) cropping history information; and
    4) other pertinent documentation that will support the request.

The state board reserves the right to require special provisions to ensure at least equal resource value as a condition of approving the request. The state board must be compensated by the landowner for all damages and loss of benefits to the conservation easement and the state board may also require reimbursement for administrative expenses and costs incurred in the alteration, release, or termination of a conservation easement.

Policy Developed by Easement Alteration Subcommittee and adopted by the BWSR on 5-24-06

This policy applies to all state RIM, PWP and CREP easements currently in place and all future state conservation easement acquisitions.

All easement alteration requests that come to BWSR will be accompanied by a $500 processing fee. Checks should be made payable to the BWSR. For alterations where actual costs to amend the easement exceed $500 the state reserves the right to charge the applicant the actual cost.

Public initiated projects (public road and utility projects, etc.)
Easement staff has the authority to tentatively approve of releases for public infrastructure projects. However, releases are not considered final until after the release request is presented to and approved by the Board and all fees have been paid.

In addition to the fee as outlined above, public entities must pay:

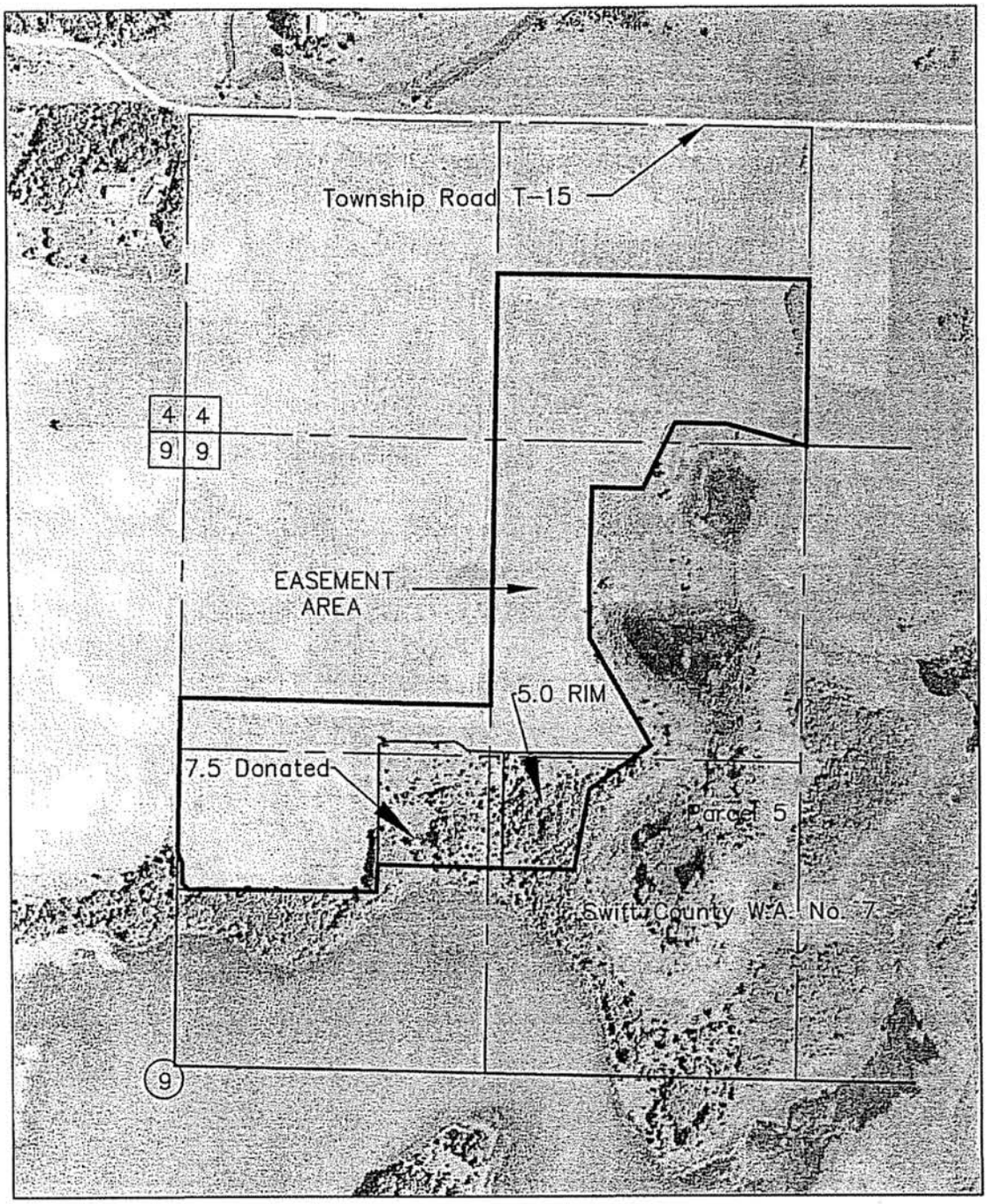
1) Two times the current average township assessed market value (ATAMV) for acres released, and
2) An amount equal to all state funds dispersed as reimbursement for costs incurred to establish cover on the land being released.

Private landowner requests
All alteration requests that come to the BWSR must contain all the information items requested in Section 8400.3610 of RIM Reserve Rule (items A – D as listed above), plus the $500 processing fee in the form of a check made payable to the BWSR.

All requests must also meet the following conditions for BWSR approval:

1) Replacement acres will increase by a minimum factor of 2:1 (replacement acres to released acres). Replacement acres proposed on easements must meet crop history requirements, cropped 2 of last 5 years, if land proposed for release was cropland at the time the easement was granted.
2) The resource protection and habitat benefits of the original easement will remain the same or be enhanced by the proposed alteration. For example;
   - restored wetland acres will not be drained or filled by the proposal
   - riparian buffers will be preserved or enhanced
   - easement configuration will preserve or enhance wildlife benefits (larger blocks of habitat, not fractured puzzle-like boundaries).
3) The SWCD Board and/or the DNR Area Wildlife Manager approve of the proposed alteration.
4) Landowners will be required to pay all costs associated with establishment of conservation cover practices on replacement acres according to an approved conservation plan.
5) Any alteration proposed would not allow or enable any land development projects to occur on lands currently under easement. Land development projects include, but are not limited to, such things as new homes, cabins, storage buildings, livestock facilities, cell phone towers, wind generators, sewage treatment systems, private roads and drives, and mining operations.

Meeting the criteria outlined above for private requests does not guarantee that the Board will approve of the request for release and alteration of a conservation easement.


Township Road T-15
4 4
9 9
EASEMENT
AREA
5.0 RIM
7.5 Donated
Parcel 5
Swift County W.A. No. 7
9

Minnesota Department of Natural Resources

Division of Wildlife

Appleton Area Wildlife Office

3715 Campground Road

Montevideo, MN 56265

PHONE: (320) 752-4394

FAX: (320) 752-4391

December 11, 2006

SWCD Board of Supervisors
Swift County SWCD
1430 Utah Ave.
Benson, MN. 56215

Dear County Supervisors,

Please allow me to clarify my position on the matter of sale of 12.5 acres of the Gary Wehrer Rim Agreement in Section 9, Twp 122N, R37W (Kerkhoven Twp.). Although my comments to you in a letter dated November 8, 2006 pertained mostly to the 5 acres that Mr. Wehrer whishes to buy back, they also apply to the 7.5 acres described as originally donated to the RIM easement.

I have looked at the maps and photos provided by MR. Wehrer, the NRCS, and the US Fish and Wildlife Service. Mr. Wehrer proposes to buy back approximately 5 acres of land previously enrolled **and** 7.5 acres donated to a R.I.M. agreement so that a building site can be created.

As I stated before the property enrolled in the R.I.M. easement is just north of and immediately adjacent to the Big Slough Waterfowl Production Area owned and managed by the USFWS. As such it compliments the natural resource value of the area and provides a tract of wildlife habitat large enough (427 + ac.) to be uncommon in much of the state. The area receives extensive use by waterfowl, deer, and pheasant. The area also provides a public area, open for hunting, trapping, and fishing to all users of these resources.

While it is understandable that Mr. Wehrer would want the property released so that a building site could be established, such development will reduce the wildlife utility of the tract and on a portion of the WPA. Building developments in these situations often lead to property rights/boundary disputes between the owners and the public now using the adjacent area.

Disturbance factors in the construction and use of the property would diminish the current value of the easement. Additional disturbance factors can be anticipated in getting access to the proposed building site. Any road or trail construction on the R.I.M. easement will require release or modification to the easement as well.

I do not feel that the public interests or the general welfare of the public would be better served by the release **of any** of the property from the R.I.M. easement.

Sincerely,

David Soehren
Area Wildlife Supervisor
Appleton, MN

Cc; John Schladweiler
Steve Delehanty
Tim Fredbo

November 20, 2006

Mr. Tim Fredbo, BWSR
520 Lafayette Road North
St. Paul, Minnesota 55155

Dear Mr. Fredbo:

#5415

Enclosed please find our check in the amount of $500.00 made out to BWSR for the purpose of complying with your requirements.

In answer to your concerns about the establishment of a permanent roadway, let us reassure you no permanent roadway is to be constructed. Access will be through the established grass growth with the intent of the land remaining in its natural state.

We hope this will satisfy your concern, however, if you have any additional comments or concerns we can be reached at the following address and telephone number.

Thank you for your kind consideration.

Sincerely,

Gary and Carol Wehrer

Gary and Carol Wehrer
P.O. Box 1007 Lot SL7
Zapata, Texas 78076

Telephone: 956-765-3115

RECEIVED
NOV 27 2006
Bd. of Water & Soil Resources
St. Paul

Swift County Soil & Water
1430 Utah Ave
Benson MN 56215
320-842-7201
320-843-4168 Fax

SWIFT COUNTY Soil and Water Conservation District Everyone's Concern

November 15, 2006

MN Board of Water & Soil Resources
520 Lafayette Rd N
St Paul MN 55155

BWSR Board

After reviewing a request from Gary and Carol Wehrer to remove 7.5 acres of the donated land and 5.0 acres of Rim land from their CREP easement #76-15-01-01, the Swift County Soil & Water Conservation District Board recommends keeping the 5 acres on the East side of the easement area in as RIM land and allowing the Wehrer's to remove the remaining acres to the West as Option 1.

As Option 2 the Wehrer's request to also remove the 5 acres of RIM that were put into the easement and were paid for by the RIM program is also recommended by the Swift County Soil & Water Conservation District Board, IF the landowner is willing to pay the money they received back plus penalty, interest and if approved by the State BWSR Board.

If you have any additional questions, you may contact Thomas Orr at 320-842-7201-113.

Swift County Soil & Water Conservation District Board

Mark Weimerskirch
Orvin Gronseth
Tim Koosmann
Sheldon Ahrndt
Clinton Schuerman

RECEIVED
NOV 17 2006 Tim F
Bd. of Water & Soil Resources
St. Paul

Minnesota Department of Natural Resources

Division of Wildlife
Appleton Area Wildlife Office
3715 Campground Road
Montevideo, MN 56265
PHONE: (320) 752-4394
FAX: (320) 752-4391

November 8, 2006

SWCD Board of Supervisors
Swift County SWCD
1430 Utah Ave.
Benson, MN. 56215

Dear County Supervisors,

Although I have not had the opportunity to personally walk the property of Mr. Gary Wehrer in Section 9, Twp 122N, R37W (Kerkhoven Twp), I have looked at the maps and photos provided by MR. Wehrer, the NRCS, and the US Fish and Wildlife Service. Mr. Wehrer proposes to buy back approximately 5 acres of land previously enrolled in a R.I.M. agreement so that a building site could be created making this tract of land more desirable for future sale.

The property enrolled in the R.I.M. easement is just north of and immediately adjacent to the Big Slough Waterfowl Production Area owned and managed by the USFWS. As such it compliments the natural resource value of the area and provides a tract of wildlife habitat large enough (427 + ac.) to be uncommon in much of the state. The area receives extensive use by waterfowl, deer, and pheasant.

While it is understandable that Mr. Wehrer would want the property released so that a building site could be established, such development will reduce the wildlife utility of the tract and on a portion of the WPA. Disturbance factors in the construction and use of the property would diminish the current value of the easement. Additional disturbance factors can be anticipated in getting access to the proposed building site. Any road or trail construction on the R.I.M. easement will require release or modification to the easement as well.

I do not feel that the public interests or the general welfare of the public would be better served by the release of this property from the R.I.M. easement.

Sincerely,

David Soehren
Area Wildlife Supervisor
Appleton, MN

Cc; John Schladweiler
Steve Delehanty

RECEIVED
NOV 20 2006
Bd. of Water & Soil Resources
St. Paul

November 6, 2006

Subject: A Formal Request to:

The Soil Conservation Board Members
Swift County, Minnesota

Honorable Members:

Please consider our formal request for your approval of the release of a 7 ½ acre plot of land classified as "donated"; located in Section 9, Kerkhoven Township, Swift County, Minnesota.

We also beg your consideration in allowing us to buy back 5 acres of RIM classified land located adjacent to that parcel. This acreage may not have legitimately met RIM qualifications as explained in our previous letter.

For your information, We are enclosing a map showing the property in question.

Your consideration is greatly appreciated.

Sincerely,

Gary and Carol Wehrer

Gary and Carol Wehrer
685 155th Avenue N.E>
Murdock, Minnesota 56271

October 20, 2006

Mr. Thomas Orr
Swift County Soil and Water Conservation Officer
1430 Utah Avenue
Benson, Minnesota 56215

RECEIVED
OCT 25 2006
Bd. of Water & Soil Resources
St. Paul

Dear Tom:

I have greatly appreciated the cooperative working relationship we have shared over the years. The land we enrolled in the CREP Program has proved very beneficial. As you know, I have approximately 200 acres in CREP. The income we received from those easements has aided us in meeting our huge farming expenses while wildlife habitat, population and species have improved and increased. CREP is an excellent conservation program.

Now that we are at the stage in life where retirement is rapidly approaching, we are in the process of selling both our farmland and our conservation acreage. Since farmers are covered by no retirement plan, our retirement income is dependent on sales of assets. Our established CREP land is becoming very attractive to hunters. We have been working with a young couple who wish to purchase some hunting land from us and construct a hunting retreat for their family. They are aware that a portion of that plot is in CREP and can never be farmed or built upon.

The easement agreement shows this piece at 62.5 acres, however, our survey states the total acreage is only 62.28 acres. Fifty of those acres are in CREP, five acres are in RIM, and the remaining acreage is classified as "donated".

We are requesting approval to buy back the five acres of RIM land and/or regain title to the remaining "donated" land (a total of 12.28 *surveyed* acres) 12.5 AC located in Section 9 of Kerkhoven Township, Swift County, Minnesota. The RIM land may not have legitimately qualified for RIM as it had never been farmed. It is a wooded area and would make a wonderful building site. Because we put 50 acres into CREP, we were told we could put that 5 acre hill into RIM for a one time payment of $1684.00. We were told nothing about "donating" any acreage to the State of Minnesota either verbally or as

part of our written proposal. We would never consciously have agreed to doing so as there is no financial benefit in such an action. We received no money, were given no verification of this "donation" to be used for income tax purposes and we continued to pay real estate taxes on the entire parcel. (Please see real estate statements)

In reviewing the contract, however, we find we did sign an agreement to "donate" said piece of property. Please understand, the contract was mailed to us and we had no physical contact with either a state or local representative at that time. We understand a signed contract is legally binding, but by adhering to this agreement, we are losing a sale.

In retrospect, we should perhaps have had an attorney look the contract over for us, but because we had enrolled other land in conservation programs and had no difficulty, we believed that to be unnecessary. Our attention was directed to the much needed payment as we prepared to meet our spring farming expenses.

It is our belief that, with this information at your disposal, you will be willing to work with us on this. We are prepared to repay the $1684.00 together with a small penalty if necessary to regain title on this property.

We look forward to your direction and assistance in this matter. Thank you for your kind attention.

Sincerely,

Gary and Carol Wehrer

Gary and Carol Wehrer
685 155th Ave. N.E.
Murdock, MN. 56271

Telephone: 320-366-3491

C.C. Tim Fredbo: BWSR
520 Lafayette Rd. No.

FY 07 NON POINT ENGINEERING ASSISTANCE CHALLENGE GRANT

BACKGROUND

The NPEA Challenge Grant is made available to NPEA JPBs once a biennium to provide accelerated engineering/technical assistance funding to assist landowners implementing high priority conservation practices.

Ten percent of the annual Feedlot Water Quality Management Grant ($1.5 M.) is reserved to fund this program.

SUMMARY

Amount Available - $300,000

Eligible Applicants - All NPEA JPBs

BWSR First Funding Priority - JPBs whose member SWCDs received FY 07 Feedlot Water Quality Management Grants, and propose to maintain or hire accelerated staffing to provide shared feedlot technical assistance.

07 FWQMG Allocations:

JPB	# Projects Funded
1	0
2	3
3	0
4	1
5	16
6	2
7	3
8	1
9	8
10	2
11	19

RECOMMENDATION

Ten applications were received from seven JPBs requesting $674,837:

General Category	Amount Requested
Staff	$336,753
Equipment	$284,584
Training	$ 3,500
Dedicated $s	$ 50,000
Total	$ 674,837

All applications were reviewed and approved by their Board Conservationists. The Cost Share Committee is forwarding their funding recommendation of *Option 1* as indicated on the attached spreadsheet:

General Funding Strategy

Staff - Apply BWSR's First Funding Priority to add or retain staff.

Vehicles - capped at $15K. $15K plus trade-in value ($7 - 10K) of current vehicle deemed adequate.

Equipment – Option 1 funds all of their request up to $9,780. Option 2 funds 24.2% of request. JPB 1 request capped at $4,000 because of long-term employment of only one staff.

NOTE: First Funding Priority to add or retain staff is upheld because funding recommendation results in a 2/3 to 1/3, staff to equipment ratio. Non-Staff requests that are recommended for funding are regarded as high regional priority.

H:07NPEACG

Summary of NPEA 2007 Challenge Grant Applications

File Name	Applicant	Requested $s	Less $ Acceptable?	Predominant Category	ITEM	Funding Recommendation OPTION 1	OPTION 2
Area 1 Application	NW MN NPEA	13,000	No Indication	Admin/Coordination			
Summary: $10,500 Equipment Purchase ATV, Digital Projector, Drafting Computer w/ LCD monitor, Field Radios & GPS unit w/ antenna. $2,500 Training to Attend Rosgen's River Course.						$4,000	$3,142
File Name	Applicant	Requested $s	Less $ Acceptable?	Predominant Category			
Area 2 Application 1	N. Central NPEA	80,000	No Indication	Land/Water Treatment			
Summary: $80,000 Staff to establish and fill a Riparian Specialist position serving the nine SWCDs in TSA2 for a two-year period.							
File Name	Applicant	Requested $s	Less $ Acceptable?	Predominant Category			
Area 2 Application 2	N. Central NPEA	80,000	No Indication	Land/Water Treatment			
Summary: $80,000 Equipment to purchase a GPS Total Station (support equipment was a a 2005 Challenge Grant). The GPS Total station was not fully funded in 2005. This request will enable full use of previously acquired equipment for the 21 counties in TSAs 1, 2 & 4.						$9,780	$19,336
File Name	Applicant	Requested $s	Less $ Acceptable?	Predominant Category			
Area 2 Application 3	N. Central NPEA	50,000	No Indication	Dedicated Funds			
Summary: $50,000 needed between fiscal year cycles. Re-establish a carry-over fund, and once funded, it will annually self-perpetuate Through replentishment from annual revenue stream.							
File Name	Applicant	Requested $s	Less $ Acceptable?	Predominant Category			
Area 3 Application	CCLNS NPEA	28,000	No Indication	Land/Water Treatment		$9,780	$6,767
Summary: $28,000 to Purchase replacement survey equipment for original 1995 equipment.							
File Name	Applicant	Requested $s	Less $ Acceptable?	Predominant Category			
Area 5 Application1	Central MN NPEA	1,500	Yes	Not Answered			
Summary: $1,500 to Replace an outdated computer with one able to run the new software.							
File Name	Applicant	Requested $s	Less $ Acceptable?	Predominant Category			
Area 5 Application2	Central MN NPEA	49,300	Yes	Not Answered	EQIP.	$9,780	$8,411
Summary: $48,300 to Purchase a notebook computer, 2 digital cameras, a total station, software upgrades & a replacement vehicle. $1,000 to Train staff on latest technological advances.					(INCLUDES COMPUTER ABOVE) VEHICLE	$15,000	$15,000
File Name	Applicant	Requested $s	Less $ Acceptable?	Predominant Category			
Area 6 Apllication	Impack 6 NPEA	25,625	No Indication	Admin/Coordination	EQIP	$2,100	$508
Summary: Purchase a laptop computer ($2,100) and new vehicle ($23,525).					VEHICLE	$15,000	$15,000
File Name	Applicant	Requested $s	Less $ Acceptable?	Predominant Category			
Area 9 Application	SW Prairie NPEA	184,818	Yes	Admin/Coordination	EQIP	$9,780	$11,239
Summary: $138,318 for existing E-I-T position & $46,500 for new GPS Survey equipment.					STAFF	$90,000	$90,000
File Name	Applicant	Requested $s	Less $ Acceptable?	Predominant Category			
Area 11 Application	SE NPEA	162,594	Yes	Admin/Coordination			
Summary: $118,435 for expenses of 2 PE staff for 2 years exceeding the NPEA Base Grant plus 25% minium local match. High feedlot workload in need of PE's. $44,159 to purchase computer equipment, new vehicle, & sofware for new staff hired in January 2006.					STAFF	$110,000	$110,000
					VEHICLE	$15,000	$15,000
					EQIP	$9,780	$5,597
				TOTAL		**$300,000**	**$300,000**

RATIONALE

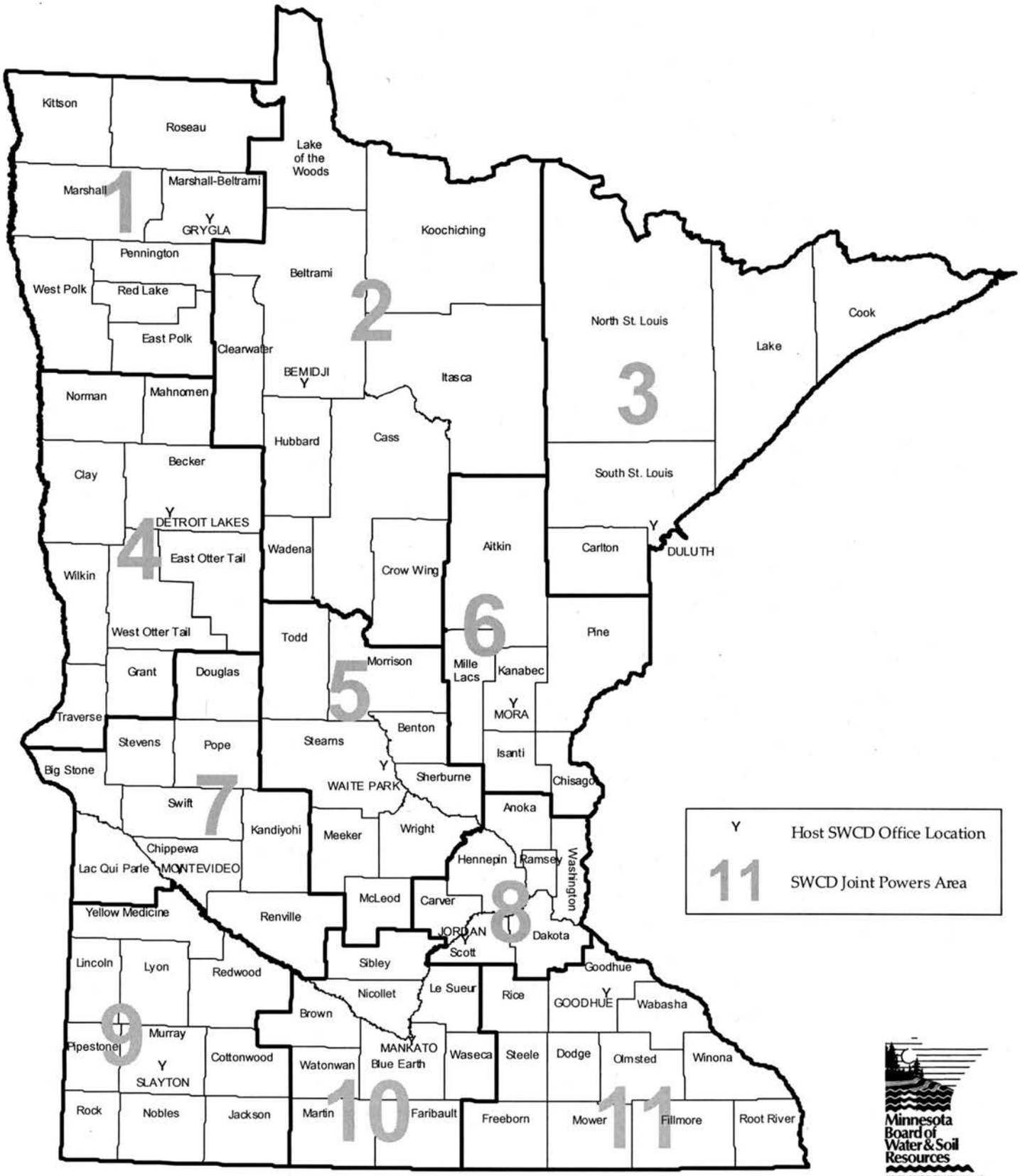
Uphold first funding priority to add or retain staff results in a 2/3 to 1/3, staff to equipment ratio. Non-staff requests that are recommended for funding are regarded as a high regional priority. Matched requests receive higher funding priority.

Vehicles - capped at $15K. $15K plus trade-in value of current vehicle ($7 - 10K) deemed adequate.

Equipment - Option 1 funds all of their request up to $9,780. Option 2 funds 24.2% of request. JPB 1 request capped at $4,000 because of long-term employment of only one staff.

H:07NPEACGGTFR

Nonpoint Engineering Assistance Program



Minnesota Board of Water & Soil Resources
WWW.BWSR.STATE.MN.US

January 2003

FOR YOUR INFORMATION

January 24, 2007

- Updated BWSR Member listing
- Updated BWSR Committees
- Updated BWSR Staff listing
- NRCS News Release "USDA Releases State-By-State National Resources Inventory on Soil Erosion and Land Cover and Use"

MINNESOTA BOARD OF WATER AND SOIL RESOURCES
520 LAFAYETTE ROAD NORTH
ST. PAUL, MINNESOTA 55155
Phone: 651-296-3767 Fax: 651-297-5615

Appointed Members

	Appointment Designation	Term Expires	Telephone/Fax	
Randy Kramer, Chair 42808 County Road 11, Bird Island, MN 55310 rlkramer@westtechwb.com	**Citizen**	01-01-07	320-365-3094 320-365-4784	*Home* *Office*
Dana Allen 11304 19th Street, SE, Eyota, MN 55934 dm.allen@myclearwave.net	**Citizen**	01-05-09	507-545-3969 507-951-5597	*Home* *Office*
Paul Brutlag 27113 County Road 11, Wendell, MN 56590 brutlagp@runestone.net	**Citizen**	01-07-08	218-458-2113 320-589-4151	*Home* *Office*
Quentin Fairbanks 16374 Stoner Memorial Dr., NE, Hines, MN 55647 quentin@paulbunyan.net	**Co. Commissioner**	01-01-07	218-835-4184 218-679-3378	*Home* *Fax*
Brian Kletscher 30427 County Hwy. 10, Vesta, MN 56292 bk3376@redred.com	**Co. Commissioner**	01-05-09	507-762-3376 507-828-1429	*Home* *Office*
Brian Napstad 51227 Long Point Place, McGregor, MN 55760 bnapstad@yahoo.com	**Co. Commissioner**	01-04-10	218-426-3008 218-426-4662	*Home* *Office*
Paul Langseth 35505 280th Street, Worthington, MN 56187 pltrees@frontiernet.net	**SWCD**	01-04-10	507-376-5686 507-360-5844	*Home* *Office*
Louise Smallidge 10992 Point Douglas, Hastings, MN 55033 Choregirl2@juno.com	**SWCD**	01-07-08	651-459-5600	*Home*
Robert Burandt 1340 Waconia Pkwy. S., Waconia, MN 55387 robertburandt@aol.com	**SWCD**	01-10-09	952-442-4216	*Home*
Kay Cook 20783 Eastway Court, Richmond, MN 56368 kayc@meltel.net	**Watershed**	01-01-07	320-597-2794	*Home*
Gene Tiedemann 13099 310th Ave., SW, Euclid, MN 56722 gtiedemann@rrv.net	**Watershed**	01-04-10	218-281-6723 218-289-3511	*Home* *Office*
LuAnn Tolliver 14801 Wychewood Road, Minnetonka, MN 55345 mltolly@aol.com	**Watershed**	01-07-08	952-938-6749 952-838-1571	*Home* *Office*

State Agency Members:

Joe Martin Freeman Office Bldg., 625 Robert St. N., St. Paul, MN 55155 Joe.Martin@state.mn.us	**Department of Agriculture**	651-201-6551 651-297-5522	*Office* *Fax*
Dan Wilson Well Management Section, P.O. Box 64975, St. Paul, MN 55164-0975 Daniel.Wilson@health.state.mn.us	**Department of Health**	651-201-4598 651-201-4599	*Office* *Fax*
Gene Merriam 500 Lafayette Road, St. Paul, MN 55155 Gene.Merriam@dnr.state.mn.us	**Department of Natural Resources**	651-259-5555 651-296-4799	*Office* *Fax*
Jim Anderson 439 Borlaug Hall, 1991 Upper Buford Circle, St. Paul, MN 55108 Ander045@umn.edu	**U of M/Dept. of Soil, Water & Climate**	612-625-0279 612-625-2208	*Office* *Fax*
Lisa Thorvig 520 Lafayette Road, St. Paul, MN 55155 Lisa.Thorvig@pca.state.mn.us	**Pollution Control Agency**	651-296-8811 651-296-6334	*Office* *Fax*

January 2007

BOARD OF WATER AND SOIL RESOURCES
COMMITTEES
January 2007

ADMINISTRATIVE ADVISORY COMMITTEE

Membership:	Randy Kramer, chair	citizen
	Paul Brutlag, vice-chair	citizen
	Louise Smallidge	soil and water conservation district
	Kay Cook	watershed district
	LuAnn Tolliver	watershed district
	John Jaschke	staff
	Mary Jo Anderson	staff

Responsibility:

The administrative advisory committee consists of the Board's chair and vice-chair and the chairs of the Board's standing subcommittees. The administrative advisory committee will make evaluations and recommendations to the Board on various Board issues including ethics; expenses/per diem; bylaws; and legislation and budgets. The Administrative Advisory Committee will act as the personnel committee for personnel actions relating to the board's executive director.

Meetings: The committee will meet at the call of the chair.

COST-SHARE/SOIL CONSERVATION COMMITTEE

Membership:	Louise Smallidge, chair	soil and water conservation district
	Dana Allen	citizen
	Brian Kletscher	county commissioner
	Bob Burandt	soil and water conservation district
	Paul Langseth	soil and water conservation district
	Joe Martin	Department of Agriculture
	Lisa Thorvig	Pollution Control Agency
	Wayne Zellmer	staff lead

Responsibility:

The committee is responsible for reviewing cost-share, non-point engineering and general services allocation policies and rules and making recommendations to the Board.

Meetings:

The committee will meet two times a year, once prior to the June allocation of cost-share (feedlots, general and special projects); non-point engineering; RIM Reserve and general services grants.

DISPUTE RESOLUTION COMMITTEE (DRC)

Membership:	Randy Kramer, chair	citizen
	Paul Brutlag	citizen
	Kay Cook	watershed district
	Quentin Fairbanks	county commissioner
	Louise Smallidge	soil and water conservation district
	Jim Haertel	staff lead

Responsibility:

The DRC is responsible for appeals relating to the Wetland Conservation Act rule decisions of local governments, watershed district rule and permit decision appeals, and, under MS103A.301, determinations of water law and policy. The authority of the DRC is established in statute and assigned to the DRC by the Board. Under current guidelines the DRC receives the appeals; hears the issues; and makes recommendations to the Board.

Meetings: The Committee will meet as needed to process appeals that have been filed with the Board.

EDUCATION AND PUBLIC RELATIONS COMMITTEE

Membership:	Kay Cook, chair	watershed district
	LuAnn Tolliver	watershed district
	Dana Allen	citizen
	Paul Langseth	soil and water conservation district
	Wayne Edgerton	Department of Natural Resources
	Jim Anderson	Minnesota Extension Service
	Jon Fure	staff
	Steve Woods	staff

Responsibility:

The education committee is responsible for the development of an overall education strategy for the Board including, biennial outcomes, and updating the education strategy biennially.

Meetings: Committee will meet twice a year or at the call of the chair.

WATER PLANNING and COMPREHENSIVE WETLAND PLAN REVIEW COMMITTEES: NORTHERN/SOUTHERN/METRO

Membership: The committee consists of Board Members from the BWSR administrative regions - metro, north, and south.
Chairs: north – Quentin Fairbanks
south – Brian Kletscher
metro – LuAnn Tolliver

North (4)	South (4)	Metro (3)
Quentin Fairbanks - CC, Chair	Brian Kletscher - CC, chair	Bob Burandt – SWCD, Chair
Paul Brutlag – CIT	Dana Allen - CIT	Louise Smallidge - SWCD
Kay Cook - WD	Randy Kramer - CIT	LuAnn Tolliver - WD
Brian Napstad – CC	Paul Langseth - SWCD	Jim Anderson - MES
Gene Tiedemann - WD	Joe Martin – MDA	Lisa Thorvig - PCA
Wayne Edgerton - DNR	Dan Wilson - MDH	Steve Woods, staff lead
Ron Shelito, staff lead	Jeff Nielsen, staff lead	

Responsibility:

The committee has the responsibility to review county water plans, water management organization plans, watershed district overall plans, comprehensive wetland plans, and amendments to same and to advise the Board on the adequacy of the plans.

Meetings:

The committee will meet as necessary to review the local plans and amendments. A ***majority*** *of the committee members must be present. The BWSR northern, southern, and metro regional supervisors will coordinate meeting schedules with members.*

CC = county commissioner
CIT = citizen
SWCD = soil and water conservation district
WD = watershed district

WETLANDS COMMITTEE

Membership:	LuAnn Tolliver, chair	watershed district
	Paul Brutlag	citizen
	Bob Burandt	soil and water conservation district
	Kay Cook	watershed district
	Brian Kletscher	county commissioner
	Brian Napstad	county commissioner
	Gene Tiedemann	watershed district
	Wayne Edgerton	Department of Natural Resources
	Joe Martin	Department of Agriculture
	Lisa Thorvig	Pollution Control Agency
	Dave Weirens	staff lead

Responsibility:

The Wetlands Committee is responsible for reviewing Wetland Conservation Act (WCA) rules, policies and guidelines and making recommendations to the Board.

Meetings: The committee will meet twice during the year or at the call of the chair.

STATUTORY COMMITTEES

Committee: Committee on Wells and Borings

Membership: Eric Mohring, staff lead

Responsibility:

Interest and availability with regard to Advisory Council on Wells and Borings and Pesticide Advisory Committee. Policy issues will be brought before the Board for discussion as a new business agenda item.

Meetings: The committee will meet when necessary.

GENERAL COMMITTEE MEETING SCHEDULE

The Board has adopted a resolution that ***committees shall schedule meetings in conjunction with monthly Board meetings as much as possible.*** *A majority of each committee's membership should be available for a scheduled meeting. The committee chair and staff are expected to develop an agenda and staff are responsible for keeping minutes of the committee proceedings. The committee meetings are considered to be* ***public meetings*** *under the open meeting law and therefore must be noticed in the same manner as regular board meetings. All committee agendas should be e-mailed to Mary Jo Anderson for appropriate notice posting.*

Advisory members have offered to serve and may serve on BWSR committees as non-voting members and provide assistance as needed.

Advisory members:

Local Government Partners

- *Association of Minnesota Counties (AMC) – Annalee Garletz*
- *Minnesota Association of Conservation District Employees (MACDE) – Brian Watson/Rick Reimer*
- *Minnesota Association of Soil & Water Conservation Districts (MASWCD) – LeAnn Buck*
- *Minnesota Association of Townships (MAT) – Sandy Hooker*
- *Minnesota Association of Watershed Districts (MAWD) – Ray Bohn*
- *Minnesota County Planning and Zoning Administrators (MCPZA) – Norman Craig*
- *League of Minnesota Cities (LMC) - Jim Miller*

Federal Partners

- *U.S. Army Corps of Engineers (USCoE) – Bob Whiting*
- *U.S. Fish and Wildlife Service (USF&WS) – Robyn Thorson, Regional Director*
- *USDA Farm Services Agency (FSA) – John Monson*
- *USDA Natural Resources Conservation Service (NRCS) – Tim Koehler*

State Agencies

- *Met Council – Peter Bell*
- *Minnesota Department of Transportation (MNDOT) – Carol Molnau, Lieutenant Governor*

Interest Partners

- *Audubon Society of Minnesota – Ken Finch, Executive Director*
- *Builders Association – Remi Stone*
- *Fish and Wildlife Legislative Alliance – Lance Ness*
- *Izaak Walton League – Gary Schwartz*
- *Mining Industry Association of Minnesota – Wayne Brandt*
- *Minnesota Agri-Growth Council – Daryn McBeth*
- *Minnesota Association of Realtors – Glen Dorfman*
- *Minnesota Barley Research & Promotion Council – Marv Zutz, Executive Director*
- *Minnesota Cattlemen's Association – Steve Brake, President*
- *Minnesota Center for Environmental Advocacy – Mark TenEyck*
- *Minnesota Conservation Federation – Gary Botzek*
- *Minnesota Corn Growers Association – Bruce Stockman, Executive Director*
- *Minnesota Ducks Unlimited -*
- *Minnesota Environmental Partnership – Ron Kroese, Executive Director*
- *Minnesota Farm Bureau Federation – Al Christopherson, President*
- *Minnesota Farmers Union – Doug Peterson, President*
- *Minnesota Forest Industries & Timber Producers Association – Wayne Brandt*
- *Minnesota Land Trust – Jane Prohaska, Executive Director*
- *Minnesota Milk Producers Association – Bob Lefebvre*
- *Minnesota Pork Producers Association – Dave Preisler, Executive Director*
- *Minnesota Sierra Club – Judy Chucker, President*
- *Minnesota Soybean Growers Association – Jim Palmer, Executive Director*
- *Minnesota Turkey Growers Association – Steve Olson, Executive Director*
- *Minnesota Viewers Association – Ron Ringquist*
- *Minnesota Waterfowl Association – Jim Cox, President*
- *Minnesota Waters – Bruce Johnson*
- *Minnesota Wetland Bankers Association*
- *Minnesota Wetland Delineators Association*
- *Minnesota Wheat Growers Association – Dave Torgerson, Executive Director*
- *Pheasants Forever – Joe Duggan*
- *Property Rights Groups –*
- *Red River Valley Sugarbeet Growers, Nick Sinner, Executive Director*
- *The Nature Conservancy – Ron Nargang*
- *Urban Wetland Management Coalition – Cliff Aichinger*
- *Utility Industry- Keith Hansen*

PHONE NUMBERS FOR BWSR STAFF **USE LAST FIVE DIGITS WHEN TRANSFERRING**

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Anderson, Mary Jo	297-4290
Bonde, Karen	297-3998
DeVoe, Natasha	205-4664
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Engineers Cell Phone	485-8466
Eisele, Bill	282-2929
Fredbo, Tim	296-0880
Fure, Jon	296-0884
Girolamo, Dan	215-1703
Haertel, Jim	297-2906
Hanson, Angela	297-8029
Hubbell, Dianne	296-0873
Jacobson, Bob	297-4958
Jaschke, John (cell 612-202-3815)	296-0878
Kean, Al (cell 651-245-6531)	297-2907
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Mohring, Eric	297-7360
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Sokatch, Char	297-4016
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NRCS **NEWS RELEASE**

United States Department of Agriculture • Natural Resources Conservation Service • P.O. Box 2890
Washington, DC 20013 • Phone: (202) 720-3210 • Web: http://www.nrcs.usda.gov

Terry Bish (202) 720-5974

USDA RELEASES STATE-BY-STATE NATIONAL RESOURCES INVENTORY ON SOIL EROSION AND LAND COVER AND USE

WASHINGTON, January 16, 2007—The Department of Agriculture's Natural Resources Conservation Service (NRCS) today released state-by-state results on soil erosion and land cover and use for the contiguous United States from its 2003 National Resources Inventory (NRI). The NRI provides comprehensive and statistically reliable information on various natural resource conditions and trends on nonfederal lands.

"This information is the first release of any state-level estimates from the Annual NRI inventory process," said NRCS Chief Arlen L. Lancaster.

The first NRI was conducted in 1977 and, until 1997, was done every 5 years. Starting in 2000, NRCS began the transition to an annual inventory cycle. NRCS conducts the NRI in cooperation with Iowa State University's Center for Survey Statistics and Methodology.

The annual NRI uses a sub-sample of the total complement of NRI sample sites, and requires several years of cumulative data collection to provide estimates at a state or sub-state scale that are in accordance with Quality of Information guidelines established by the Office of Management and Budget and USDA.

This latest release represents 2003 conditions only. It does not include a trend analysis for individual states and cannot be used to evaluate change from previous inventory cycles. State-level change estimates and associated trending information from the 2003 NRI will be available for release later this winter. Trend analysis information at national and major-river-basin scales is available for the 2003 NRI on the NRI Website.

NRCS provides products and services that enable people to be good stewards of the nation's soil, water, and related natural resources on non-Federal lands. Additional information about NRI and other USDA conservation programs is available at USDA Service Centers nationwide and online at: http://www.nrcs.usda.gov/technical/NRI/ or http://www.nrcs.usda.gov.

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Minnesota Board of Water & Soil Resources

DATE: February 21, 2007

TO: Board of Water and Soil Resources Members, Advisors, and Staff

FROM: John Jaschke, Executive Director

SUBJECT: February 28, 2007, Board Meeting Notice

The Board of Water and Soil Resources (BWSR) will meet on Wednesday, February 28, 2007, beginning at 9:00 a.m. The meeting will be held in the second floor conference room, at 520 Lafayette Road North, in St. Paul. Parking is available in the lot directly in front of the building (use hooded parking areas).

The following information pertains to agenda items:

NEW BUSINESS

1. **Northeast Minnesota Wetland Management Strategy** - The Strategy is a planning document intended to guide wetland mitigation in northeast Minnesota. It includes six recommended actions, of which three could involve BWSR. The Wetland Committee reviewed the Strategy on January 24, 2007. See attached. ***DECISION ITEM***

2. **Local Water Management Challenge Grants** – The Legislative Citizens Commission on Minnesota Resources (LCCMR) is recommending, and the Legislature is expected to pass, an appropriation of $350,000 for Local Water Management Challenge Grants. Staff are requesting Board approval for "Guidelines for Applications for FY2008/09 Local Water Management Challenge Grants" and authority to request proposals from eligible local units of government. See attached. ***DECISION ITEM***

3. **Office of Legislative Auditor (OLA) Report: Status and Approach** – The OLA has presented their recommendations to the House Environment and Natural Resources Policy Committee (Rep. Eken, chair) on Jan. 25th, and to the Watersheds, Wetlands and Buffers Subcommittee (Rep. Hansen, chair) of the House Environment and Natural Resources Policy Committee on Feb. 20th. Board Chairman Kramer and Executive Director Jaschke provided responses at both hearings. See attached. ***INFORMATION ITEM***

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4. **Board Retreat Follow-Up** – The information and analysis developed at the facilitated Board Retreat in November has been compiled. A recommendation to use those resources as a starting point for updating the agency's Strategic Plan has been developed. See the attached resolution and retreat documentation. ***DECISION ITEM***

5. **Board Committees –** The Chairman has developed changes for some of the Board's committees to expand their scope and add members. A revised listing of committee responsibilities and members will be provided at the Board meeting. ***INFORMATION ITEM***

6. **Legislative Update – *INFORMATION ITEM***
   - SF 749 – Board Membership Expansion
   - HF 577/SF 642 Drainage System Buffers
   - Wetland Conservation Act

7. **Biofuels Update** –Board Members Brian Kletscher and Joe Martin; and Mark Lindquist, Minnesota Project, will present the current state of biofuels and wind energy production in Minnesota. They will inform us about what the future might look like with increasing cellulosic production and potential State roles, including BWSR's, in making the most of the new biofuel production opportunities.

   An overview of SF480/HF589 provisions will be included with a focus on the RIM-Clean Energy (CE) component. ***INFORMATION ITEM***

If you have any questions regarding the agenda, please feel free to give me a call at 651-297-5617. The meeting will adjourn about 12:30 p.m. I look forward to seeing you on February 28th!

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BOARD OF WATER AND SOIL RESOURCES
520 LAFAYETTE ROAD NORTH
2nd FLOOR CONFERENCE ROOM
ST. PAUL, MINNESOTA 55155
WEDNESDAY, FEBRUARY 28, 2007

PRELIMINARY AGENDA

9:00 AM CALL MEETING TO ORDER

PLEDGE OF ALLEGIANCE

ADOPT AGENDA

MINUTES OF JANUARY 24, 2007

OPEN MIKE (10-minute agenda time, two-minute limit/person)

REPORTS

- Chair – Randy Kramer
- Executive Director – John Jaschke
- Dispute Resolution Committee – Randy Kramer
- Wetlands Committee – LuAnn Tolliver
- Cost-Share/Soil Conservation Committee – Louise Smallidge
- Education and Public Relations Committee – Kay Cook
- Administrative Advisory Committee – Randy Kramer

NEW BUSINESS

1. Northeast Minnesota Wetland Management Strategy - Dave Weirens - ***DECISION ITEM***

2. Local Water Management Challenge Grants – Dave Weirens and Wayne Zellmer – ***DECISION ITEM***

3. Office of Legislative Auditor (OLA) Report: Status and Approach – John Jaschke – ***INFORMATION ITEM***

4. Board Retreat Follow-Up – Steve Woods – ***DECISION ITEM***

5. Board Committees – Chair Kramer – ***INFORMATION ITEM***

6. Legislative Update – John Jaschke – ***INFORMATION ITEM***
   - SF 749 – Board Membership Expansion
   - HF 577/SF 642 Drainage System Buffers
   - Wetland Conservation Act

7. Biofuels Update – Board Members Brian Kletscher and Joe Martin; and Mark Lindquist, Minnesota Project - ***INFORMATION ITEM***

AGENCY REPORTS

- Minnesota Pollution Control Agency – Brad Moore
- Minnesota Extension Service – Jim Anderson
- Minnesota Department of Natural Resources – Mark Holsten
- Minnesota Department of Health – Dan Wilson
- Minnesota Department of Agriculture – Joe Martin

ADVISORY COMMENTS

- Association of Minnesota Counties (AMC) – Annalee Garletz
- Minnesota Association of Conservation District Employees (MACDE) – Rick Reimer
- Minnesota Association of Soil and Water Conservation Districts (MASWCD) – LeAnn Buck
- Minnesota Association of Townships (MAT) – Sandy Hooker
- Minnesota Association of Watershed Districts (MAWD) – Ray Bohn
- Natural Resources Conservation Service (NRCS) – Tim Koehler
- Others

UPCOMING MEETINGS

- Next Board Meeting, March 28, 2007, St. Paul

12:30 PM **ADJOURN**

DRAFT DRAFT DRAFT

BOARD OF WATER AND SOIL RESOURCES
520 LAFAYETTE ROAD NORTH
2ND FLOOR CONFERENCE ROOM
ST. PAUL, MINNESOTA 55155
WEDNESDAY, JANUARY 24, 2007

BOARD MEMBERS PRESENT:
Dana Allen, Jim Anderson, MES; Wayne Anderson/Brad Moore, MPCA; Paul Brutlag, Bob Burandt, Kay Cook, Quentin Fairbanks, Mark Holsten, DNR; Brian Kletscher, Randy Kramer, Paul Langseth, Joe Martin, MDA; Brian Napstad, Louise Smallidge, Gene Tiedemann, LuAnn Tolliver, Dan Wilson, MDH.

STAFF PRESENT:
Mary Jo Anderson, Tim Fredbo, Jon Fure, Jim Haertel, John Jaschke, Dale Krystosek, Sarma Stramanis, Carol Strojny, Karli Swenson, Doug Thomas, Steve Woods, Brad Wozney, Wayne Zellmer.

OTHERS PRESENT:
Kevin Bigalke, Nine Mile Creek Watershed District
Amanda Goebel, Washington County
Keith Hansen, Minnesota Power
Sandy Hooker, Minnesota Association of Townships (MAT)
Karen Kill, Browns Creek Watershed District
Tom Tri, St. Louis County

Chair Kramer called the meeting to order at 9:00 a.m.

PLEDGE OF ALLEGIANCE

Chair Kramer welcomed John Jaschke, newly hired executive director.

John Jaschke was saddened to report on the unexpected death of Clair Nelson, previous BWSR board member and Lake County Commissioner, who passed away unexpectedly last week.

John was also saddened to report on the unexpected death of Bob Jacobsen, BWSR staff working on the wetland banking program in a joint position with MNDOT. Bob passed away yesterday. In respect for the two losses, there was a moment of silence.

** 07-01 **ADOPT AGENDA** – Moved by Louise Smallidge, seconded by Paul Langseth, to adopt the agenda as presented. Motion passed on a voice vote.

MINUTES OF DECEMBER 20, 2006 – John Jaschke stated that there is an error on page seven, first paragraph, line seven, the word "initiative" should be replaced with "initiate". Brian Napstad stated that there is clarification needed on page six, regarding the Wetland Conservation Act Assessment Final Report. The minutes should state, "Brian Napstad asked that staff provide pictoral diagrams which clearly support Executive Director Harnack's statement that the total effect of the proposed WCA changes within greater than 80% counties would only result in limited de minimis use in the building setback zone in shoreland areas. Outside the building setback zone in shoreland areas no de minimis changes would occur in greater than 80% counties". Moved by Paul Langseth, seconded by Brian Napstad, to approve the minutes of December 20, 2006, as corrected. Motion passed on a voice vote.

** 07-02

Mark Holsten, newly appointed DNR Commissioner was introduced. Wayne Anderson, PCA, was introduced. Wayne stated that newly appointed PCA Commissioner Brad Moore would be attending upcoming BWSR meetings as often as possible.

REPORTS

Chair's Report – Chair Kramer attended the EQB meeting on January 18. Chair Kramer reported that Department of Agriculture Commissioner Gene Hugoson is the new EQB Chair. Chair Kramer will attend the EQB retreat on January 31.

Executive Director's Report – John Jaschke stated that this is day three as Executive Director. John thanked Doug Thomas and Steve Woods for their assistance in helping him be ready to step into his new role as Executive Director. Randy thanked John for attending various meetings in the interim before his start date.

Dispute Resolution Committee – Jim Haertel reported that there were 43 appeals in 2006. The Dispute Resolution Committee has an item to be considered later today on the agenda.

Wetlands Committee – LuAnn Tolliver reported that the Wetlands Committee will meet this afternoon.

Cost-Share Committee - Louise Smallidge met with Wayne Zellmer and Cost-Share Committee members via e-mail; the item is on the agenda later today.

Education Committee – Kay Cook reported that the Education Committee will meet today immediately following the full Board meeting.

Administrative Advisory Committee – Chair Kramer reported that the Administrative Advisory Committee (AAC) met on January 11, for a briefing on the Office of the Legislative Auditor (OLA) Report. Chair Kramer stated that the AAC met again this morning to discuss the budget and OLA Report and response from BWSR. Chair Kramer also attended budget hearings and information will be discussed on the agenda later today.

COMMITTEE RECOMMENDATIONS

Metro Water Planning Committee

Browns Creek Watershed District Watershed Management Plan – Bob Burandt reported that the Metro Water Planning Committee reviewed the Browns Creek Watershed District Watershed Management Plan and recommends approval. Moved by Bob Burandt, seconded by Louise Smallidge, to approve the Browns Creek Watershed District Watershed Management Plan. Motion passed on a voice vote.

** 07-03

South Washington Watershed District Complaint of Failure to Implement – Bob Burandt reported that the Metro Water Planning Committee met to review the complaint. The Committee unanimously concurs with the staff recommendation to address the issue in the final draft of the 2007 South Washington Watershed District (SWWD) Plan update, expected this summer. The Metro Water Planning Committee finds the SWWD to be implementing its

** 07-04 1997 Watershed Management Plan. Moved by Bob Burandt, seconded by LuAnn Tolliver, to accept the Metro Water Planning Committee's recommendation to address the issue in the final draft of the 2007 South Washington Watershed District (SWWD) Plan update, expected this summer. Discussion followed. Motion passed on a voice vote.

Mississippi Watershed Management Organization Major Plan Amendment – Bob Burandt reported that the Metro Water Planning Committee reviewed the Mississippi Watershed Management Organization Plan amendment and

** 07-05 recommends approval. Moved by Bob Burandt, seconded by Louise Smallidge, to approve the Mississippi Watershed Management Organization Watershed Management Plan amendment. Motion passed on a voice vote.

Nine Mile Creek Watershed District, Watershed Management Plan – Bob Burandt reported that the Metro Water Planning Committee reviewed the Nine Mile Creek Watershed District Watershed Management Plan and recommends

** 07-06 approval. Moved Bob Burandt, seconded by Louise Smallidge, to approve the Nine Mile Creek Watershed District Watershed Management Plan. LuAnn Tolliver abstained from the vote as she is involved with the Nine Mile Creek Watershed District. Discussion followed. Motion passed on a voice vote. It was noted that good citizen participation and input was a key to development of this Plan.

Northern Water Planning Committee

Hubbard County Comprehensive Local Water Management Plan – Quentin Fairbanks reported that the Northern Water Planning Committee reviewed the Hubbard County Comprehensive Local Water Management Plan update and

** 07-07 recommends approval. Moved by Quentin Fairbanks, seconded by Kay Cook, to approve the update of the Hubbard County Comprehensive Local Water Management Plan. Motion passed on a voice vote.

Mille Lacs County Local Water Management Plan – Quentin Fairbanks reported that the Northern Water Planning Committee reviewed the Mille Lacs County Local Water Management Plan update and recommends approval.

** 07-08 Moved by Quentin Fairbanks, seconded by Kay Cook, to approve the update of the Mille Lacs County Local Water Management Plan. Motion passed on a voice vote.

Quentin Fairbanks briefly commented on the difficulties and potential liabilities involved with interim committee review of local water plans. LuAnn Tolliver reported that the Metro Water Planning Committee will conduct a working

session on March 7th regarding local water plans, review, assessment, and non-implementing plans. Chair Kramer requested that the Attorney General's office be present at the working session to advise on the legal liabilities, roles and responsibilities of BWSR.

Southern Water Planning Committee

Steele County Local Water Management Plan Update – Brian Kletscher reported that the Southern Water Planning Committee reviewed the Steele County Local Water Management Plan update and recommends approval.

** 07-09 Moved by Brian Kletscher, seconded by Paul Langseth, to approve the update of the Steele County Local Water Management Plan. Motion passed on a voice vote.

Wabasha County Priority Concerns Scoping Document – Brian Kletscher reported that the Southern Water Planning Committee reviewed the Wabasha County Priority Concerns Scoping Document and recommends approval.

** 07-10 Moved by Brian Kletscher, seconded by Paul Langseth, to approve the Wabasha County Priority Concerns Scoping Document. Motion passed on a voice vote.

Chair Kramer called for a break in the meeting at 10:05 a.m. The meeting reconvened at 10:15 a.m.

NEW BUSINESS

Public Hearing on Petition for Enlargement and to Increase the Number of Managers of Carnelian-Marine Watershed District – Jim Haertel explained that staff find the petition sufficient and have coordinated with the pertinent parties and facilities such that setting a public hearing is recommended. The Metro Water Planning Committee would preside over a public hearing.

** 07-11 Moved by Louise Smallidge, seconded by Bob Burandt, that the Board orders the public hearing on the enlargement and increase number of managers petition for the Carnelian-Marine Watershed District be presided over by the Metro Water Planning Committee on Thursday, February 22, 2007, starting at 7:00 p.m., at the Marine on St. Croix City Hall located at 121 Judd Street in Marine on St. Croix, Minnesota. Motion passed on a voice vote.

WCA Appeal of a Wetland Boundary and Replacement Plan Decision, Rice Creek Watershed District, File 05-1 – Jim Haertel reported that the Dispute Resolution Committee (DRC) heard oral arguments on December 13, 2006. The DRC continued the hearing on January 11, 2007. Jim reported that on January 10, 2007, the Rice Creek Watershed District withdrew its approval of the wetland delineation for the replacement plan because of the lowering of a culvert in the

ditch system. The DRC deliberated over the issue of whether the replacement plan application was sufficient. The Dispute Resolution Committee decided on a three to one vote to recommend remanding the decision of the District to require submittal of a complete replacement plan application following a new wetland delineation.

Jim provided alternative language for the Memorandum attached to the Order.

** 07-12 Moved by Louise Smallidge, seconded by Quentin Fairbanks, to accept the DRC recommendation to approve the Order remanding the decision to the Rice Creek Watershed District, with Alternative A inserted into the Memorandum attached to the Order. Dana Allen stated that as a member of the DRC, she voted against the remand. Discussion followed. Jim explained the appeal process noting that the timeframe for the final decision of the Board on the appeal must be made within 60 days.

Chair Kramer stated that we have two issues: the replacement plan, and the new

** 07-13 delineation requirement. Discussion followed. Moved by Kay Cook, seconded by LuAnn Tolliver, to move the previous question. Motion passed by 2/3 hand vote to close debate.

Chair Kramer asked for a roll call vote on the motion. Affirmative: Jim Anderson, Kay Cook, Quentin Fairbanks, Mark Holsten, Paul Langseth, Brad Moore, Gene Tiedemann, LuAnn Tolliver, Dan Wilson. Opposed: Dana Allen, Paul Brutlag, Bob Burandt, Brian Kletscher, Joe Martin, Brian Napstad, Louise Smallidge, Randy Kramer. The motion passed, 9 to 8.

** 07-14 Moved by Mark Holsten, seconded by Dana Allen, to reconsider the previous Motion #07-13. Motion passed on a voice vote.

** 07-15 Moved by Louise Smallidge, seconded by Paul Brutlag, to replace the word "new" with "updated" in the Order. The Order will read, "The decision of the RCWD approving the replacement plan is remanded to the RCWD for an updated, complete replacement plan following the new wetland delineation determination". Motion passed on a voice vote.

Request to Release 12.5 Acres from Perpetual RIM Reserve Conservation Easement 76-15-01-01, Swift County – Tim Fredbo explained the request to release RIM acres. Tim reported that the request clearly does not meet the criteria to address easement alteration requests as contained in the Board's easement alteration policy adopted on May 24, 2006. The land released would be used for a building site and that is not allowable under Board policy. The

agreement and easement legal documents were explained and provided to the landowners, Gary and Carol Wehrer, which clearly showed the easement boundaries with donated acres, and their signatures are on both documents. Staff recommendation is to deny the Wehrer's request to release any acres from
** this easement. Moved by Brian Napstad, seconded by Paul Brutlag, to deny the
07-16 request for release of easement acres. Motion passed on a voice vote.

FY 07 Non-Point Engineering Assistance (NPEA) Challenge Grant – Wayne Zellmer explained that the NPEA Challenge Grant is made available to NPEA Joint Powers Board (JPBs) once a biennium to provide accelerated engineering/technical assistance funding to assist landowners implementing high priority conservation practices. Ten percent of the annual Feedlot Water Quality Management Grant ($1.5 M) is reserved to fund this program. Wayne reported that there is $300,000 available. BWSR's first funding priority is JPBs whose member SWCDs received FY 07 Feedlot Water Quality Management Grants, and propose to maintain or hire accelerated staffing to provide shared feedlot technical assistance. Wayne stated that ten applications were received from seven JPBs requesting $674,837. All applications were reviewed and approved by the respective Board Conservationist. Louise Smallidge reported that the Cost-Share Committee met via e-mail and recommends Option #1 funding.

** Moved by Louise Smallidge, seconded by Kay Cook, to accept the Cost-Share
07-17 Committee's recommendation to approve Option #1 funding. Motion passed on a voice vote. The Cost-Share Committee suggests the requests be reevaluated and modifications for FY09 be reviewed in person.

Invasive Species Overview – Jay Rendall, DNR Invasive Species Program Coordinator, presented information on "Invasive Species, MISAC, and the Minnesota Invasive Species Plan". Jay explained the Minnesota Invasive Species Advisory Council (MISAC) and its effort to coordinate a state management plan. Jay distributed the "2007 Invasive Species Calendar". Jay stated that Bob Jacobsen was a participant of MISAC on behalf of BWSR. Jay requested that BWSR remain involved with MISAC to review and consider endorsement of the state plan, and then educate and inform people about invasive species issues. Chair Kramer thanked Jay for his presentation; and stated that BWSR looks forward to working on this effort.

Budget Update – John Jaschke and Doug Thomas gave an overview of the Governor's budget recommendations. Doug summarized BWSR's components in the Governor's FY08-09 recommended budget proposal that was released January 22nd.

Doug briefly reviewed the Drainage Work Group Recommendations. Doug asked board members to contact him or Al Kean regarding any questions on the Drainage Work Group Consensus Recommendations.

Doug stated that he and John Jaschke will be looking at the WCA Assessment and finding authors for expected legislation and will be working with the Clean Water Cabinet to seek endorsement. BWSR will have a better understanding after the February forecast to see if a supplemental budget will provide any additional appropriations. Chair Kramer thanked Doug for his involvement in the budget process. Chair Kramer also thanked Doug for his efforts as acting Executive Director prior to John Jaschke's arrival.

John Jaschke reported that the Office of Legislative Auditor (OLA) report will be released tomorrow at 3:00 p.m. with a hearing in the House Environment and Natural Resources Policy Committee at 4:00 p.m. Copies of the report will be made available to board members after tomorrow.

Chair Kramer reported that a hearing was held on January 10 in Austin regarding the establishment of the Cedar River Watershed District. This item will likely be on the February 28th Board meeting agenda.

Chair Kramer welcomed and introduced Brad Moore, MPCA Commissioner.

AGENCY REPORTS

Minnesota Pollution Control Agency (MPCA) - Brad Moore, newly appointed MPCA Commissioner, reported that Clean Water Legacy provides $10.5M/year to MPCA, partly for TMDLs; $3M/year for mining and ethanol project accelerated environmental review. Brad presented a brief biography of himself.

Minnesota Extension Service (MES) - Jim Anderson reported that his co-director Deb Swackhamer has been named interim Director of the Institute on Environment; MES is currently going through the search to replace her. Jim will assist Deb in inter-agency activities with MDA, MPCA and BWSR.

Department of Natural Resources (DNR) - Mark Holsten, newly appointed DNR Commissioner, presented a brief biography of himself. Mark reported that Clean Water Legacy provides DNR funding for groundwater assessment and monitoring; working lands initiative; forestry; and exotic species - targeting emerald ash borer. Mark reported that DNR is in the process of rebuilding the DNR Commissioner's office. Laurie Martinson is now the Deputy Commissioner

and Bob Mieir is a new Assistant Commissioner, another assistant commissioner position is currently vacant.

Minnesota Department of Health (MDH) - Dan Wilson distributed a press release "Low levels of PFBA found in six cities' wells in southeast metropolitan area". MDH will continue working with MPCA on monitoring and investigation.

Minnesota Department of Agriculture (MDA) - Joe Martin reported that MDA's budget appropriations have increased funding for prevention of soybean rust; emerald ash borer; and gypsy moth. Joe stated that there will be more interaction with agencies on these issues. Joe reported that the Governor's budget proposal for MDA will focus on ethanol and gasification technologies to build biofuel production for the future.

ADVISORY COMMENTS

Minnesota Association of Townships (MAT) - Sandy Hooker congratulated John Jaschke on being hired as the new executive director. Sandy asked that BWSR continue to provide training and education for MAT.

UPCOMING MEETINGS

- Next Board Meeting, February 28, 2007, St. Paul

** 07-18 Moved by Kay Cook, seconded by Dana Allen, to adjourn the meeting at 12:32 p.m. Motion passed on a voice vote.

Respectfully submitted,

Mary Jo Anderson
Recorder

Dispute Resolution Report
February 15, 2007
by: Jim Haertel

There are presently 23 appeals pending. All of the appeals involve WCA except File 05-24. There have been three new appeals filed since the last report dated January 11, 2007.

File 07-4. This is a new appeal of a restoration order in Hubbard County. The appeal regards the filling of Type 2/7 wetland for an access road to a lake. No decision has been made on the appeal.

File 07-3. This is a new appeal of a replacement plan decision in Traverse County. The appeal concerns the approval of a wetland replacement plan application. No decision has been made on the appeal.

File 07-2. This is a new appeal of a restoration order in Stearns County. The appeal regards the filling, draining and excavation of Types 1, 2 and 3 wetlands. No decision has been made on the appeal.

File 06-43. This is an appeal of a restoration order in Morrison County. The appeal involves the placement of fill in wetland near a lake. The appeal has been placed in abeyance and the restoration order has been stayed pending field review by the Technical Evaluation Panel this spring.

File 06-28. This is an appeal of a restoration order in St. Louis County. The appeal regards the placement of fill in Type 7 wetland associated with construction of a road. The appeal has been remanded for TEP review of a wetland delineation and measurement of the wetland fill areas.

File 06-27. This is an appeal of a replacement plan decision in Otter Tail County. A permanent road was constructed in Type 6/7 wetland with a portion of it in the shoreland zone. A Restoration Order was issued and a replacement plan application was submitted to retain the road. An LGU staff individual denied the replacement plan. The appeal has been remanded for a public hearing at the local level.

File 06-26. This is an appeal of a wetland exemption determination in Cass County. The LGU approved the wetland exemption. The TEP recommended the exemption not be approved. The activity involves the placement of drain tile in a Type 2 wetland that was previously hayed and is now a sod farm. The appeal has been accepted, a pre-hearing conference was held, and a hearing before the DRC is being scheduled.

File 06-23. This is an appeal of a replacement plan decision in Kanabec County. The LGU denied the wetland replacement plan application. A previous denial of the same replacement plan application had been appealed, the appeal was remanded for a hearing, and now the current denial has been appealed. The appeal has been placed in abeyance pending the outcome of a lawsuit between the landowner and the county. The lawsuit concerns the county's possible noncompliance with the 60-day rule. The county prevailed in district court, however the decision has been appealed to the Court of Appeals.

File 06-20. This is an appeal of a restoration order in Carlton County. The appeal regards filling and grading in Type 2 and Type 6 wetlands for construction of an airplane hangar, airstrip extension and taxiway. The restoration order has been stayed and the appeal has been placed in abeyance pending TEP review of a wetland delineation and restoration plan.

File 06-17. This is an appeal of a replacement plan decision in the City of Montgomery in LeSueur County. The LGU denied an after-the-fact wetland replacement plan application based on a lack of sufficient reasons why the restoration could not be completed. The appeal has been remanded for further processing at the local level.

File 06-12. This is an appeal of a no-loss decision in Stearns County. It involves the same project and issues as File 06-6. After a restoration order was issued, a no-loss application was submitted by the developer and denied by the LGU. The appeal has been remanded for further technical evaluation.

File 06-6. This is an appeal of a restoration order in Stearns County. At issue are numerous wetlands impacted by filling, sedimentation, reduction of hydrology and lack of Best Management Practices associated with a residential development. The appeal has been denied in part. The Restoration Order has been affirmed in part and has been stayed in part.

File 06-5. This is an appeal of a wetland boundary and type decision in the City of Hermantown in St. Louis County. The appeal concerns the denial of a wetland delineation. There are issues regarding the soils and vegetation in a disturbed area. The area has been disturbed by wetland filling and a cease and desist order has been issued to the developer. The appeal has been remanded for further processing by the LGU.

File 06-4. This is an appeal of a restoration order in Carlton County. At issue is the unauthorized placement of fill in wetland for a roadway. The appeal is in abeyance pending completion of a wetland delineation during the growing season.

File 06-2. This is an appeal of a restoration order in Mille Lacs County. At issue is the unauthorized placement of fill in wetland for construction of a road. Also, unstable steep slopes exist along the edge of the fill in wetland. The appeal is in abeyance pending further technical work during the growing season.

File 06-1. This is an appeal of a replacement plan approval in Itasca County. The appeal contends that sequencing was not followed. The TEP recommended denial on a 3:1 vote. The SWCD approval was on a 3:2 vote. The application sought wetland filling for three outbuildings and lake access. The appeal has been accepted and is in abeyance pending settlement discussions.

File 05-26. This is an appeal of a replacement plan decision in Crow Wing County. The appeal concerns the denial of a wetland replacement plan application. The application was denied because there was no hardship to support approval. Upon inspection it appears a decision was made to deny a variance, however it is likely no WCA decision was made. The appeal has been accepted and is in abeyance pending settlement discussions.

File 05-24. This is an appeal, actually three appeals, of the Bois de Sioux Watershed District compensation to landowners related to a project. The appeal has been held in abeyance pending settlement discussions, was starting to be move forward for a hearing before the DRC, and now is in settlement discussions.

File 05-20. This is an appeal of a replacement plan decision in Cokato, Wright County. The decision approved the filling of a 0.2 acre Type 2 wetland on a residential lot for construction of a residence. There is a question about the alternatives proposed for sequencing. Also, no TEP was held. The appeal has been remanded for a TEP to be held and sequencing to be addressed.

File 05-17. This is an appeal of a replacement plan decision in the City of Holdingford in Stearns County. At issue is the denial of a replacement plan application relating to a residential development. Wetland impacts of 0.7 acres were proposed for construction of a road and multi-use trail. The TEP recommended approval of the application. The LGU denied the application on finding the development could proceed without wetland impacts. The Corps issued a permit for the project. The appeal has been accepted and is in abeyance pending settlement discussions.

File 05-1. This is an appeal of a replacement plan decision by the Rice Creek Watershed District. The District previously made a decision that was appealed which resulted in a remand for an expanded TEP. Now there is an appeal of the decision made under remand since the decision differed from the TEP report. At issue is a wetland delineation and the Comprehensive Wetland Protection and Management Plan that BWSR approved. After a hearing before the DRC, the board remanded the matter for a new wetland delineation and for submission on an updated, complete replacement plan application.
File 04-26. This is an appeal of a restoration order in Spring Lake Township, Scott County. At issue is the placement of 4,300 feet of fill in a wetland for a driveway. The approved plat showed access to the lot without wetland impacts. The appeal is in abeyance pending a decision on a replacement plan application.

File 04-23. This is an appeal of a forestry exemption decision in Kittson County. Unpermitted fill was placed in a Type 7 wetland for a road. A Cease and Desist Order

was issued. Additional filling has recently occurred in violation of the CDO. Corps and DNR violations also exist. The appeal has been accepted and is in abeyance pending completion of a wetland delineation and submittal of a replacement plan application.

File 04-15. This is an appeal of a wetland boundary and type decision in Anoka County. At issue is the decision by the Rice Creek Watershed District to classify a site as effectively drained. Previously a wetland delineation report identified most of the site as wetland. The appeal has been remanded for a technical evaluation panel to meet onsite. The appeal remains in abeyance under the remand.

Board of Water and Soil Resources
February 28, 2007

Northeastern Minnesota Wetland Management Strategy

Background

The Northeastern Minnesota Wetland Management Strategy is a planning document that includes the vision, goals, strategy, and recommendations to guide future wetland mitigation in northeast Minnesota. The strategy was developed over the last 14 months by a coalition of local, state, and federal agencies along with the mining industry and regional organizations. The overall goal of the project is to deal with the scarcity of wetland mitigation opportunities in the region and ensure coordination among the three sectors that use wetland credits in the northeast (mining, roads, residential/commercial).

The project area covers the 18 counties that still have greater than 80% of their pre-settlement wetlands as defined by the Wetland Conservation Act (WCA). This strategy works within the principles outlined in the Interagency Wetland Mitigation Memorandum of Understanding (MOU) and does not advocate any changes to the MOU.

The Strategy includes 6 recommended actions, 3 of which could involve BWSR:

1) Conduct a Northeast Wetland Mitigation Inventory
2) Conduct a Regional Mitigation Siting Study
3) Develop Wetland Mitigation Guidelines

BWSR staff have coordinated the effort during the 14 months of project plan development. If the project is funded, BWSR could play a role in coordinating the mitigation inventory with LGUs and regional and private project participants. As the state oversight agency for the WCA, BWSR involvement in the Regional Mitigation Siting Study would be essential. This component of the project would ensure coordination among LGUs, the mining industry, local transportation authorities and private wetland bankers to ensure high quality wetland mitigation for the region's impacts. The Wetland Mitigation Guidelines component would involve an interagency effort to further develop guidance for actions eligible for credit from the Wetland Mitigation MOU that are suitable for northeastern Minnesota.

Benefits

The Northeastern Minnesota Wetland Management Strategy would benefit BWSR in several ways:

- The mitigation inventory would help BWSR locate wetland mitigation sites for the public road mitigation program.
- The Regional Mitigation Siting Study would ensure coordination between the 3 main sectors (mining, roads, commercial/residential) that use wetland mitigation credits. This will help hold down wetland mitigation costs for public roads.
- The Mitigation Guidelines will help BWSR and LGUs promote a more predictable wetland banking program to landowners in northeastern Minnesota. The result should be a more robust banking program in the region with more high quality wetland mitigation options available.

BWSR Wetland Committee Recommendations

1) **Endorse the recommendations of the Northeastern Minnesota Wetland Management Strategy.**
2) **It is appropriate for BWSR to be the lead state agency for implementing elements of the Strategy.**

Northeast Wetland Mitigation Strategy
Recommendation #1:

DRAFT

COOPERATIVE MINING MITIGATION BANK

NEEDS STATEMENT:

This strategy recommends developing a third party-administered wetland bank specifically for the mining industry. Furthermore, this Strategy suggests that an independent public agency (i.e. Iron Range Resources Board, Arrowhead Regional Development Commission, or other) administers the bank. This Strategy envisions that after an initial establishment of credits, the bank could operate perpetually with mining companies purchasing credits as needed when permits are issued. The bank would also allow individual mining companies to establish bank accounts for credits they develop.

GOALS:

A) Establish regional mining wetland mitigation bank administered by regional authority overseen by state and federal agencies.
B) Improve quality of wetland mitigation resulting from mining impacts.
C) Provide mechanism for coordinated inter-agency oversight of wetland mitigation and water quality protection in Northeast Minnesota.

PARTICIPANTS:

A) Iron Range Resources Board, Arrowhead Regional Development Commission *(Bank Administration)*
B) DNR Lands and Minerals *(WCA LGU)*
C) Wetland Mitigation Review Team *(state, local and federal agencies, wetland bankers, environmental groups select and oversee mitigation projects)*
D) Private consultants *(mitigation project development)*
E) Board of Water and Soil Resources *(participate in Wetland Mitigation Review Team)*

ACTIONS:

A) Continue discussions with Iron Range Resources, Arrowhead Regional Development Commission regarding development of bank.
B) Develop agreement with Corps of Engineers, regional authority, and state agencies establishing mining bank.
C) Establish Wetland Mitigation Review Team of state, local and federal agencies, wetland bankers, and environmental groups to select and oversee mitigation projects.
D) Establish "jump start fund" to begin establishing credits.
E) Develop request for proposals for mitigation projects in Northeast and North Central Minnesota.
F) Develop agreements with selected mitigation projects and begin development of projects.

OUTCOMES EXPECTED:

A) Higher quality wetland mitigation for mining wetland impacts.
B) Increased opportunity for water quality protection and improvement in Northeast and North Central Minnesota.
C) More efficient permitting for mining projects.

COST ESTIMATE: "Jump-start Fund" (to be determined)

ESTIMATED PROJECT COMPLETION DATE: December 31, 2008

Northeast Wetland Mitigation Strategy
Recommendation #2:

Draft

REGIONAL WETLAND MITIGATION INVENTORY

NEED STATEMENT: A study is needed to compile known and potential wetland mitigation opportunities within the northeastern region of Minnesota (the >80% presettlement wetland areas as designated in the Wetland Conservation Act, Minnesota Rules 8420.) The inventory will include identification of water quality improvement opportunities and areas where watershed improvements are needed. The study will also include an inventory of wetlands and water resources that have developed on former mine lands. This inventory will be the basis for setting wetland mitigation goals for the 3 sectors of the NE Wetland Mitigation Strategy: 1) mining 2) residential/commercial and 3) roads.

GOALS:

A) Gain a better understanding of mitigation potential in northeastern Minnesota.
B) Document mitigation potential on minelands.
C) Provide data to reevaluate mitigation goals.

PARTICIPANTS:

A) Board of Water and Soil Resources (project oversight)
B) Private consultants (project implementation).
C) LGUs, SWCDs, County Land Departments (assist with inventory).
D) Arrowhead Regional Development Commission (mapping, GIS management).

ACTIONS:

A) Collect and evaluate existing inventory data (local, state and federal agencies)
B) Develop protocol for inventory work.
C) Meet with LGU and SWCDs to develop work plan.
D) Conduct GIS (Geographic Information System) analysis to screen potential sites for wetland inventory work based on soils, topography, ownership, NWI and other factors.
E) SWCDs ground truth potential mitigation sites and screen and select high value sites.
F) Prepare inventory information for regional mitigation siting study.

OUTCOMES EXPECTED:

A) Comprehensive inventory of wetland mitigation sites in the 18 counties designated as <80% pre-settlement wetlands counties in northeastern and north central Minnesota.
B) This inventory will be the basis for setting wetland mitigation goals for the 3 sectors of the NE Wetland Mitigation Strategy
    1) Mining
    2) Residential and commercial
    3) Roads
C) The inventory will serve as the basis for the Regional Mitigation Siting Study.
D) Improved quality of wetland mitigation to offset the wetland impacts in northeast and north central Minnesota.

COST ESTIMATE: $225,000

ESTIMATED PROJECT COMPLETION DATE: December 31, 2008

Northeast Wetland Mitigation Strategy
Recommendation #3:

Draft

REGIONAL WETLAND MITIGATION SITING STUDY

NEED STATEMENT: The results of the Northeast Wetland Mitigation Inventory are expected to show insufficient wetland mitigation opportunities to meet the expected future demand. Therefore, there is a need to conduct a region-wide mitigation siting analysis based on the mitigation inventory. The siting study will take into account wetland mitigation opportunities in each watershed and Bank Service Area and develop goals for maintaining water quality. The study will identify opportunities in impaired watershed regions. A regional Mitigation Siting Study could curtail the level of effort required by each individual project in the region to meet the state and federal siting standards and allow resources to more efficiently be expended on mitigation planning instead. The siting study will help guide the establishment of wetland mitigation goals for the 3 sectors of the NE Wetland Mitigation Strategy: 1) mining 2) residential/commercial and 3) roads.

GOALS:

A) Utilize the Northeast Wetland Mitigation Inventory data to evaluate the mitigation potential in northeastern Minnesota.
B) Develop a plan for allocating wetland mitigation opportunities in the northeast among the three sectors of 1) mining, 2) residential/commercial and 3) roads.
C) Develop a plan that will target minor watersheds with impaired waters for increased wetland protection, enhancement and restoration.
D) Evaluate needs for wetland mitigation outside of the study area and set goals to meet demand.

PARTICIPANTS:

A) Board of Water and Soil Resources (project oversight)
B) Private consultants (project implementation).
C) LGU Steering Committee of elected officials (provide LGU policy input)
D) Minnesota Pollution Control Agency (assist with setting water quality goals).
E) Staff of LGUs, SWCDs, and County Land Departments (assist with regional plans).
F) Arrowhead Regional Development Commission (mapping, GIS management).
G) Wetland Mitigation Bank Review Team (provide technical guidance in targeting mitigation sites)

ACTIONS:

A) Evaluate northeast regional wetland mitigation inventory data.
B) Analyze wetland mitigation opportunities in the northeast by minor watershed, major watershed and basin (Bank Service Area).
C) Evaluate opportunities for water quality improvement in watersheds of impaired waters.
D) Set wetland mitigation goals for each minor watershed, major watershed, and bank service area.
E) Develop wetland-banking plan and promotion program for northeast Minnesota in cooperation with Wetland Bankers Association, LGUs and BWSR.
F) Allocate wetland mitigation opportunities in northeast by each of 3 sectors (mining, residential/commercial, roads)

(Continued)

OUTCOMES EXPECTED:

A) Comprehensive wetland mitigation strategy for the 18 counties designated as <80% pre-settlement wetlands counties in northeastern and north central Minnesota.

B) Comprehensive strategy for setting wetland mitigation goals for the 3 sectors of the NE Wetland Mitigation Strategy

1) Mining
2) Residential and commercial
3) Roads

C) Strategy for protecting and improving water quality in targeted minor watersheds of Northeast Minnesota.

D) Improved quality and better targeted wetland mitigation to offset the wetland impacts in northeast and north central Minnesota.

COST ESTIMATE: $175,000

ESTIMATED PROJECT COMPLETION DATE: June 30, 2009

Northeast Wetland Mitigation Strategy
Recommendation #4:

Draft

DEVELOP WETLAND MITIGATION GUIDELINES

NEED STATEMENT: This project will build on the actions eligible for credits as defined in the Minnesota Interagency Wetland Mitigation Memorandum of Understanding to add guidance for actions that are well suited for projects in northeast Minnesota. In the past, the lack of predictability in allocating wetland mitigation credits has created uncertainty in developing wetland mitigation sites in the northeast resulting in project delays and increased total project costs. This uncertainty may be a factor in the lack of wetland mitigation banking projects in northeast Minnesota. To resolve this uncertainty, the strategy recommends that state, local and federal agencies cooperatively develop guidelines for planning and allocating credits for unique wetland mitigation methods in northeastern Minnesota.

GOALS:

A) Develop BWSR guidance for LGUs for actions eligible for credit that is fully consistent with the Minnesota Interagency Wetland Mitigation Memorandum of Understanding.
B) Initiate an interagency committee including BWSR, Corps of Engineers, DNR, and LGUs that will develop consensus on standards for allocation of credit.
C) Develop a plan guidance, for example for establishment of white cedar restoration that will include, but is not limited to stocking rates, standards for deer protection, allocation of credit.

PARTICIPANTS:

A) Board of Water and Soil Resources (project leadership)
B) Corps of Engineers (active participation in development of guidelines)
C) Department of Natural Resources (active participation in development of guidelines)
D) Staff of LGUs, SWCDs, and County Land Departments (assist with regional plans).
E) Private consultants (assist with development of standards and guidelines).

ACTIONS:

A) Establish membership of a technical team including state, federal and local agencies and consultants to develop guidelines.
B) Use Interagency Wetland Mitigation MOU (and current WCA Rule) to identify actions eligible for credits that need guidelines for use in northeastern Minnesota..
C) Develop guidelines and standards for those actions eligible for credit that have been identified for targeted use in northeast Minnesota.

OUTCOMES EXPECTED:

A) Better guidance for wetland mitigation projects in northeast Minnesota.
B) Increase in number of private accounts in Minnesota Wetland Bank.

COST ESTIMATE: $150,000

ESTIMATED PROJECT COMPLETION DATE: June 30, 2009

Board Resolution #_____

Northeastern Minnesota Wetland Management Strategy

WHEREAS, the Northeastern Minnesota Wetland Management Strategy (Strategy) is a planning document that includes the vision, goals, strategy, and recommendations to guide wetland mitigation and management activities in northeastern Minnesota;

WHEREAS, the Strategy was developed over a fourteen month period with BWSR staff coordination and the support and assistance from individuals representing the federal, state, regional and local governments and the private business community;

WHEREAS, the Strategy includes six recommended actions, as follows: (1) Develop a Cooperative Mining Mitigation Bank; (2) Conduct a Northeast Wetland Mitigation Siting Inventory; (3) Conduct a Regional Siting Study; (4) Develop Mitigation Guidelines; (5) Update the National Wetland Inventory in Northeastern Minnesota; and (6) Identify Research Needs;

WHEREAS, the Wetland Committee reviewed the Strategy on January 24, 2007.

NOW, THEREFORE BE IT RESOLVED THAT, the Board of Water and Soil Resources:

(1) accepts the recommendations of the Strategy; and

(2) will continue to be the lead state agency for implementing select recommended actions contingent on sufficient funding.

_____ _____

Randy Kramer
Chair, Minnesota Board of Water and Soil Resources

Date

PROPOSED GUIDELINES FOR APPLICATIONS FOR FY 2008/09 LOCAL WATER MANAGEMENT CHALLENGE GRANTS:

Application Period: March 1, 2007 – April 13, 2007

Available Funding: $350,000

Eligible Local Units of Government includes counties, watershed districts and watershed management organizations. Soil and water conservation districts (SWCD) may apply if the county has delegated the local water management planning responsibilities to them per 103B.311, subd. 2. All applicants must have an approved, current local water management plan.

Grant maximums: Grants will not exceed $25,000 per local government unit (LGU) or $75,000 per project where 3 or more LGUs are involved in implementing a project.

Required Match: All grants must be matched one-to-one with non-state cash or in kind contributions.

Priority consideration will be given to projects that develop and implement innovative practices, programs, or plans to protect or restore surface and ground waters. Examples of an innovative practice, program or plan would be one that applies a new method or approach to address a water quality problem, applies an accepted practice in a new way or as a demonstration, etc.

Eligible projects: Proposed projects must implement priority action items in an approved local water management plan. Eligible projects include:

1. land and water treatment (i.e., install erosion or water quality improvement practices);
2. planning and environmental controls (i.e. developing a lake plan or special area ordinance)
3. monitoring and modeling (i.e. water quality data or watershed modeling)

Ineligible projects include:

1. installation of individual sewage treatment systems;
2. updating local water plans;
3. Clean Water Partnership Phase 1 diagnostic studies;
4. federal and state combined cost-share that exceeds 75% of the cost of the project;
5. additional state money for BWSR easement payments (RIM, CREP, WRP, road replacement) or admin/tech services associated with the easement acquisition; and
6. digitizing soil surveys not done to USDA-NRCS standards.

Additional information on eligible/ineligible costs can be found on the LCMR website under LCMR Project Manager Information:

http://www.commissions.leg.state.mn.us/lcmr/manager/promanager.htm

Application period closes at 4:30 p.m. on Friday, April 13th, 2007.

All applications must be submitted using the BWSR eLINK program.

Board Resolution #_____

FY 2008-09 Local Water Mgt. Planning Grants Application Procedures

WHEREAS the Board of Water and Soil Resources submitted a Request for a Proposal to the Legislative-Citizens Commission on Minnesota Resources for funds to eligible local units of government to implement high priority actions identified in current, state-approved local water management plans through competitive grants known as Local Water Management Challenge Grants; and

WHEREAS the Legislative Commission on Minnesota Resources is recommending $350,000 from the Environment and Natural Resources Trust Fund for this proposal;

WHEREAS the Legislature is expected to appropriate these funds in the 2007 Legislative Session;

WHEREAS the Board of Water and Soil Resources is proposing to solicit for grant projects under this proposal, to be funded contingent on legislative appropriation;

NOW, THEREFORE BE IT RESOLVED THAT, the Minnesota Board of Water and Soil Resources will solicit for FY2008-09 Local Water Management Challenge Grants according to the attached guidelines. The agencies represented on the board will be invited to participate in the review and ranking of applications received, which will be completed prior to the June 2007 Board Meeting.

_____ _____

Randy Kramer
Chair, Minnesota Board of Water and Soil Resources

Date

Office of Legislative Auditor (OLA) Report: Status and Approach -

The OLA presented their recommendations to the House Env. And Nat. Res. Policy Committee (Rep. Eken, chair) on Jan. 25th, and to the Watersheds, Wetlands and Buffers Subcommittee (Rep. Hansen, chair) of the House Env. and Natural Resources Policy Committee on Feb. 20th. Board Chairman Kramer and Executive Director Jaschke provided responses at both hearings.

Based on discussions with legislators and others, BWSR will begin working with legislators to develop an Oversight proposal that:

is **Pre-emptive** - so that problems are identified and diagnosed early (relying only on annual reports and 10-year planning intervals is not enough)

is **Systematic** - thorough, consistent and expected so that local governments can be prepared

is **Constructive** - recognizes uniqueness, charts a path for those needing help to get better, and showcases successes

has **Consequences** - that are proportionate to the uncorrected deficiencies

is **Transparent** - allowing for greater public awareness and participation

BWSR has used a District Assessment tool in the past and Assistant Director Steve Woods will overview the scope of those efforts and discuss some alternatives and cost analysis for potential future oversight efforts.

Rep. Hansen has said he'd like to try and get something done this year via the budget. So, there may be an opportunity to address resources and authority tweaks this year and get going right away. The first Senate hearing is set for March 1st right after the BWSR budget overview presentation.

INFORMATION ITEM

BOARD RETREAT FOLLOW-UP

Whereas, the Board met in November 2006 for a two-day workshop to identify issues, review stakeholder input, and begin to set broad priorities; and

Whereas, the information and analysis from the November 2006 workshop has been compiled; and

Whereas, the Strategic Plan for the Minnesota Board of Water and Soil Resources adopted in 1997 has served the agency well; and

Whereas, Board membership over the intervening years since 1997 has changed such that only one currently serving member of the Board participated in the development of the 1997 Plan; and

Whereas, the regulatory, fiscal, conservation, and policy matters the Board is responsible for have evolved since 1997; and

Whereas, it is anticipated that significant policy and implementation efforts are upcoming in the areas of wetlands, public ditches, conservation easements, local government oversight, and impaired waters, among others.

Now Therefore, The Board hereby directs the Public Relations and Outreach Committee and staff to undertake the following actions:

a) convene and engage the services of an outside facilitator,
b) develop a schedule and process plan that builds on the November workshop findings
c) gather further input from stakeholders and other Board members, and
d) provide a preliminary draft for Board review by September 2007 and a final draft for consideration by the end of 2007.

Randy Kramer, Chair

February 28, 2007

REPORT TO THE MINNESOTA BOARD OF WATER AND SOIL RESOURCES

Results of the Board and Staff Retreat

November 15-16, 2006
St. Cloud Minnesota

Prepared by
Donald Buckhout
Retreat Facilitator
November 22, 2006

DRAFT

Step 1: Accumulate Information

The first part of this retreat was devoted to the presentation of information that helps to define the Board of Water and Soil Resources and the environment in which it operates.

MISSION AND MANDATES

Executive Director Ron Harnack presented the Mission of BWSR that was developed in the 1997 Strategic Plan. He also summarized the Mandates that are largely specified in state statute and define the authorities and programs the agency is expected to administer.

MISSION

To assist local governments to manage and conserve their irreplaceable water and soil resources.

MANDATES

(Specific Mandates of the Board of Water and Soil Resources are not listed here. See the appendix of the September 1997 for a partial list of the Board's mandates.)

SURVEY ISSUES

Assistant Directors Doug Thomas and Steve Woods presented the results of a survey of BWSR's clients that was conducted in the two weeks prior to the retreat. The following list contains those items that Board members and staff took note of in the report of the survey results. These items represent what is important to the clientele that BWSR serves or areas to address in future client relations.

1. Communicate: MESSAGE
2. Training
3. Education / Awareness
4. Client / customer perceptions
5. Funding
6. Coordination
7. Survey response analysis
8. Decision Making: Who/How?
9. Impaired Waters
10. Who is the client/customer?
11. Salesmanship skills
12. Resource losses

EXTERNAL AND INTERNAL ASSESSMENT

The final task in the information accumulation step was to generate information based on the knowledge, experience, and perception of Board members and staff regarding the External environment that has an effect on BWSR and the Internal dynamics of the agency. Participants were encouraged to identify those factors that can affect (positively or negatively) ability of the agency to accomplish its Mission and carry out its Mandates. Opportunities and Strengths are those factors that the agency could take advantage of or build on in the next four years. Threats and Weaknesses are those factors that need to be avoided or carefully managed to minimize the damage they might cause to the agency's future effectiveness. After the items were listed in each category, Board members and staff voted for the most important items, which are indicated in **bold** with the number of votes in parentheses.

EXTERNAL OPPORTUNITIES

1. **Legislative interest (14)**
2. Dedicated fund potential (7)
3. 2007 Federal Farm Bill (6)
4. Special Interest Groups: work with coalition building groups (e.g., AMC) (6)
5. Single issue Special Interest Groups (e.g., commodity groups, D.U.) (1)
6. Organizations with similar interests or missions (5)
7. **General public support for mission (14)**
8. **Impaired waters is agreed upon priority (17)**

EXTERNAL THREATS

1. **Competition for funds (20)**
2. Running out of good development land; LGUs compromise (1)
3. North-South landscape differences/exclusivity (4)
4. Special Interest Groups: single issue environmental (2)
5. Government re-organization to eliminate/combine agencies (1)
6. New legislators are ignorant/unaware of BWSR (6)
7. **Legislature is ignorant/unaware of BWSR (14)**
8. Public does not understand new WCA policies (1)
9. **Inadequately addressed impaired waters (10)**
10. People don't trust state government to manage land/resources (7)
11. BWSR Board function seen as non-essential (5)

INTERNAL STRENGTHS

1. Focus on Outcomes (7)
2. **Diversity of Board (15)**
3. **Ability to collaborate across agencies/groups (16)**
4. Reality-based staff (9)
5. Board hires the executive director (not appointed) (2)

INTERNAL WEAKNESSES

1. **Communication of Message (19)**
2. Quantification of scientific results for dollars spent (10)
3. Procedures for LGUs becoming more cumbersome (3)
4. **Do not control funding (15)**

Step 2: Analyze the Information

The second part of the retreat required a look back at all the information presented or generated to try to identify key themes, ideas or priorities that emerge.

ISSUE TOPICS

The Board and staff identified the key themes that emerged from looking at all the information presented, and each of these themes was given a topic label that was descriptive. These Issue Topics can focus on policy, management, a specific program, or a broad trend that encompasses several factors. The participants voted for their top five Topics. The Topics in boldface type received the most votes. The number of votes is indicated in parentheses.

(Results of the first vote.)

1. **Public relations (12)**
2. Buffers/drainage (6)
3. **Impaired Waters (16)**
4. Building local capacity (10)
5. Human Resources: staff, exec. dir.; LGU capacity, volunteer leaders (10)
6. **Coordination/Partnerships (16)**
7. Management of BWSR (3)
8. Wetlands/No Net Loss (4)
9. 2007 Farm Bill (1)
10. Integrated Education (4)
11. **Marketing the Budget Request to Governor (15)**
12. Support/assistance for LGU program delivery system (9)
13. **Private Lands conservation (12)**

(Results of the second vote after Topics 4 and 5 were combined with Topics 12 and 7. After the second vote Topic 12 replaced Topic 13 as one of the top five and, in fact, received the most votes, indicating it was the most important Strategic Issue on the list.)

1. **Public relations (10)**
2. Buffers/drainage (7)
3. **Impaired Waters (18)**
4. ~~Building local capacity~~
5. ~~Human Resources: staff, exec. dir.; LGU capacity, volunteer leaders~~

6. **Coordination/Partnerships (15)**
7. Management of BWSR (8)
8. Wetlands/No Net Loss (8)
9. 2007 Farm Bill (0)
10. Integrated Education (5)
11. **Marketing the Budget Request to Governor (15)**
12. **Support/assistance for LGU program delivery system (21)**
13. Private Lands conservation (9)

STRATEGIC ISSUES

Strategic Issues are statements, usually in the form of a question, worded in such a way that they lead to practical steps or actions that will take the agency in a certain direction. Strategic Issues contain important **value** and **qualifier** words to guide decisions about the most effective actions to take to get you where you want to go. The following five Strategic Issues are listed in priority order based on the votes for the Topics in the previous section.

STRATEGIC ISSUE #1: **Support and assistance for LGU delivery system**

How do we **best** deliver technical information to local governments so that they have a **good base** to operate from?

What is the best way to provide **necessary** training and coordination?

What are the **top priority** training needs?

How do we identify and prioritize LGU technical and financial assistance needs?

How do we gather data and technical information?

How do we **best** identify and direct financial assistance opportunities?

How do we maintain accountability for funds spent?

STRATEGIC ISSUE #2: **Impaired waters**

How can we show the legislature what we are purchasing with their money?

How do we assist LGUs to administer TMDLs?

How can we clarify what is being done by local government?

How do we emphasize to the public and the legislature the importance of addressing impaired waters now?

How can we prevent waters from becoming impaired?

How do we influence the impaired waters designation process to ensure the **viability** of the economic community?

STRATEGIC ISSUE #3: **Marketing the BWSR budget request**

How can best use the influence of our clientele and the diversity of our Board to identify, assess, and persuade the Governor and legislature of the importance of the work, initiatives and outcomes of our agency so that we are adequately funded?

How do we show accountability to demonstrate effective delivery of results?

How do we identify, inform and influence key decision-makers that will affect our budget?
How can we best integrate our budget with "hot topics" (e.g., impaired waters)?

STRATEGIC ISSUE #4: **Coordination/Partnerships**

How do we best help with the coordination/connection of various units of government (in a way that helps the LGU to best achieve its purpose)?
How do we identify **key partners** or limit the number of partners to those who are **relevant**?
How do we best develop, nurture and use partnerships to **achieve our mission**?

STRATEGIC ISSUE #5: **Public relations**

How can we build a **uniform** message, get the message out, market who BWSR is, build our public image, so that we **compete well** for funds and all units of government collaborate in a way that capitalizes on public sentiment and legislative interest (to better accomplish our mission)?

Step 3: Develop Actions

Without specific actions, the Issues identified never get addressed. This third step was just barely started near the end of the retreat. However, it is probably the easiest step for people to accomplish because people at your level in the organization are action oriented. You automatically think in terms of what needs to be done. The caution is to make sure that the actions you select to devote time and resources to are the ones that will get at the key values identified in the Strategic Issue statements.

STRATEGIC ACTIONS

Strategic Actions are the specific tasks that will be done to address the Strategic Issues. Actions should be written very clearly and a deadline and responsibility assigned. When writing the Strategic Actions pay attention to the key words and qualifiers in the Issues.

A Strategic Action can apply to more than one issue. In the example below, a few Strategic Actions were identified for Strategic Issue #3. That Issue was selected because it was judged to be the most urgent. Note that the fourth Action also applies to Strategic Issue #5.

Applies to Strategic Issue #	**Strategic Action**	By when?	By whom?
3	Prepare ***easily understood*** documentation of past achievements and future goals/needs	11/30/06	Staff
3	Develop a process/mechanism to achieve full Board support for budget	12/13/06 ?	Board & staff
3	Contact (e.g.) Ray Bohn, LeAnn Buck, other association groups to identify key legislators	12/13/06	Board members
3, 5	Develop the BWSR "Message" (why BWSR is important)	12/31/06	Staff→Admin. Advisory Comm→Board

Step 4: Follow-Up and Next Steps

There are several key activities that the Board and staff need to do to follow-up on the retreat. The first is to determine whether the Strategic Issues generated still ring true: are these the key issues that the agency wants to pursue in the next four years? Having decided that, the next step is for the Board and staff to spend some time developing additional Strategic Actions using the format in the previous section. The best Strategic Actions will address more than one Strategic Issue. It is suggested that Board devote time on the agenda of up-coming Board meetings for this task.

Final Note from the Facilitator:

It was a pleasure for me to help facilitate the important task of charting the future direction of your agency. I wish you the very best success as you continue to carry out your mission and the mandates you have been given. Please contact me if I can be of further assistance.

Don Buckhout
218-744-4482
Don.Buckhout@dnr.state.mn.us

FOR YOUR INFORMATION

February 28, 2007

- Board Members' Handbook of Legal Issues
- Clean Water Legacy Council – BWSR Representative
- Briefing and Hearing Schedule – WCA Appeal of an Exemption Determination Cass County
- USDA Announces Christina Muedeking as NRCS Regional Assistant Chief
- Representative Rick Hansen Named Chair of Subcommittee on Wetlands, Watersheds, and Buffer Protection and Committee Schedule
- Summary of South Two River Watershed District Termination

BOARD MEMBERS' HANDBOOK
OF
LEGAL ISSUES

LORI SWANSON
Attorney General
State of Minnesota

January 2, 2007 Edition

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INTRODUCTION

This Manual is designed to be a guide for state boards, their members and staff. It generally describes the role of boards in state government and the role of the Attorney General's Office in representing them. It also discusses several important laws that apply to the operations and activities of state boards. Although it is intended to be educational and informative about potential legal questions which may arise, it should not be viewed as a substitute for boards actually seeking advice from their assigned attorneys when specific situations raise questions of a legal nature.

Our Office hopes that the Manual will serve both as a handbook for new board members and staff as well as a review of relevant laws for the more experienced. We suggest that you use a loose-leaf notebook format in maintaining the Manual. The pages are numbered and dated in a manner which will allow us to send updated substitute pages when applicable statutes change or when a new court decision may affect the operation of state boards.

I. ROLE OF ADMINISTRATIVE AGENCIES IN GOVERNMENT

A. What Is An Administrative Agency

A fundamental principle of the United States Constitution requires that the executive, legislative, and judicial powers be exercised by separate branches of government, each of which may check or balance the actions of the others. Administrative agencies occupy a unique place in government because they have the statutory authority to exercise all three types of powers in the course of performing their official business. An administrative agency is an entity within the executive branch of government. It exercises its authority to enforce the statutes enacted by the Legislature. It also exercises "quasi-legislative" authority granted to it by the Legislature by adopting rules to further implement applicable statutes. Finally, it also has powers similar to courts to resolve particular kinds of disputes and to require individuals to give testimony as witnesses.

Because administrative agencies combine the powers of all three branches of government, the very existence of early administrative agencies troubled the courts. Courts finally resolved this issue by recognizing that the danger to citizens' liberty is not in blended power itself, but in unchecked power. Two checks on agency powers have been established. First, only the Legislature may create agencies. The Legislature must declare a legislative policy and establish primary standards for agency actions. Agencies are permitted the authority to fill in details, through rules or adjudication, but such agency action must be consistent with legislatively-determined policy. Second, the judiciary operates as a check by retaining residual authority to prevent and rectify errors or abuses.

Judicial review of agency decisions is important. The role of the courts is twofold: 1) to make sure that the Legislature does not unlawfully vest powers in an administrative agency and 2) to ensure that administrative agencies exercise their powers within the limits set by the Legislature and without violation of the legal rights of any persons. If a court finds that an

agency has exercised powers beyond the limits set by the Legislature or that it has violated a person's rights, the administrative agency's decision or action may be overturned.

State boards are a type of administrative agency. In the case of licensing boards, the Legislature has reposed in such boards the power to regulate specialized professions for which licenses or certificates are required. The boards are mainly composed of persons in those professions who, thus, are best prepared to undertake regulation. These specialists are often complemented by public members, bringing other backgrounds, knowledge and experience to board activities.

B. Administrative Agencies And The Due Process Clause

The due process clause is found in the Fourteenth Amendment to the U.S. Constitution and states that "No State shall . . . deprive any person of life, liberty, or property without due process of law. . . ." The courts have held that a professional license is a property right to which the Fourteenth Amendment applies. In reviewing procedures used by boards in dealing with the property rights of applicants or licensees courts recognize two types of due process: substantive and procedural. Substantive due process requires that agency actions relate to the purpose for which the agency exists. Procedural due process requires an agency to use methods which deal fairly with those it regulates.

Due process primarily affects the adjudicatory functions of a board. A board acts in its adjudicatory capacity whenever it reviews the activities of a particular individual or party, makes determinations of fact based upon such a review, and issues an order affecting that specific individual or party. A party is entitled to notice of a proposed board action and, in some instances, to a "contested case hearing" before a board makes findings of fact or issues an order affecting the party's activities. For further discussion of contested case hearings, especially in the context of licensing board activities, see section IV of this Manual.

Boards must take great care in implementing their responsibilities. The requirements of procedural due process are contained in court interpretations of the United States and Minnesota

Constitutions, the Minnesota Administrative Procedures Act, Rules of the Office of Administrative Hearings and in other statutes and rules. Although some of the requirements may seem technical, their underlying purpose is to ensure fundamental fairness.

The law also requires that boards be bound by certain requirements in establishing jurisdiction, interpreting legislative standards, and imposing remedies. Courts may review actions of all boards to determine whether or not the boards complied with due process requirements, acted within their jurisdiction, and interpreted the governing law reasonably.

II. ROLE OF THE ATTORNEY GENERAL IN GOVERNMENT

A. Authority Of The Attorney General

The power of the Attorney General stems from three sources: the Minnesota Constitution, Minnesota Statutes, and the common law derived from court decisions. The constitution establishes the Office of Attorney General as a separate entity within the executive branch. The Attorney General is chosen by the state's voters. Minnesota Statutes, particularly chapter 8, set forth some of the Attorney General's responsibilities. Chapter 8 requires the Attorney General to "appear for the state in all causes . . . wherein the state is directly interested; also . . . whenever, in the attorney general's opinion, the interests of the state require it." Minn. Stat. § 8.01. In addition, chapter 8 directs the Attorney General to act as the attorney for all state officers, boards, or commissions in all matters pertaining to their official duties. Minn. Stat. § 8.06. Chapter 214, which prescribes some of the duties of boards, is another statute that describes the role of the Attorney General. Minnesota Statutes sections 214.10 and 214.103 specifically define the role of the Attorney General with regard to investigating complaints against licensees.

But the common law (decisions by Minnesota courts) is the most extensive source of the Attorney General's authority. The Minnesota Supreme Court has described the expansive powers of the Attorney General:

> The attorney general is the chief law officer of the state. His powers are not limited to those granted by statute but include extensive common law powers inherent in his office. He may institute, conduct, and maintain all such actions and proceedings as he deems necessary for the enforcement of the laws of the state, the preservation of order, and the protection of public rights. He is the legal adviser to the executive officers of the state, and the courts will not control the discretionary power of the attorney general in conducting litigation for the state. He has the authority to institute in a district court a civil suit in the name of the state whenever the interests of the state so require.

Slezak v. Ousdigian, 260 Minn. 303, 308, 110 N.W.2d 1, 5 (1961).

As an elected constitutional officer, the Attorney General has authority to make independent legal decisions, based on the public interest, regarding the representation of client

agencies and boards. This authority distinguishes the relationship between the Attorney General and his clients from the attorney-client relationship found in the private sector. Although it is rare for the Attorney General and a given client to disagree on what course of legal action it is best to take, when that happens the Attorney General exercises the final judgment.

B. Structure Of The Attorney General's Office

The Attorney General has divided the office into five sections, each of which holds several divisions. The Chief Deputy, Solicitor General and three deputies head up the five sections; division managers and deputies are responsible for the day-to-day operations of the divisions.

Many of the divisions have been created to serve the needs of the various departments and agencies within state government. The Transportation Division, for example, represents the Department of Transportation. Other divisions, on the other hand, exist to carry out special Attorney General responsibilities. The Residential Utilities Division, for example, devotes its energies to protecting the interests of residents and small businesses with respect to utility issues. In these matters, the Attorney General, not a state agency, is the party.

C. Legal Representation Of State Boards

Legal advice is regularly sought by state boards and board staff on a variety of issues. These range from questions about jurisdiction to data practices to due process. The Attorney General's Office tries to offer advice that includes alternative courses of action, when appropriate, as well as ramifications of any board action being considered.

Representation of non-health-related boards is largely consolidated in the Office's Public Finance/Opinions/Agriculture/Natural Resources Division. The Health Licensing Division represents health-related boards. The purpose of this consolidation is to ensure efficient service to board clients and consistency of legal advice. It will also develop a nucleus of highly accessible attorneys with legal expertise regarding issues commonly facing boards. These attorneys work to ensure that legal advice is consistent from one client to another. Memoranda

of advice on crucial issues are shared with the appropriate attorneys. Occasionally, however, board staff may discover instances of inconsistent advice being offered by different attorneys on the same issue. We encourage clients to bring such inconsistencies to the attention of the board's general counsel.

Representing state boards generally includes four functions: representation in adversarial proceedings; assisting in investigations; client advice; and rulemaking. Investigations and rulemaking are discussed later in this Manual in section VI. Adversarial proceedings, discussed further in section III.B, include representation of the board's disciplinary committee at conferences, board meetings, contested cases and in court proceedings which may occur from time to time. Court proceedings may be appropriate when a board wishes to prevent an unauthorized person from engaging in a profession for which a license or certificate is required. Occasionally, a licensee will try to prevent a board from moving forward with disciplinary action by suing the board in district court. Finally, a board's decision following a contested case may be appealed, resulting in a case being filed in the Court of Appeals.

When a matter proceeds to a contested case or a suspension proceeding, more than one attorney from the Attorney General's Office will become involved in the case. The first attorney will be the prosecuting attorney for the committee while the second attorney will be the advising attorney for the board. The prosecuting and advising attorney roles are discussed further in section IV-5 of the Manual.

III. LICENSING BOARD RESPONSIBILITIES

As administrative agencies, licensing boards have only those powers given to them by the Legislature, as set forth in the statutes. Minnesota Statutes chapter 214 and the boards' individual practice acts are the principal statutes that define and limit a licensing board's powers and responsibilities. Licensing board duties fall into two major categories: 1) granting and denying licensure and certification, and 2) complaint resolution, including discipline. The goal of board actions must always be to preserve the health, safety, and welfare of Minnesotans.

A. Licensure And Certification

A board is given authority to ensure that only qualified persons engage in a profession. The Legislature has predetermined which individuals are "qualified" for licensure through the legislative prescription of requirements for licensure found in every board's practice act.

As opposed to the disciplinary function of a board, which is often discretionary, the licensing or certifying function of a board is primarily "ministerial" in nature. A "ministerial" act is one that involves executing fairly specific standards which allow for little interpretation by a board. The Legislature determines the qualifications needed for a profession by setting out specific education and experience requirements. If those requirements are met, a board may not deny licensure or certification, except as set out below. In this way, the Legislature mandates that boards license or certify particular persons while withholding approval from others.

Even though licensing or certification is largely ministerial, a board can and does exercise a certain degree of discretion. First, while a board's practice act sets out mandatory requirements for licensure or certification, the act also allows the board to adopt rules to implement the legislative standards. For example, even if a practice act has a mandatory examination requirement, the board has discretion to define in its rules the nature and scope of the examination or a passing score.

Second, many practice acts require that applicants be "of good moral character" or that they have not "engaged in conduct warranting disciplinary action." Such requirements also

afford boards some discretion. A board must decide how a statutory criterion applies to each applicant. If information is received about an applicant which demonstrates that the applicant should not hold an unlimited license or certificate to engage in a profession, a board may attach conditions or restrictions to the license. For those cases a board's discretion, as warranted by the evidence could range from restricting the scope of practice or requiring monitoring or supervision of a licensee or certificate holder, to less stringent conditions such as requiring additional educational courses.

B. Complaint Resolution

The second major type of licensing board function, the complaint resolution process, is outlined in parts B.1 - B.5 below. The Peace Officer Standards and Training Board has unique statutory procedures governing complaint resolution, which are outlined in section B.6 below.

1. Initial Handling of Complaints

A licensing board's receipt of a complaint begins the complaint resolution process. Most complaints consist of a statement of grievances or accusations against a licensee or certificate holder and a request or demand for board intervention. A complaint may be submitted orally or in writing. Minn. Stat. § 214.10, subd. 1. Before an oral complaint is investigated further, the Attorney General's Office may require that the complaint be stated in writing. Complaints may be submitted by anyone, including a board member or board staff.

A licensing board generally has the authority to act on any complaint that is jurisdictional. A complaint is jurisdictional if it "alleges a violation of a statute or rule which the board is empowered to enforce." Minn. Stat. § 214.10, subd. 1. Thus, jurisdictional determinations relate exclusively to whether a board has legal authority to act based on the facts presented by the particular complaint. Whether a complaint is true or can be proven is not germane to the determination of jurisdiction.

Complaints that are determined to be non-jurisdictional are dismissed by the board and, when possible, referred to other agencies that may have jurisdiction. Examples of non-

jurisdictional complaints may include those that allege a licensee's commission of a crime not related to the licensee's practice or a licensee's offensive personality.

Many of the licensing boards have established a complaint panel or committee. The panels normally consist of one or more board members. The complaint panel may make recommendations on how best to pursue a complaint. Options may include requesting the licensee's written response to the complaint; asking the complainant for additional information; referring the matter to the Attorney General for investigation; referring the matter to an outside consultant for expert advice; scheduling a disciplinary conference or educational meeting; or dismissing the complaint. A board member who has had a financial or professional relationship with the subject of a complaint may be prohibited from participating in complaint panel activities involving that person. A detailed discussion of conflicts of interest issues appears in section VII.C of this Manual. Members of health-related licensing boards should also be aware of the prohibition regarding conflicts of interest in Minn. Stat. § 214.10, subd. 8(b).

2. Investigation of Complaints

Each licensing board has developed procedures for investigating complaints. Minnesota Statutes section 214.10, subdivision 2 allows a non-health licensing board's complaint committee to decide whether it wishes to conduct the investigation with the assistance of board staff and to consult with the Attorney General's Office if legal issues arise, or whether to have the Attorney General's Office take the lead in an investigation. Health licensing boards are required to refer any matter requiring investigation to the Attorney General's Office. Minn. Stat. § 214.103, subd. 5. Sometimes boards will need to hire an outside consultant to assist on the investigation of a particular complaint on the complaint or on the investigation of the complaint. If this is done, a nondisclosure agreement should be signed by the consultant to ensure the privacy of data related to the active investigation of the complaint.

The collection, storage and dissemination of data during a board's investigation of a complaint must be consistent with the requirements of the Minnesota Government Data Practices

Act, Minnesota Statutes chapter 13. This Act is discussed in detail in section VII of this manual. This section presents a brief overview of how the Government Data Practices Act affects the investigation of complaints.

The Government Data Practices Act classifies a complainant's identity as private data unless the complainant consents to disclosure. Therefore, a complainant's identity should not be revealed to third parties without first obtaining the complainant's written permission. If this permission is not given, then the identity cannot be disclosed. Minn. Stat. § 13.41, subd. 2. Also, before an investigator interviews people or asks them to provide information related to the complaint, a warning as to the use of the data commonly known as the Tennessen Warning,[1] should be given. In conjunction with this warning, it is a good idea to briefly describe the complaint resolution process to the person from whom information is being sought. Further, data collected and maintained as part of a complaint against a licensee are classified as confidential under Minn. Stat. § 13.41, subd. 4. A board should take appropriate measures to protect the confidentiality of this data.

The Tennessen Warning, found in Minn. Stat. § 13.04, subd. 2, should be given to all witnesses and to other third persons from whom information is sought. This statute requires that whenever a governmental agency asks an individual to provide private or confidential information about himself or herself, the individual must be informed of:

a. The purpose and intended use of the information within the collecting agency;

b. Whether or not the individual is legally required to supply the requested data;

c. Any known consequences of giving or refusing to give the information; and

d. The identity of other persons or agencies authorized by state or federal law to receive the information.

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[1] The commonly used reference to the "Tennessen Warning" is derived from Robert Tennessen who was the chief author of the original Government Data Practices Act.

At the investigation stage, third parties do not have to provide the information requested unless they are subpoenaed by the board or the board's statutes and rules require the third party to make the disclosure. Some boards' statutes specifically require third parties to provide information requested by a board complaint committee without the necessity of issuing a subpoena. All licensing boards can ultimately rely on the subpoena power found in Minn. Stat. § 214.10, subd. 3 to obtain information relevant to a complaint. Board subpoenas may be enforced in district court if the subpoenas are not honored by the recipient.

After witnesses are interviewed and acquired documents are reviewed, an interview with the subject of the investigation may be required. That person may be contacted by telephone, in person or by letter, and advised of the complaint. As with all persons interviewed, the licensee should be given the Tennessen Warning and information concerning the complaint resolution process. The licensee should also be informed that he or she may have an attorney present during the interview.

Members of health-related licensing boards, except the Board of Veterinary Medicine, should also be familiar with the special requirements for investigations, information exchanges, and handling of complaints which are found in Minn. Stat. § 214.10, subd. 8.

3. Conferences

The conference is the complaint panel's chief vehicle for resolving complaints. A conference may be held for the purposes of investigation, negotiation, education, or conciliation. The licensee is notified of the conference by service of a notice of conference which sets forth the conduct alleged to violate the board's practice or certification act and gives the licensee information about the process. Generally, a licensee receives the notice about thirty days before the conference, although this is not a statutory requirement. In emergency cases, the licensee may receive only a few days' notice.

Thorough conference preparation by the complaint panel members and board counsel is essential to accomplishing the purpose of the conference. This includes review of the notice of

conference, any investigative data, any licensee's letter of response to the allegations, and all other written material relevant to the complaint. A licensee may be represented by an attorney at a disciplinary conference.

The panel chair or board attorney generally opens the conference with a brief statement about procedural matters. A Tennessen Warning should be given before anyone asks questions of the licensee. The panel then questions the licensee about the allegations found in the notice of conference. In addition to the panel members, board staff and board counsel sometimes ask questions. Questioning should be relevant to the complaint's subject matter and help panel members develop a full understanding of the licensee's position with respect to the allegations. This discussion should also allow the panel to assess the licensee's credibility and candor regarding the allegations, as well as the licensee's understanding of the appropriate statutes and rules. This gathering of information permits the panel to decide how it will proceed with the case. Sometimes, when highly technical issues are involved, the panel will hire an outside consultant to participate in the conference.

When the questioning is complete, the licensee is excused while the panel deliberates. The panel has a variety of options, including dismissal of the complaint, a continuance to gather additional information, or negotiation of disciplinary action pursuant to a consent stipulation and order. If the panel and the licensee cannot agree on a stipulation for disciplinary action, the panel may decide to recommend to the board that certain disciplinary action be taken, and that a contested case hearing be held to determine whether that disciplinary action is appropriate and proper.

Health-related licensing boards have the additional option of "corrective action." Minn. Stat. § 214.103, subd. 6. Corrective action is intended to be used when the panel identifies practice problems but the deficiency does not warrant disciplinary action or the evidence is insufficient to sustain disciplinary action. Corrective action is memorialized in a written agreement, reviewed and approved by the Attorney General, between the panel and the licensee. Once the licensee completes the corrective action, the complaint is dismissed.

4. Disciplinary Action

As discussed above, disciplinary action, such as reprimands, imposition of civil penalties or suspensions or revocations of licenses, may be accomplished through a consent order or through a contested case. A consent order is issued after the full board reviews and approves a written stipulation setting forth facts and discipline to which both complaint committee and the licensee have agreed. Generally, the complaint panel does not resort to a contested case unless the licensee has refused to sign a stipulation for disciplinary action. Contested cases are discussed more fully below.

Licensing boards also have the option of seeking an injunction from the district court. Minnesota Statutes section 214.11 empowers boards to seek injunctive relief for two purposes: to restrain any unauthorized practice or activities or to prevent a threatened violation or violation of any statute or rule which the board has the authority to enforce. If an injunction is granted, the board can still proceed with its own disciplinary action in respect to the person's license or application for license or renewal. Obtaining an injunction also does not preclude an appropriate criminal prosecution of the person who has been enjoined.

The legislature has also given many boards specific authority to issue cease and desist orders. This type of board order requires that certain conduct in violation of a board's rules or statutes stop. A cease and desist order must be served on the person(s) whose conduct is the subject of the order. The order must also contain language providing an opportunity to request a hearing before an administrative law judge concerning the allegations in the order. If a hearing is not requested within thirty days, the cease and desist order becomes final. A final cease and desist order is a public document under the Data Practices Act. A violation of a properly served, final cease and desist order may form the basis for a board to seek injunctive relief in district court.

The Legislature also requires boards to initiate contested case proceedings to suspend or revoke a license, or to refuse to renew a license, of a person convicted of certain criminal offenses. Minn. Stat. § 214.10, subd. 2(a).

5. Temporary Suspensions

Some boards have at their disposal the extraordinary remedy of temporary suspension. It is reserved for emergency cases in which the threat to the public of a licensee's continued practice is immediate. Although each board with authority to temporarily suspend licenses may have slightly different procedures, the following is a general description of how the process works. A board with such authority may temporarily suspend the license of a licensee without a full trial-type hearing if it has probable cause to believe that the licensee has violated a rule or statute which the board is empowered to enforce and continued practice by the licensee would create a serious or imminent risk of harm to the public. The suspension is effective upon written notice to the licensee, specifying the rule or statute violated. The suspension remains in effect until the board issues a final order in the matter. When the board issues the suspension notice, it must commence a disciplinary hearing within a specified period, often thirty days.

a. Record to be considered by the board on temporary suspension

When the complaint committee decides that a case warrants temporary suspension, the full board must be asked to take this action, usually by filing a petition for temporary suspension. The prosecuting attorney from the Attorney General's office is responsible for working with board staff in compiling the record provided to the board by the complaint committee. The prosecuting attorney provides a copy of the materials to the board's advising attorney, simultaneously serving a complete copy of the materials on the licensee, and filing them with the board for distribution to the deliberating board members. The materials filed by the prosecuting attorney become part of the record before the board, along with any other materials submitted by the licensee.

b. Notice

Because of the nature of temporary suspension cases, the board generally acts quickly to consider the committee's petition. Efforts are made to provide reasonable notice to the licensee regarding the time, date and place of the board meeting at which temporary suspension will be considered. The licensee is served with a copy of the materials to be submitted to the board by the prosecuting attorney, and is informed that the licensee has the opportunity to present argument and information to the board regarding the proposed temporary suspension. The licensee or the licensee's attorney is also informed that any questions regarding procedures to be followed should be raised with the board's advising attorney. The advising attorney also receives a copy of this notice.

c. Evidence

Evidence presented by the prosecuting attorney or the licensee is in affidavit form only. The board does not hear testimony at the hearing on the temporary suspension.

d. Board order of temporary suspension

The prosecuting attorney submits a proposed order of temporary suspension to the board in advance of the meeting. A copy is simultaneously provided to the licensee. After the meeting, the board must issue an order, either suspending or not suspending the licensee. If suspension is ordered, the board will schedule a contested case hearing within a specified period after issuance of the suspension order. If a contested case hearing is held, the administrative law judge (ALJ) typically will issue a report within thirty days after closing of the contested case hearing record. Some practice acts require that the board issue a final order within thirty days after receiving the ALJ's report and any exceptions to it.

The emergency nature of temporary suspension proceedings may require that one or more of the above procedures be dispensed with in an unusual case. In an extreme emergency, an *ex parte* proceeding (one in which the licensee does not participate) could be held involving the temporary suspension of the licensee's license.

6. Complaint Resolution Procedures of the Peace Officer Standards and Training Board

Under Minn. Stat. § 214.10, subds. 10, 11, 12 and 13, when the executive director or a board member of the POST Board receives a complaint that alleges a violation of the board's statutes or rules, the executive director and the chair of a three member committee (discussed below) must select a law enforcement agency to investigate the complaint. The law enforcement agency has 30 days to investigate the complaint and submit a written report to the executive director.

Following the investigation, the executive director must schedule a meeting between the licensee, who is the subject of the complaint, and a three-member committee of the board to determine whether there are reasonable grounds to believe the licensee has violated the board's statutes or rules. The three-member board committee must include at least two board members who are peace officers.

At least 30 days before the meeting, the executive director must give the licensee and the complainant written notice of the meeting and give the licensee a copy of the complaint. At the meeting, the committee must give both the licensee and the complainant a reasonable opportunity to be heard.

After considering the investigative report and the information provided by the licensee and the complainant, the committee, by majority vote, must take one of the following actions:

a. Find that there are reasonable grounds to believe that the licensee has violated the board's rules and order an administrative hearing; or

b. Decide that no further action is warranted; or

c. Continue the matter.

The executive director is required to promptly give notice of the committee's action to the complainant and the licensee.

If an administrative hearing is ordered, the administrative law judge makes a recommendation on the matter and the full board makes the final decision on the complaint.

Before the board meets to consider the matter, however, the executive director must notify the licensee and the complainant of the meeting. After the board has made its decision, the executive director must notify the licensee, the complainant, and the chief law enforcement officer of the employer of the licensee of the decision of the board.

IV. CONTESTED CASES

A. Adjudicatory Functions of the Board

Whenever a board reviews the activities of a particular individual or party, makes determinations of fact based upon this review, or issues an order with regard to that specific individual or party, it is acting in an adjudicatory capacity, like a court. For example, when a licensee and a board complaint panel cannot agree on the facts or the disciplinary action to be taken concerning a licensee, a contested case becomes the method of resolving the disputes.

The term "contested case" is defined in Minn. Stat. § 14.02, subd. 3 as a "proceeding before an agency in which the legal rights, duties, or privileges of specific parties are required by law or constitutional right to be determined after an agency hearing." Put another way, a contested case is a type of proceeding in which the board makes a specific factual, legal or factual and legal determination regarding a specific party. Thus, it differs from a rulemaking proceeding, in which the board is establishing general standards for future conduct by all licensees and future determinations by the board. Rulemaking involves the making of laws by the board, pursuant to the board's legislative authority. Contested cases involve a resolution of particular cases pursuant to the board's "adjudicative" or quasi-judicial authority.

A contested case hearing is necessary only if there are adjudicative facts which are in dispute. Generally, for licensing boards, contested cases will involve one of two situations:

a. The board denies licensure to an applicant because of a failure to meet qualification requirements or because of some past activity of the applicant. For example, an applicant's ethical standards might be called into question because of some past activity; or

b. The board initiates a disciplinary hearing because of past or current activities engaged in by an individual already licensed or registered by the board.

A non-licensing board may be required to use a contested case if the board statute requires such a process or if a constitutionally protected interest is involved. The determination of whether a contested case hearing is necessary should be made after consultation with the

Attorney General's Office. The following is a description of the contested case hearing process in the context of a licensing board.

B. Steps In The Contested Case Process

A contested case proceeding involves a number of steps, beginning with a decision of the board's complaint panel or discipline committee and its executive director to initiate a contested case hearing and ending, potentially, with review by an appellate court. The various steps will be briefly reviewed below.

1. Initiation of a Hearing

Minnesota Statutes section 214.10, subdivision 2 states that if, after investigation, certain board representatives believe that a licensee has engaged in illegal or unauthorized activities warranting board action, a disciplinary hearing may be initiated. A hearing is initiated when a notice of and order for hearing is issued by the executive director of the board. This document is drafted for the board by the attorney who will be "prosecuting" the case for the complaint committee.

Upon initiation of a contested case proceeding, an agency may, by order, provide that the report or order of the administrative law judge constitutes the final decision in the case. Minn. Stat. § 14.57(a).

2. Agreement to Arbitrate

As an alternative to initiating or continuing with a contested case proceeding, the parties, subsequent to agency approval, may enter into a written agreement to submit the issues to arbitration by an administrative law judge according to Minn. Stat. §§ 572.08 to 572.30. Minn. Stat. § 14.57(b).

3. The Hearing

A contested case hearing is a formal proceeding similar to a trial by a judge, without a jury. The hearing is presided over by an administrative law judge (ALJ) appointed by the Office

of Administrative Hearings. Each ALJ is an attorney, independent from any state agency other than the Office of Administrative Hearings. In the hearing process, one party is the board's complaint or disciplinary panel, represented by the Attorney General's Office. The licensee or a license applicant is the other party. Each party has a right to present witnesses and documentary evidence, and to cross-examine any witnesses presented by the other party. The investigative report which is used by the board's complaint panel in determining whether the hearing should be initiated does not become a part of the hearing record unless it is introduced as evidence. After completion of the hearing, the ALJ issues a report to the board consisting of findings of fact, conclusions and a recommendation. This report, a transcript of the testimony, all documentary evidence, and the written arguments of the parties are submitted to the board following the completion of the hearing. The ALJ's report is a recommendation to the board. The board is not bound by the report and is, in fact, obliged to make its own determination. However, any modification or rejection of the report must be based on evidence contained in the hearing record.

4. Board Decision

Upon receipt of the ALJ report, the board must review the report as well as the hearing record. In some cases where the record is voluminous questions are often raised whether board members have to review the entire record but instead abbreviate the scope of their review. Such exceptions should be rare and only upon the advice of counsel. Failure to do an adequate review of the record can led to reversal on appeal. In *Morgan v. United States,* 298 U.S. 468 (1936), the court held that the decision-making process was defective where the Secretary of Agriculture did not read any of the evidence or briefs, did not hear the oral arguments, and relied solely on what he derived from consultation with Department employees. The court ruled that the official who decides the matter must consider the evidence and argument.

In *Urban Council on Mobility v. Minnesota Dep't of Natural Resources,* 289 N.W.2d 729 (Minn. 1980), the issue before the court was whether the agency head had adequately reviewed the record. The court upheld the agency's decision, stating:

> [T]he commissioner made an informed decision, after adequate consideration of the voluminous evidence submitted at the hearing. He spent about ten hours personally studying the record. The commissioner reviewed the entire transcript 'reading verbatim those areas of testimony which (he) felt were of substance or were in dispute,' and examined every exhibit submitted at the hearing. In addition, he received a four-or-five-hour briefing from his staff, which consisted of a review of the evidence and the arguments made by the parties.

289 N.W.2d at 736 (parentheses in original).

In most cases an entire review of the record should be made by board members. A review of the record also includes review of any "exceptions" made by the aggrieved party.

Parties must have an opportunity to file "exceptions" or objections to the ALJ report. A minimum of ten days is provided to the aggrieved party to file exceptions. Minn. Stat. § 14.61, subd. 1. Each licensing board generally schedules a specific time following review of the record for the attorneys representing each party to present oral argument on the case.

Except as provided below, the report of the ALJ does not bind the board to a particular outcome, and the board must review the ALJ report as well as the hearing record. Once the board determines the facts of the case and whether those facts constitute a violation of the board's statute or rules, it must decide what action, if any, should be ordered. The board's decision and order must be in writing, be based on the record, and include the findings of fact and conclusions on all material issues. Minn. Stat. § 14.62, subd. 1.

The board decision should be reached at a meeting following discussion by all board members eligible to vote on the matter. The decision should not be reached through meetings or telephone calls involving only two or three board members at a time. The advising attorney responsible should be present to give advice on legal issues that arise during the deliberations

and to ascertain the board's wishes so that the attorney can draft a decision accurately reflecting the board's findings and conclusions. These board deliberations are typically conducted in a closed portion of an official board meeting.

The contested case record must be closed upon the filing of any exceptions to the report and presentation of argument or upon the expiration of the time allowed for exceptions and arguments. The agency shall notify the parties and the presiding administrative law judge of the date when the hearing record is closed. Minn. Stat. § 14.61, subd. 2. If a decision or order rejects or modifies a finding of fact, conclusion or recommendation contained in the report of the administrative law judge, it must include the reasons for each rejection or modification. Minn. Stat. § 14.62, subd. 1.

5. Administrative Law Judge Decision Could Become Final

The report or order of the administrative law judge constitutes the final decision in the case unless the agency modifies or rejects it under Minn. Stat. § 14.62, subd. 1 within 90 days after the record of the proceedings closes. When an agency fails to act within 90 days in a licensing case, the agency must return the record of the disciplinary proceeding to the administrative law judge for consideration of disciplinary action. Minn. Stat. § 14.62, subd. 2a.

6. Board Order

The board order is public under the Data Practices Act whether or not disciplinary action is taken by the Board.

7. Judicial Review

Under Minn. Stat. §§ 14.63 - 14.69 any person who is aggrieved by a board's final decision in a contested case may seek review of that decision in the Minnesota Court of Appeals. The attorney who prosecuted the case before the board will represent the board during any appeal. The standard which the Court of Appeals must apply in reviewing the board decision is

set forth in Minn. Stat. § 14.69. Under that statute, the court may reverse or modify the board's decision if it is:

(a) in violation of constitutional provisions; or

(b) in excess of the statutory authority or jurisdiction of the board; or

(c) made upon unlawful procedure; or

(d) affected by other error of law; or

(e) unsupported by substantial evidence in view of the entire record; or

(f) arbitrary or capricious.

A reviewing court should overturn the board's factual findings only if they are unsupported by substantial evidence contained in the record. The court can substitute its own legal determinations for those of the board. Generally, however, the court will show some deference to the board's interpretation of statutes and rules which it enforces because of the agency's expertise in the field. The court should reverse or modify the board's discretionary decisions only if it concludes that the board decision is arbitrary or capricious or on the basis of one of the other grounds in Minn. Stat. § 14.69. Courts often characterize the "arbitrary and capricious" standard as the agency exercising its will rather than its judgment.

C. Prosecuting And Advising Attorneys

Whenever the board's complaint panel or disciplinary committee decides to initiate a contested case or temporary suspension proceeding, the attorney assigned to the case assumes a role very similar to a prosecutor. It is that attorney's responsibility to present and advocate a case supporting the complaint panel's or disciplinary committee's position on disciplinary action against the licensee. As an advocate, that attorney may not advise the full board when it assumes its quasi-judicial role as the final decision-maker in a contested case; however, the full board needs the services of an attorney to advise it on any legal issues that arise. Case law holds that the attorney advising the board at the decision stage of the contested case process must not have

been involved in prosecuting the case before the ALJ. The Attorney General's Office has, therefore, created separate roles for "advising" and "prosecuting" attorneys in contested cases.

As soon as the attorney for the complaint or disciplinary committee determines that there is a good probability that the matter he or she is working on will proceed to a contested case hearing, an advising attorney is appointed for the full board unless a permanent advisor has already been assigned. (Some boards have permanent advising attorneys because of the large volume of cases for those boards.) The advising attorney is someone who has not been involved in the handling of the case or any discussions relating to it. Upon designating an advising attorney, all other division attorneys, as well as board staff, are informed of the appointment. The advising attorney is then isolated from the prosecution of the case.

Until the case goes to the board for a decision, the advising attorney does not review any of the case files and avoids discussion about the matter with the attorney prosecuting the case or any individuals with knowledge of the case. Once the case is referred to the board, the advising attorney reviews the record. At that point, while the advising attorney may meet with the deliberating board members and discuss the case with them, the advising attorney continues to refrain from discussing any issue of law or fact raised by the case with any person who has been involved in the hearing or investigation. The advising attorney may, however, discuss administrative and procedural matters with board staff. The advising attorney assists the board in drafting the decision and will provide the board with advice about any legal issues or other matters involved in the case. Once the board issues its decision, the advising attorney also advises the board in connection with any request for reconsideration, for a stay of the decision pending appeal, or for a waiver of bond. The prosecuting attorney, however, handles any appeal.

D. Disqualification Of Board Members

Some board members may be prohibited from participating in a decision in a contested case or in a temporary suspension of licensure under certain circumstances. For example, Minn. Stat. § 214.10, subd. 2 states that any board member who was consulted during the course of the

investigation may not vote on any matter pertaining to the case once it goes before the board following a formal contested case proceeding. This prohibition is followed with respect to temporary suspensions as well. (Note, the statute does not prohibit complaint panel members from participating in a board final decision to adopt an agreed-upon stipulation. The prohibition only applies to a formal contested case proceeding.)

Finally, a board member's personal familiarity with the person subject to the contested case should be taken into account when deciding whether to disqualify oneself. Familiarity with the person who is the subject of the proceedings does not in itself disqualify a board member. As a general rule, a board member should disqualify himself or herself if the board member's familiarity with the person will affect the board member's ability to render a fair and impartial decision. With regard to health licensing boards, Minn. Stat. § 214.10, subd. 8(b) states that "a board member who has a direct, current or former financial connection or professional relationship to a person who is the subject of board disciplinary activities must not participate in board activities relating to that case." Note that this prohibition prevents participation in any board activities relating to a case in which the conflict is presented. Thus, the board member may not participate either on a complaint committee or as a board member in issuing a final decision. *See also* section VII.C of this Manual, dealing with conflicts of interest.

V. THE ROLE OF BOARD MEMBERS IN HEARINGS

A. Judicial Demeanor

A member of a state board acts in a quasi-judicial role when serving as the "finder of facts" and the decision-maker over a particular set of facts. In this quasi-judicial role, the board members want and expect to be treated with respect. It is therefore important that the board members act in ways that will generate respect from those who appear in front of them.

It is the responsibility of a judge to be patient, dignified, and courteous to litigants, jurors, witnesses, lawyers, and staff (Code of Judicial Conduct). Members of a state board acting in a quasi-judicial capacity should demonstrate the same patience, dignity and courtesy that a judge would.

At times there may be understandable temptation to be disrespectful to people who appear before the board as advocates for particular points of view. Remember it is the advocate's job to make the best and most persuasive argument he or she can for the position desired. Although the board member may not agree with the position advocated, he or she should not try to discourage it through discourtesy, belittling statements or by being excessively argumentative.

B. Consistency

A board member in a quasi-judicial role should give, and be perceived as giving, consistent and fair treatment to all those who appear in front of the board. Consistency is important. It helps regulated individuals and the general public to predict how the board will view a certain situation. Yet a board should also not blindly follow its previous decisions on a particular topic. If the facts of a contested case differ significantly from a previous case, the board does not always have to follow its prior decision. In addition, consistency does not mean that a board cannot change its position or interpretation of a law. A change in the board's interpretation of its statutes may have to be implemented through rulemaking if the board's new position will be generally applicable to the public in the future.

C. Objectivity

The role as a board member acting in a quasi-judicial capacity is as decision-maker, not advocate. The question of fairness involves many competing factors, but the board member must be sure that he or she does not act as a promoter of either side. It is very important that oral arguments are carefully listened to and all the exhibits in the record, including any written exceptions and the report of the administrative law judge are reviewed before the board votes on its decision. This will ensure that the board makes decisions in an impartial manner.

Objectivity or, at a minimum, the perception of objectivity, is threatened by *ex parte* communications and contact. *Ex parte* contact is contact by a decision-maker with only one party, without the knowledge or consent of the other party. For instance, if one party to a hearing before the board saw a board member having lunch with a witness for the other side during a break from the adjudicatory hearing (even if discussing unrelated matters), that party might feel that he or she would likely not be treated fairly. If information is received outside of the administrative hearing process pertaining to a contested case, no one has the ability to challenge or disprove that information. Ideally, although the Open Meeting Law does not apply to board deliberations in a contested case proceeding, it can preserve the integrity of the decision-making process and maximize the perception of objectivity and open-mindedness by not discussing the matter currently before the board with anyone, even other members of the board, outside the forum for adjudication.

D. Judicial Review Of An Agency Or Board Decision Following A Hearing

1. Decisions Based on the Official Record Before the Board

A board or agency's decision can be challenged in an appeal to the Minnesota Court of Appeals on the grounds that it is arbitrary and capricious. "An agency's decision is arbitrary and capricious if it represents the agency's will and not its judgment." *Petition of N. States Power Gas Util.,* 519 N.W.2d 921, 924 (Minn. Ct. App. 1994) (citing *Markwardt v. Water Resources Bd.,* 254 N.W.2d 371 (Minn. 1977)). "Will" is when there is a desire to achieve a certain result

but without factual support. "Judgment" is when there is a desire to achieve a certain result and have the facts to support the conclusions.

The Minnesota Court of Appeals has also stated that

> An agency ruling will be determined by the courts to be arbitrary and capricious if: '(a) an agency relied on factors not intended by the legislature; (b) it entirely failed to consider an important part of the problem; (c) it offered an explanation that is contrary to the evidence; or (d) the decision is so implausible that it cannot be explained as a difference in view or a result of the agency's expertise.'

Petition of N. States Power Gas Util., 519 N.W.2d 921, 925 (Minn. Ct. App. 1994) (citing *Space Ctr. Transp.*, 444 N.W.2d at 581).

Therefore, board members should always base their decisions on the facts in the official record of the matter before them.

2. Judicial Deference to the Board's Interpretation of Statutes and Rules

A reviewing court will consider and will usually give some weight to a board decision on technical issues within its area of expertise. For example, a board's decision that a machine does not meet the technical parameters set forth in board rules will usually be given much deference. However, a board's decision that a licensee did not properly deliver a document to the board will probably not. A court will probably feel freer to closely scrutinize an issue which either falls outside an area of board expertise or is a legal question of procedure or statutory interpretation. Nevertheless, sometimes a reviewing court gives great weight to a board's long-standing interpretation of a statute or rule, especially if the legislature has not acted to overturn that long-standing administrative interpretation.

VI. RULEMAKING

A. Introduction

The authority of a state agency or board to adopt, amend and repeal rules is one of its most important tools for refining and implementing the public policy set by the Legislature for the state. This portion of the Manual is designed to familiarize board members with the concept of rulemaking, and provide them with practical information relating to rulemaking and their role in it. The sections that follow explain what rulemaking is, the authority to establish rules, basic rulemaking procedures, and the major responsibilities of board members during rulemaking.

B. What Is Rulemaking

> Rulemaking by an agency or board is often described as a quasi-legislative function. It is the part of the administrative process that resembles a legislature's enactment of a statute. The term "rule"[2] is defined in the Administrative Procedure Act, Minn. Stat. § 14.02, subd. 4 (2002), as: "[E]very agency statement of *general applicability and future effect*, including amendments, suspensions, and repeals of rules, adopted to implement or make specific the law enforced or administered by it or to govern its organization or procedure." (Emphasis added.)

Rulemaking is designed to relieve the Legislature from the burdensome task of enacting detailed and specialized laws in numerous complex areas for which the Legislature has no expertise. Administrative rules are legally binding; they have the force and effect of law within the state. Typically, rules are directed to a particular group of people. This is the case with the boards, whose rules regulate only those persons subject to the jurisdiction of the board. Although both statutes and rules are intended to guide or restrict future behavior, they are enforced differently.

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[2] Minnesota Statutes section 14.03 excludes several items from the definition of a rule, including standards concerning only the internal management of the agency or other agencies that do not directly affect the rights of or procedures available to the public.

C. Statutory Authority

The adoption of rules by a state agency or board constitutes the exercise of legislative power which has been delegated to it by the Legislature. Under Minnesota's Constitution, the Legislature has the power to establish the state's policy but may delegate its lawmaking authority to agencies and boards to make more specific and implement that policy, so long as the Legislature gives the agencies and boards reasonably clear standards to guide their actions.

Legislative power is delegated to agencies and boards by statute. In order for a board to adopt rules, there must be a statute in effect granting rulemaking authority to the board on a given subject matter. Any rules adopted by a board must be authorized by statute and must not exceed the scope of, or conflict with, the authority granted by the Legislature.

D. Basic Rulemaking Procedures

Rulemaking is a lengthy and involved process. It is more than simply drafting rules. In fact, rule drafting is only the first of approximately twenty steps which must be followed in sequence before rules go into effect. This section will not attempt to explain the intricate procedures involved. Instead, it will provide board members with an overview.

The Administrative Procedure Act ("APA") establishes two different procedures for adopting rules: (1) procedures applicable to *controversial* rules (Minn. Stat. §§ 14.131 - 14.20); and (2) procedures applicable to *non-controversial* rules (Minn. Stat. §§ 14.22 - 14.28). There are also some general requirements applicable to all rules (Minn. Stat. §§ 14.05 - 14.126); a procedure for an exemption from rulemaking requirements for good cause, such as an immediate threat to public health or welfare (Minn. Stat. § 14.388); an expedited procedure to repeal obsolete rules (Minn. Stat. § 14.3895); and an expedited procedure that applies only if the law requiring or authorizing adoption of rules states that the expedited procedure may be used. (Minn. Stat. § 14.389).

The main difference between controversial and non-controversial rules is that a public hearing before an administrative law judge (ALJ) is required for controversial rules. A proposed rule is considered controversial if twenty-five or more people request a hearing on it. Interested

persons may appear and testify at the hearing and submit written comments. The ALJ recommends whether the board may adopt the rules or should modify or withdraw them. After considering the ALJ's recommendation, the board may adopt the rules. If the board makes any modification to the rules, it must return the adopted rules to the Chief ALJ for a review of the legality of the modifications, including the issue of whether the rule as modified is substantially different from the rule as originally proposed. Minn. Stat. § 14.16, subd. 1. Non-controversial rules may be adopted after a period for written comment by the public, and, after adoption, must be approved by an ALJ. Minn. Stat. § 14.26.

Whichever procedures apply, rulemaking proceeds slowly. Excluding the time for drafting the rules, which in itself may be many months, the series of steps involved in rulemaking[3] require a minimum of six to nine months, depending upon whether the rules are non-controversial or controversial. It is realistic to expect non-controversial rule procedures to take about nine months, and for controversial rule procedures to take twelve months or longer, because of the public hearing and additional review requirements involved.

E. Major Rulemaking Responsibilities Of Board Members

The first major responsibility of board members is to decide what needs to be accomplished by rulemaking and then to draft the rule language. This can be a difficult and time-consuming task. Rules must be drafted in a way to accomplish the board's intent as well as being clear enough to be understood by those being regulated and those administering the rules.

The next major responsibility is to draft the "statement of need and reasonableness" (also referred to as the "SONAR") for the rules. The APA precludes the adoption of rules unless a

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[3] These steps include soliciting outside comment from affected persons before beginning the process; drafting rules and a statement of need and reasonableness; publishing and mailing various notices; receiving outside comment on the rules as drafted, including a public hearing in some cases; submitting the rules for review and approval by the Revisor of Statutes, the Governor's Office and an administrative law judge at various stages and, in certain cases, the Chief Administrative Law Judge and legislative bodies.

board or agency can make, during the formal rulemaking process, an affirmative presentation of facts establishing that each rule is both needed and reasonable.

Establishing that a rule is needed and reasonable requires evidence that 1) there is a problem which needs to be addressed by rulemaking; and 2) the specific rule being proposed by the board is an appropriate response to the problem. To support its conclusion that a rule is needed, a board must explain the facts and circumstances creating the need for the proposed rule, citing specific evidence relied upon by the board. This evidence may be in the form of public testimony, scientific data, studies, statutory requirements, or board experience. To show that the specific requirements of a proposed rule are reasonable, the board must explain why the proposed rule is an appropriate means of addressing the problem. This should include an explanation of the expected benefits of the rule, as well as the impact the rule will have on those who must comply with it. The probable costs of complying with the proposed rule must also be addressed.

Drafting the rules and the SONAR are the key responsibilities of board members during the rulemaking process. The remaining steps of the rulemaking process are accomplished mainly by board staff, with the assistance of board counsel.

The governor may veto all or a severable portion of a rule of an agency by submitting notice of the veto to the State Register within 14 days of receiving a copy of the rule from the Secretary of State or agency. The veto is effective when the veto notice is submitted to the State Register. *See* Minn. Stat. § 14.05, subd. 6.

If standing committees of the House of Representatives and the Senate, with jurisdiction over the subject matter of a proposed rule, both vote to advise an agency that a proposed rule should not be adopted as proposed, the agency may not adopt the rule until the legislature adjourns the annual legislative session that began after the vote of the committees. *See* Minn. Stat. § 14.126, subd. 1. In addition, if the cost of compliance with a rule exceeds a certain threshold, it will not take effect with respect to certain small businesses and small cities until the

rules are approved by a law enacted after adoption of the rules. *See* Minn. Stat. § 14.127 (enacted in 2005 Minn. Laws ch. 156, art. II, §§ 9-10).

Even if a rule is exempt from the "formal" rulemaking provisions of the APA, it must follow certain procedures to have the force and effect of law. *See* Minn. Stat. §§ 14.386 (rules excluded from rulemaking requirements or excluded from the definition of "rule"); 13.388 ("good cause" exemption). With certain important exceptions, exempt rules are only effective for two years.

Any elected governing body of a statutory or home-rule city, a county or a sanitary district may petition an agency to amend or repeal a rule or a specified portion of a rule. The petition must demonstrate that since the adoption of the rule, there has been either 1) significant new evidence relating to the need for or reasonableness of the rule; or 2) less costly or intrusive methods of achieving the purpose of the rule exist. Within 30 days of receiving a petition, an agency shall reply to the petitioner in writing stating that the agency will either a) give notice of its intent to adopt the amendment or repeal requested; or b) give notice that it does not intend to amend or repeal the rule and that it has requested the Office of Administrative Hearings to review the petition. *See* Minn. Stat. § 14.091. Any other person may request adoption, amendment or repeal of a rule, and the agency must respond within 60 days regarding its intentions. Minn. Stat. § 14.09.

A person or entity may petition an agency for a variance from a rule adopted by the agency, as it applies to the circumstances of the petitioner. General terms that apply to variances include 1) the agency may attach conditions to the granting of a variance that the agency determines are needed to protect public health, safety, or the environment; 2) a variance has prospective effect only; 3) the conditions are an enforceable part of the rule; and 4) the agency may not grant a variance from a statute or court order. Minn. Stat. § 14.055, subd. 2.

An agency is required to grant a variance if it finds that the application of the rule, as applied to the circumstances of the petitioner, would not serve any of the purposes of the rule. An agency may grant a variance if the agency finds: 1) the application of the rule to the

petitioner would result in hardship or injustice; 2) the variance would be consistent with the public interest; and 3) the variance would not prejudice the substantial legal or economic rights of any person or entity. An agency must issue a written order granting or denying a variance within 60 days of receipt of the completed petition, unless the petitioner agrees to a later date. Failure of the agency to act on a petition within 60 days constitutes approval of the petition. *See* Minn. Stat. § 14.056, subd. 5. The agency may adopt rules establishing general standards for granting mandatory or discretionary variances from its rules. *See* Minn. Stat. § 14.055, subd. 5. An agency may also grant or deny variances based on standards or requirements in other law. *See id.*, subds. 5 and 6.

A person may petition the office of administrative hearings seeking an order of an administrative law judge determining that an agency is engaging in improper legal rulemaking by enforcing or attempting to enforce a policy, guideline, bulletin, criterion, manual standard, or similar pronouncement as though it were a duly adopted rule. *See* Minn. Stat. § 14.381. In addition, the legislature has provided agencies with a process for repealing obsolete rules. *See* Minn. Stat. § 14.3895.

State agencies may not impose new fees or increase existing fees through rulemaking. Instead, they are required to have new fees or increased fees approved by the legislature and governor. *See* Minn. Stat. § 16A.1283. Some types of fees are exempt from this prohibition.

VII. SPECIAL STATUTES THAT AFFECT LICENSING BOARDS

A. Open Meeting Law

1. What is the Open Meeting Law?

The Minnesota Open Meeting Law, Minnesota Statutes chapter 13D, *et seq.*, requires that, except as otherwise expressly provided by statute, all meetings, including executive sessions, of any state board, and of any committee or subcommittee of the board, shall be open to the public. It also requires that the votes of the members of a board, committee, or subcommittee on any action taken in such a meeting be recorded in a journal kept for that purpose. The journal is to be open to the public during all normal business hours.

The Minnesota Supreme Court has articulated three purposes of the Open Meeting Law. First, the law prevents "actions being taken at a secret meeting where it is impossible for the interested public to become fully informed concerning board decisions or to detect improper influences." *Lindahl v. Independent School Dist. No. 306,* 270 Minn. 164, 167, 133 N.W.2d 23, 26 (1965). Second, the law assures the "public's right to be informed." *Channel 10, Inc. v. Independent School Dist. No. 709,* 298 Minn. 306, 313, 215 N.W.2d 814, 821 (1974). Finally, it gives the public an "opportunity to present its views to the board." *Sullivan v. Credit River Township,* 299 Minn. 170, 175, 217 N.W.2d 502, 506 (1974).

Meetings at which a state board exercises quasi-judicial functions involving disciplinary proceedings, including complaint committee meetings, are not subject to the Open Meeting Law. Minn. Stat. § 13D.01, subd. 2.

2. What Constitutes a Meeting?

The Open Meeting Law has been broadly construed in favor of the public. In *Moberg v. Independent School Dist. No. 281,* 336 N.W.2d 510 (Minn. 1983), the Minnesota Supreme Court held all gatherings of at least a quorum of a board or of a committee or subcommittee at which members discuss, decide or receive information as a group on issues relating to official business of the board are "meetings" subject to the act. Although non-business occasions such as purely

social gatherings are not subject to the requirements of the law, a quorum may not as a group discuss or receive information on official business in any setting including a social gathering without complying with the open meeting requirements. In *Thuma v. Kroschel,* 506 N.W.2d 14 (Minn. Ct. App. 1993), when the mayor and enough council members to constitute a quorum of the Afton Planning Commission left a Planning Commission meeting for eight minutes and were seen talking at an anteroom counter regarding a contract matter and the mayor later stated at the commission meeting, "what 'we' had decided to do" with respect to the contract, the mayor and council members were found to have violated the Open Meeting Law. Even though the court viewed the council members' action as a "misstep--a stumble--", it remained a violation and the members were subject to the monetary sanctions. In addition, in *Kroschel v. City of Afton,* 524 N.W.2d 719 (Minn. 1994), the court found that neither the City nor its insurer were required to reimburse the mayor and council members for the fees and costs incurred in defending an action alleging a violation of the Open Meeting Law.

The statute has been held not to apply generally to communications among fewer than a quorum. However, discussion and persuasion among small groups of members may be improper under the Open Meeting Law when designed to avoid public discussions, to forge a majority in advance of public hearings on an issue, or to hide improper influences such as the personal or pecuniary interest of a public official.

The Minnesota Supreme Court held that previously-scheduled informational seminars about board business, attended by the whole board, must be publicized and open. It makes no difference if board members took no official action to resolve specific problems and no decisions or pre-decisions were made on any issue. If information was received and discussions held at such meetings could foreseeably influence later decisions of the board. *St. Cloud Newspapers, Inc. v. District 742 Community School,* 332 N.W.2d 1, 6 (Minn. 1983).

In any open meeting, at least one copy of any printed materials relating to the agenda items of the meeting, which are prepared, distributed, or available to board members, must be available in the meeting room for inspection by the public while the board considers the subject

matter of the materials. These requirements do not apply to materials classified by law as not public under the Government Data Practices Act or to materials relating to the agenda items of a meeting permitted to be closed.

3. Electronic Meetings

Meetings subject to the Open Meeting Law may be conducted by interactive television if specific statutory requirements are satisfied. Absent other statutory authority, electronic meetings via telephone are not authorized.

4. Notice To Public Of Meetings

a. Regular meetings

The Open Meeting Law requires a board to keep on file at its offices a schedule of all regular meetings. If a regular meeting is held at a time or place different from the time or place stated in the schedule of regular meetings, the board must provide the same notice of the meeting that the board is required to provide for special meetings. In *Merz v. Leitch,* 342 N.W.2d 141, 146 (Minn. 1984), the court held that conducting business about one-half hour before the time the public was told the meeting was to start was a violation.

b. Special meetings

For special meetings, except emergency meetings or special meetings for which there is a separate statutory procedure for notice, the board must post a written notice containing the date, time, place and purpose of the meeting on the board's bulletin board or on the door of its usual meeting room. A bulletin board for this purpose must be located in a place reasonably accessible to the public. *Rupp v. Mayasich,* 533 N.W.2d 893, 895 (Minn. Ct. App. 1995). The notice shall also be mailed or otherwise delivered to each person who has filed a written request for notice of special meetings. Notices of special meetings must be posted, mailed, or delivered, as appropriate, at least three days in advance of the date of the meeting. In lieu of mailing or personal delivery to persons who have filed written requests for notice of special meetings, a board may publish notice in the State Register at least three days before the meeting. Presently

the State Register is published each Monday, and generally requires that notices for publication be submitted by the Tuesday before the publication date.

c. Emergency meetings

An "emergency" meeting is a special meeting called under circumstances that, in the judgment of the board, require immediate consideration by the board. For emergency meetings, boards must make good-faith efforts to provide notice, which may be by telephone, to each news medium filing a written request for such notice. Notice shall include the subject of the meeting. Posted or published notice is not required. In the event the board discusses or acts upon matters not directly related to the emergency, the minutes of the emergency meeting must include a specific description of those matters.

d. Recessed meetings

For recessed or continued meetings, Minn. Stat. § 13D.04, subd. 4 provides that no further published or mailed notice is necessary, provided that the time and place of reconvening the recessed or continued meeting was established during the previous meeting and recorded in the minutes of that meeting.

e. Committee meetings

Care should be taken that a properly noticed committee meeting not evolve into an unannounced meeting of the full board. The Attorney General has held that board members who are not members of a committee may attend public committee meetings. However, if they participate in the committee's discussion and a quorum of the entire board is present, the meeting could be considered an unannounced meeting of the full board.

5. Relationship of the Open Meeting Law to Other Laws

The Open Meeting Law must sometimes be construed with other legislation such as the Minnesota Government Data Practices Act. Occasionally, a board needs to discuss data classified as not public at a meeting. In most circumstances, the board may not close the meeting to discuss the data. Such data may be discussed without liability or penalty if the disclosure

relates to a matter within the board's authority, is reasonably necessary to address the item before the board at a required public meeting, and is disclosed without malice. The board must make reasonable efforts to protect such data from disclosure, however.

6. Closed Meetings

Closed meetings are subject to the same notice requirements as other meetings. The law does specify certain instances in which meetings must be closed to discuss nonpublic information. Minn. Stat. § 13D.05. Instances in which meetings must be closed include discussions of:

a. Data that would identify alleged victims or reporters of criminal sexual conduct, domestic abuse or mistreatment of minors or vulnerable adults;

b. Active investigative data or internal affairs data relating to allegations of law enforcement personnel misconduct collected or created by a state agency, statewide system, or political subdivision; or

c. Educational data, health data, medical data, welfare data, or mental health data that are not public data under certain sections of the data practices law.

In addition, a board must close one or more meetings for preliminary consideration of allegations or charges against an individual subject to its authority. However, such meetings must be open at the request of the individual who is the subject of the meeting. If the members conclude that discipline of any nature may be warranted as a result of those specific charges or allegations, further meetings or hearings relating to those specific charges or allegations held after that conclusion is reached must also be open. As noted above, however, the Open Meeting Law, including this provision, does not apply to meetings at which a board exercises quasi-judicial disciplinary functions.

A public body may close a meeting to evaluate the performance of an individual who is subject to its authority. The public body shall identify the individual to be evaluated prior to closing a meeting. At its next open meeting, the public body shall summarize its conclusions regarding the evaluation. A meeting must be open at the request of the individual who is the subject of the meeting.

A body may also close a meeting to review not-public property appraisals or other information related to pricing, offers or counter-offers for purchase or sale of property. Before closing the meeting the body must identify on the record the particular property at issue. The meeting must be recorded. Any final purchase or sale agreement must be approved at an open meeting.

The application of the statutory attorney-client privilege exception to the Open Meeting Law, which is much narrower than the privilege recognized in the private sector, has evolved over time. Currently, the courts require a balancing test before the need for absolute confidentiality will be recognized. *Prior Lake American v. Mader,* 642 N.W.2d 729, 737-38 (Minn. 2002); *Brainerd Daily Dispatch v. Dehen,* 693 N.W.2d 435 (Minn. Ct. App. 2005). The "public's right to be informed of all actions and deliberations made in connection with activities geared to ultimately affect the public interest" must be balanced with the policies served by the attorney-client privilege in order to determine whether there is a need for absolute confidentiality. *Mader*, 642 N.W.2d at 738-39, 742.

The privilege does not normally apply to ordinary legal advice, or to evaluating the potential for litigation in connection with a proposed action of the body. *Mader*. However, in appropriate circumstances the privilege may be invoked where specific litigation has been threatened, but not actually commenced. *Dehen*.

Minn. Stat. § 13D.01, subd. 3 requires that before closing a meeting, the body must state on the record the specific grounds permitting closure and describe the subject to be discussed. In *Free Press v. County of Blue Earth,* 677 N.W.2d 471 (Minn. Ct. App. 2004), the court held that a mere statement that the meeting would be closed "under the attorney-client privilege to discuss pending litigation" was insufficient. Rather, a more detailed description of the matter was required.

7. Penalties for Violation of the Law

Any person who intentionally violates the requirements of the Open Meeting Law, including the recording of votes, is subject to personal liability in the form of a civil penalty of up to $300 for a single occurrence, which may not be paid by the public body. In *Brown v. Cannon Falls Township,* 723 N.W.2d 31 (Minn. Ct. App. 2006), the Minnesota Court of Appeals held that town board members could not avoid a finding of intentional violation by claiming reliance on advice from the town's attorney, where the specific facts of the case showed that such reliance was clearly unreasonable. The *Brown* court also found that a town board member had committed an intentional violation, where he had agreed to the holding of a noncomplying meeting, even though he did not himself attend. The court also found it significant that the member's absence was for personal reasons, and was not motivated by a desire to avoid violating the Open Meeting Law. If a person is found to have intentionally violated the law in three or more separate actions connected with the same board, such person shall forfeit any further right to serve on the board, or in any other capacity with the board, for a period of time equal to the term of office the person was then serving. The court, upon finding the occurrence of a third violation, unrelated to the previous violations, is directed to issue its order declaring the position vacant and notify the appointing authority or clerk of the board. As soon as practical thereafter, the appointing authority shall fill the position. Minn. Stat. § 13D.06.

8. Public Meetings Prohibited on Certain Days

No state agency, board, commission, department, or committee shall conduct a public meeting on the day of the state primary or general election (Minn. Stat. § 204C.03, subd. 4), or after 6:00 p.m. on the day of a major political party precinct caucus. Except in cases of necessity, public meetings may not be held on official state holidays listed in Minn. Stat. § 645.44, subd. 5.

9. Advisory Opinions on Open Meeting Law Issues

A government entity such as a state board may ask the Commissioner of Administration for a written opinion on any question relating to the entity's duties under the Open Meeting Law. An opinion may also be requested by a person who disagrees with how members of a governing body perform their duties under the Open Meeting Law. The government entity or person requesting this type of opinion must pay a fee of $200 to the Commissioner of Administration. Minn. Stat. 13.072, subd. 1.

Opinions issued by the Commissioner on Open Meeting Law questions are not binding on the government entity or members of a body subject to Minn. Stat. ch. 13D, but a court must give deference to an opinion. A government entity or members of a body subject to the Open Meeting Law acting in conformity with a written opinion of the Commissioner is not liable for fines, awards of attorney fees, or any other penalty under chapter 13D. A member of a body subject to chapter 13D and who acts in reliance on an opinion of the Commissioner is not subject to forfeiture of office. *Id.*, subd. 2.

B. Government Data Practices Act

1. Introduction

The Minnesota Government Data Practices Act, which is found in Minnesota Statutes chapter 13, is a complex piece of legislation which has been frequently amended over the years. The correct legal analysis of issues concerning application of this Act depends on the specific facts presented.

The thrust of the Act is that all government data collected, created, received, maintained, or disseminated by any state agency or board are public unless classified otherwise by federal law, state statute, or temporary classification by the Commissioner of Administration. Minn. Stat. § 13.01, subd. 3. The major exceptions are data on employees, applicants, and contractors

(Minn. Stat. § 13.43) and data on students (Minn. Stat. § 13.32), which are presumed private unless specifically classified as public. A chart summarizing the classification of some types of board data under the Act is found at the end of this section. Because issues concerning disclosure of government data are complicated and fact-specific, the assistant attorney general representing a board should be consulted when a particular question arises. Consultation is also important in order to avoid statutory penalties for violating the Act.

Basic definitions employed throughout the statute include the following:

"Data on individuals" means all government data in which any individual is or can be identified as the subject of that data. Minn. Stat. § 13.02, subd. 5.

"Confidential data on individuals" means data that are made not public by statute or federal law and are inaccessible even to the individual subject of that data. Minn. Stat. § 13.02, subd. 3.

"Private data on individuals" means data that is not accessible to the public but is accessible to the individual subject of that data. Minn. Stat. § 13.02, subd. 12.

"Protected nonpublic data" means data not on individuals which is made by statute or federal law applicable to the data (a) not public and (b) not accessible to the subject of the data. Minn. Stat. § 13.02, subd. 13.

"Nonpublic data" means data not on individuals that is made by statute or federal law applicable to the data: (a) not accessible to the public; and (b) accessible to the subject, if any, of the data. Minn. Stat. § 13.02, subd. 9.

"Summary data" means statistical records and reports derived from data on individuals but in which individuals are not, and cannot be, identified. Minn. Stat. § 13.02, subd. 19.

The "responsible authority" in a state agency means the state official designated by law as the person responsible for the collection, use, and dissemination of any data on individuals, government data or summary data. Minn. Stat. § 13.02, subd. 16. The responsible authority must establish procedures to ensure that requests for government data are received and complied with in an appropriate and prompt manner. Minn. Stat. § 13.03, subd. 2. The responsible

authority is required to prepare public access procedures in written form and update them as necessary no later than August 1 of each year, to reflect changes in personnel or circumstances that might affect public access to government data. The responsible authority must make copies of the written public access procedures easily available to the public by distributing free copies of the procedures to the public or posting a copy of the procedures in a conspicuous place within the government entity that is easily accessible to the public. Minn. Stat. § 13.03, subd. 2(b).

"State agency" includes any state board. Minn. Stat. § 13.02, subd. 17.

2. Duties of Responsible Authority and Compliance Official

Each agency's responsible authority must prepare a public document containing the agency's name, title and address, and a description of each category of record the agency maintains containing private or confidential data on individuals. The collection, storage, use, and dissemination of private and confidential data on individuals is limited to that necessary for administering specifically authorized programs. Individuals must be informed at the time of collection of the purposes for collecting, storing, using, or disseminating data. Data cannot be used for any other purpose.

The responsible authority must establish procedures to assure that all data on individuals is accurate, complete and current for the purposes for which it was collected. The responsible authority must also establish appropriate security safeguards for all records containing data on individuals. When a board enters into a contract that requires board-collected data to be made available to the contracting party, the contracting party is bound to maintain the data according to its chapter 13 classification. Minn. Stat. § 13.05, subd. 6.

A state agency that collects, creates, receives, maintains or disseminates private or confidential data on individuals is required to disclose any breach of the security of the data following discovery or notification of the breach. Notification must be made to the individual subject of the data whose private or confidential data was, or is reasonably believed to have been, acquired by an unauthorized person. Notification must be within the most expedient time

possible, consistent with the legitimate needs of a law enforcement agency as well as with any measures necessary to determine the scope of the breach and restore the reasonable security of the data. If a law enforcement agency determines that the notification will impede an active criminal investigation, the notification may be delayed. Alternate methods of notification include first class mail, electronic notice, and "substitute notice." Electronic notice must be consistent with the provisions regarding electronic records and signatures as set forth in 15 U.S.C. § 7001. Nationwide consumer reporting agencies must also be notified, without unreasonable delay, if the state agency discovers circumstances requiring notification of more than 1,000 individuals at one time of a breach of the security of private or confidential data. *See* Minn. Stat. § 13.055 (enacted in 2005 Minn. Laws ch. 163, § 21).

The use of summary data derived from private or confidential data on individuals is permitted. Any person may request an agency to prepare summary data. The cost of preparing the summary data is borne by the requesting person. Minn. Stat. § 13.05, subd. 7.

The responsible authority must also prepare a public document setting forth in writing the rights of the data subject and the specific procedures for access by the data subject to public or private data on individuals. Minn. Stat. § 13.05, subd. 8. A responsible authority shall allow another responsible authority access to data classified as not public only when the access is authorized or required by statute or federal law. An agency that supplies government data under this provision may require the requesting agency to pay the actual cost of supplying the data. Minn. Stat. § 13.05, subd. 9.

Contracts by a government entity with a private person to perform any of its functions, must include contract terms making it clear that all data created, collected, received, stored and used, maintained, or disseminated by the private person in performing those functions is subject to the requirements of Minn. Stat. ch. 13 and that the private person must comply with those requirements as if it were a government entity. Minn. Stat. § 13.05, subd. 11(a). This does not create a duty, however, on the part of the contractor to provide access to public data if the public

data are available from the government entity unless the terms of the contract create such a duty. Minn. Stat. § 13.05, subd. 11(b).

Minnesota Statutes section 13.05, subdivision 13 requires appointment or designation of an employee of a government entity to act as its data practices compliance official. People may direct questions or concerns regarding problems in obtaining access to data or other data practices problems to the data practices compliance official. The responsible authority may also be the data practices compliance official.

3. Rights of the Subject of Data

a. Rights before collection: Tennessen Warning

Individual subjects of data are given specific rights by the Data Practices Act. Perhaps the most well-known of these is the so-called "Tennessen Warning" contained in Minn. Stat. § 13.04, subd. 2. An individual asked to supply private or confidential information concerning the individual must be informed of: a) the purpose and intended use of the requested data; b) whether the individual may refuse or is legally required to supply the requested data; c) any known consequence arising from providing or refusing to provide private or confidential data; and d) the identity of other persons or entities authorized by state or federal law to receive the data. The Tennessen Warning is not required to be given in writing, but if given orally, it should be documented in the appropriate board file.

If an investigation is an attempt to gather factual information about an incident, and identification of a particular individual is only incidental to the focus of the inquiry, it is possible that a Tennessen Warning may not be required. However, legal counsel should be consulted before deciding not to give the warning.

b. Rights after collection

i) Access by subject of data

Upon request to a responsible authority, an individual must be informed whether he or she is the subject of stored data and whether the data is classified as public, private or confidential. Upon request, an individual who is the subject of public or private data must be shown the data without any charge and if requested, shall be informed of the data's meaning if the data is unclear. After the individual has been shown the data, it need not be disclosed to that individual for six months thereafter unless an action or dispute is pending or additional data have been collected or created. If possible, the responsible authority must comply immediately with any request, or within ten working days of the date of the request if immediate compliance is not possible. The responsible authority may require the requesting person to pay the actual cost of making, certifying and compiling copies. Minn. Stat. § 13.04, subd. 3.

ii) Inaccurate data

An individual subject of data may contest its accuracy or completeness. To exercise this right the individual must notify the responsible authority in writing, describing the nature of the disagreement. The responsible authority must then either correct any data found to be inaccurate or incomplete and notify past recipients of inaccurate or incomplete data, or notify the individual that the authority believes the data to be correct. Minn. Stat. § 13.04, subd. 4. Data in dispute shall be disclosed only if the individual's statement of disagreement is included with the disclosed data. The determination of the responsible authority may be appealed pursuant to the provisions of the Administrative Procedure Act relating to contested cases. Data on individuals that have been successfully challenged by an individual must be completed, corrected, or destroyed by the board, depending on the nature of the inaccuracy.

4. Rights of Third Persons to Discover Data

Upon request to a responsible authority or designee, a person must be permitted to inspect and copy public government data at reasonable times and places, and, upon request, shall

be informed of the data's meaning. Minn. Stat. § 13.03, subd. 3. Unless authorized by statute, an agency or board cannot require a person to identify himself, state a reason for, or justify a request to gain access to public government data. Minn. Stat. § 13.05, subd. 12.

No fee is to be charged to inspect such data. Minn. Stat. § 13.03, subd. 3(a). Inspection includes, but is not limited to, the visual inspection of paper and similar types of government data. It does not include printing copies unless printing a copy is the only method to provide for inspection of the data. If data is stored by the government entity in electronic form and made available to the public on a remote access basis, inspection includes remote access to the data by the public and the ability to print copies of or download the data on the public's own computer equipment. If the government entity has a specific grant of statutory authority, it may charge a reasonable fee for remote access to data. A government entity may charge a fee for remote access to data where either the data or the access is enhanced at the request of the person seeking access. Minn. Stat. § 13.03, subd. 3(b). If a person requests copies or electronic transmittal of the data to the person, the responsible authority must provide copies, but may require the requesting person to pay the actual costs of searching for and retrieving the government data, including the cost of employee time, and for making, certifying, compiling and transmitting the copies. If 100 or fewer pages of black and white, letter or legal size paper are requested, however, actual costs cannot be charged. Instead, the responsible authority may charge no more than 25 cents for each page copied. The authority may not charge for separating public from not public data. If copies are not able to be provided at the time a request is made, the responsible authority shall provide them as soon as reasonably possible. Minn. Stat. § 13.03, subd. 3(c) (as amended by 2005 Minn. Laws ch. 163, § 8).

If the responsible authority maintains public government data in a computer storage medium, the agency must provide, upon request, a copy of public data contained in that medium, in electronic form, if a copy can reasonably be made. However, data only has to be provided in the same electronic format or program used by the agency. Minn. Stat. § 13.03, subd. 3(e).

If the responsible authority determines that the requested data is classified so as to deny the requesting person access, the responsible authority must inform the requesting person of the determination either orally at the time of the request, or in writing as soon after that time as possible, and must cite the specific statutory section, temporary classification, or specific provision of federal law on which the determination is based. Upon the request of any person denied access, the responsible authority is required to certify in writing that the request has been denied and state on what legal basis the denial is made. Minn. Stat. § 13.03, subd. 3(f).

If a state agency opposes discovery of government data on the grounds that the data are classified as not public, a party seeking access to the data may bring an action to compel discovery before the appropriate presiding judicial officer or administrative law judge. The judge must first decide whether the data are discoverable or releasable pursuant to the rules of evidence and of criminal, civil, or administrative procedure appropriate to the action. If the data are discoverable, the judge must then decide "whether the benefit to the party seeking access to the data outweighs any harm to the confidentiality interests of the agency maintaining the data, or of any person who has provided the data or who is the subject of the data, or to the privacy of an individual identified in the data." *Montgomery Ward and Co., Inc. v. County of Hennepin,* 450 N.W.2d 299, 306 (Minn. 1990). In making this decision the judge is required to consider whether notice to the subject of the data is warranted, and may fashion and issue any protective orders necessary to assure proper handling of the data by the parties. Minn. Stat. § 13.03, subd. 6. The Minnesota Supreme Court has held that failure by the judge to use this two-prong analysis is an abuse of discretion.

5. Dissemination

Private data may be used and disseminated to any person or agency if the individual subject of the data has given informed consent. Informed consent may be given by signing a consent statement, but informed consent authorizing any person or agency to disclose information about the individual to an insurer is not valid unless the statement is 1) in plain

language; 2) dated; 3) specific in designating the particular persons or agencies authorized to disclose information about the data subject; 4) specific as to the nature of the information the subject is authorizing to be disclosed; 5) specific as to the persons or agencies to whom the subject is authorizing information to be disclosed; 6) specific as to the purpose or purposes for which the information may be used by any of the parties named both at the time of disclosure and at any time in the future; and 7) specific as to its expiration date which should be within a reasonable period of time not to exceed one year. Minn. Stat. § 13.05, subd. 4. Private data may also be disseminated as authorized by law and to individuals within the agency whose job duties reasonably require access to it.

In 2005, the Legislature amended Minn. Stat. § 13.37 to allow government entities, in consultation with appropriate law enforcement, emergency management, or other officials to share security information to "aid public health, promote public safety, or assist law enforcement" (enacted in 2005 Minn. Laws ch. 163, § 35).

6. Licensing Data

The licensing data section of the Data Practices Act is frequently encountered by state boards. "Licensing Agency" means any board, department or agency which is given statutory authority to issue professional or other types of licenses, except those administered by the Commissioner of Human Services. Minn. Stat. § 13.41. Under that section, data collected by a licensing agency during an active investigation of complaints against a licensee are confidential. The identity of complainants who have made reports concerning licensees can only be released if the complainant consents. When a licensing agency has completed its work on a case, the data become inactive investigative data, which are private. Minn. Stat. § 13.39, subd. 3. Orders for hearing, findings of fact, conclusions of law and the final disciplinary action contained in the record of the disciplinary action generally are considered public. If the licensee and the licensing agency settle the dispute in writing, the agreement is public data.

A board must include in its final order only those findings of fact that form the basis for disciplinary action. In *Doe v. Minnesota State Bd. of Med. Exam'rs,* 435 N.W.2d 45 (Minn. 1989), the Board of Medical Examiners found Dr. Doe guilty of misconduct on one charge of malprescribing and dismissed the remaining charges of sexual improprieties with former patients. The board released portions of the decision relating to the dismissed charges of sexual improprieties. Dr. Doe sought an injunction to prevent board disclosure of the dismissed charges. The Supreme Court held that a "final decision" of the board following a contested case disciplinary action includes its "finding of fact, conclusions of law and order," and that that document is a public document. However, the Court also held it was improper for the board to incorporate in its final decision the discussion of the dismissed charges because the board's rule limits the scope of the data which can be made public in a final decision. Dr. Doe was awarded attorney fees pursuant to Minn. Stat. § 13.08, subd. 4.

7. Investigative Data

Data collected by state boards as part of an active investigation undertaken to commence or defend a pending civil legal action, or which are retained in anticipation of a pending civil legal action, are protected nonpublic data (data not on individuals) or confidential (data on individuals). A "pending civil legal action" includes but is not limited to judicial, administrative or arbitration proceedings. Whether a civil legal action is pending should be determined by the board's general counsel. State boards may, however, make any such data classified as confidential or protected nonpublic accessible to any person, agency or the public if a board determines that access will aid law enforcement, promote public health or safety, or dispel widespread rumor which poses a threat. Release of such data is highly sensitive. If a state board is considering providing access to such confidential or protected nonpublic data, it should consult its assistant attorney general. Minn. Stat. § 13.39.

8. Penalties for Violating the Act

a. Board liability

Violation of the Data Practices Act may subject the state agency and individual state officers or employees to a variety of civil sanctions. A board that violates any provision of the act is liable to a person or representative of a decedent who suffers any damages as a result of the violation. An action may be brought to recover any damages sustained, plus costs and reasonable attorney's fees. Minn. Stat. § 13.08, subd. 1. In the case of a willful violation the board shall, in addition, be liable for exemplary damages of not less than $100 nor more than $10,000 for each violation. The state is deemed to have waived any immunity to a cause of action brought under the Act. The responsible authority may also be enjoined by the district court to stop further violations of the Act. In addition, any aggrieved person may bring an action in district court to compel compliance with the Act and may recover costs and disbursements, including reasonable attorney fees. On the other hand, if the court determines the action brought is frivolous, it may award reasonable costs and attorneys' fees to the responsible authority. Courts can also impose a civil penalty of up to $300 against the government entity if an order to compel compliance is issued. Minn. Stat. § 13.08, subd. 4.

In any action involving a request for government data under sections 13.03 or 13.04, the court may inspect *in camera* the government data in dispute but must conduct its hearing in public and in a manner which protects the security of data classified as not public. An agency that releases data pursuant to the order of the presiding officer under section 13.03, subdivision 6 is immune from civil and criminal liability for the data's release. Minn. Stat. § 13.08, subd. 5.

b. Individual liability

Any person who willfully violates the provisions of the Data Practices Act or any rules adopted under it is guilty of a misdemeanor. Willful violation of the Data Practices Act by any public employee constitutes just cause for suspension without pay or dismissal of the public employee. Minn. Stat. § 13.09.

9. Opinions by the Commissioner of Administration

A government entity such as a state board may request an opinion from the Commissioner of Administration on any question relating to public access to government data, rights of subjects of data, or classification of data under Minn. Stat. ch. 13 or other Minnesota Statutes governing government data practices. An opinion of the Commissioner of Administration may also be requested by any individual who disagrees with a determination regarding data practices made by a government entity regarding the individual's rights as a subject of government data or right to access to government data.

Opinions issued by the Commissioner under Minn. Stat. § 13.072 are not binding on the government entity whose data is the subject of the opinion, but must be given deference by a court in a proceeding involving the data. This law does not preclude a person from bringing any other action or law in addition to or instead of requesting a written opinion. A government entity or person that acts in conformity with a written opinion of the Commissioner issued to the government entity or person or to another party is not liable for compensatory or exemplary damages or awards of attorney fees in actions under Minn. Stat. § 13.08 or for a penalty under Minn. Stat. § 13.09. A court shall award reasonable attorney fees to a prevailing plaintiff who has brought an action in district court under Minn. Stat. § 13.08, subd. 4 if the government entity that is the defendant was the subject of a written opinion of the Commissioner and the court finds that the opinion is directly related to the cause of action being litigated and that the government entity did not act in conformity with the opinion. Minn. Stat. § 13.08, subd. 4.

DATA PRACTICES ACT

Public	Private	Confidential
All data that is not made private or confidential by state or federal law	*Accessible to data subject but not the public*	*Not accessible to data subject or public*
Applicant name and address		
Application data submitted by *licensees*	Data submitted by licensure *applicants*, except for names and addresses	
Orders for Hearing, unless specifically exempt by statute Findings of Fact, Conclusions of Law and Order, Stipulation Agreement	*Inactive* investigative data	*Active* investigative data
Disciplinary Orders and the Record of disciplinary hearing if hearing was public	Name of complainant when it appears in inactive investigative data	
Board staff and consultants: name; salary or contract fees; pension and benefits information; expense and other reimbursement paid; job title and description; education, training and work experience; dates of employment; existence and status of any complaints and final disciplinary action, including reasons therefor; payroll records, work phone number and designated address	Information relating to unsubstantiated complaints Patient names and patient records Record of disciplinary proceeding except for items classified as public All other data on staff and consultants is private, including unsubstantiated complaints, record of disciplinary proceeding, and non-designated address	
Job applicants: Vet status; test scores; eligibility ranking; job history; education and training; names of job finalists	Names of job applicants, except for finalists	

"Data not on individuals" is public under Minn. Stat. § 13.03. MN Dept. of Admin. Adv. Op. 02-038 and 03-004.

"Data on individuals" listed in Minn. Stat. § 13.41, subd. 2 are private. MN Dept. of Admin. Adv. Op. 02-038 and 03-004.

C. Ethics in Government

There are many state statutes that deal with ethics in government, some of which apply to members and employees of state boards. The two statutes that primarily affect state boards are Minn. Stat. ch.10A (Ethics in Government Act) and Minn. Stat. § 43A.38 (Code of Ethics for Employees in Executive Branch). If a conflict occurs between section 43A.38 and chapter 10A, the provisions of chapter 10A take precedence. The provisions in chapter 10A are enforced by the Campaign Finance and Public Disclosure Board (CFPDB), which regulates lobbying, conflicts of interests, political committees, and campaign funding practices. The CFPDB is authorized to investigate any alleged violations of the chapter and to make findings of whether there is probable cause to believe a violation has occurred.

1. Conflicts of Interest

Minnesota Statutes section 10A.07 governs conflicts of interest. It provides that any Public official who, in the discharge of official duties, would be required to take an action or make a decision which would substantially affect the official's financial interests or those of an associated business, must follow specified procedures. Minnesota Statutes section 10A.01, subdivision 35 defines "Public official" to include any member, chief administrative officer, or deputy chief administrative officer of a state board that either has the power to adopt, amend or repeal rules, or has the power to adjudicate contested cases or appeals.[4] The procedures are not required when the effect on the official is no greater than on other members of the Public official's business classification, profession, or occupation.

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[4] Certain state boards such as the Council on Asian-Pacific Minnesotans, the Council on Black Minnesotans, the State Council on Disabilities, The Law Examiner's Board, the Ombudsperson for Corrections, the Ombudsperson for Families, the Ombudsperson for Mental Health and Retardation, the Council on Chicano-Latino People, and the Strategic and Long Range Planning Office do not have the power to adopt, amend or repeal rules or the power to adjudicate contested cases or appeals. Therefore, members or administrative officers of those boards are not subject to the requirements of chapter 10A that apply to "Public officials." However, all employees of the executive branch are subject to the requirements of Minn. Stat. § 43A.38. Questions regarding whether an individual is an employee in the executive branch can be directed to your board's general counsel.

When faced with a potential conflict of interest, the Public official must give notice and not participate in the action giving rise to the potential conflict of interest. Minn. Stat. §§ 10A.07 and 43A.38, subd. 7. Notice is given by completing a conflict of interest form and delivering copies of the notice to the CFPDB and to the chair of the board on which the official serves. If the potential conflict of interest presents itself where there is insufficient time to file in advance, then the Public official must orally inform the board chair or appointing authority and file the required written notice within one week.

The Public official who has a potential conflict of interest should remove himself from the conflict. In the case of a decision made by a state board, a member cannot "chair a meeting, participate in any vote, or offer any motion or discussion on the matter giving rise to the potential conflict of interest." Minn. R. 4515.0500.

The question arises whether abstention is sufficient without complying with the notice provision. The notice and filing requirements of section 10A.07 apply only if the Public official "would be required to take an action or make a decision" in the course of his or her official duties. That phrase is ambiguous. It can be argued that it does not apply if a board member excuses himself or abstains from the decision so that he or she is not "required to make the decision." The counter argument is to reject that interpretation because of the use of the subjunctive "would be required" and because of the apparent legislative purpose of the conflict of interest provisions of section 10A.07 of promoting disclosure and openness. In 1987, the Minnesota Supreme Court appeared to believe that both steps were required of a Public Utilities Commissioner faced with a conflict of interest. *Petition of N. States Power Co.,* 414 N.W.2d 383, 386 (Minn. 1987) (noting that both steps must be taken when a potential conflict arises). The Court's comments were dicta, however, so some ambiguity remains.

Upon request of an individual, the CFPDB is authorized to publish advisory opinions on any of the requirements of chapter 10A based upon real or hypothetical situations. An individual may, in good faith, rely on an advisory opinion response. A written advisory opinion issued by the CFPDB is binding on the CFPDB in any subsequent CFPDB or judicial proceeding brought

against the person who made the request or was covered in the request, unless the opinion has been amended or revoked, or the requester has omitted or misstated material facts. If the CFPDB intends to apply new principles of law or policy from the opinion more broadly, the CFPDB must adopt rules. Nevertheless, the CFPDB advisory opinions are useful guides to boards with questions regarding chapter 10A. The opinions are available on the CFPDB's web site.

Substantially similar conflict of interest provisions apply to all employees in the executive branch under Minn. Stat. § 43A.38.[5] If an executive branch employee is faced with the potential for a conflict of interest, it is the employee's duty to avoid the situation. If the employee or the appointing authority determines that a conflict does exist, the matter must be assigned to another employee if possible. If reassignment is not possible, interested persons must be notified of the conflict. The statute enumerates several situations which are deemed to be conflicts of interest.

Two boards have additional, board specific conflict of interest rules. The Agricultural Chemical Response Compensation Board's rule mandates that if a member of the board has a direct or indirect financial or employment interest relating to a matter before the board that is likely to affect the member's impartiality, that member must make the interest known and refrain from participating in or voting upon the matter. The abstention of a board member or members does not prevent the remaining members from conducting a legal vote. Minn. R. 1512.0500. The Harmful Substance Compensation Board has a similar rule except that its rule discusses what to do if a quorum is lost as a result of members abstaining. The rule states that in the case of loss of a quorum, the entire board shall select from among themselves a majority of members whose interests are least likely to affect their impartiality or judgment, and these members must vote upon the matter before the board. Minn. R. 7190.0004.

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[5] The Minnesota Historical Society is not considered part of the Executive Branch for purposes of section 43A.38. Minn. Stat. § 43A.02, subd. 22.

2. Statements of Economic Interest

Under Minn. Stat. § 10A.09, Public officials are required to file statements of economic interest. A Public official must file a statement of economic interest with the CFPDB within 60 days of the effective date of appointment to the state board. The statement is made on a form prescribed by the CFPDB which calls for the following information: name, address, occupation, and principal place of business; the name of each associated business[6] and the nature of that association; a listing of all real property within the state, excluding homestead property, in which the individual holds an interest valued in excess of $2,500 or an option to buy property worth $50,000 or more; a listing of all securities in which the official's share has a market value of $2,500 or more; a listing of all real property in the state in which a partnership of which the individual is a member holds a value in excess of $2,500 or an option to purchase property worth $50,000 or more; and a listing of any investments and property interests held by the official or an immediate family member in the United States or Canada connected with pari-mutuel horse racing. Although Minn. Stat. § 10A.09 is not as clear as might be desirable as to whether reporting of investments is limited to pari-mutual horse racing, the CFPDB has interpreted this statute to require reporting of all investments, including shares of stock and mutual funds.

Each individual required to file a statement of economic interest must file a supplementary statement on April 15 of each year that he or she remains in office, if information on the most recently filed statement has changed. If a supplementary statement is required, it shall include the amount of each honorarium in excess of $50 received since the previous statement, together with the name and address of the source of the honorarium.

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[6] "Associated Business" means any association in connection with which, the individual is compensated in excess of $50 except for actual and reasonable expenses in any month as a director, officer, owner, member, partner, employer or employee, or is a holder of securities worth $2,500 or more at fair market value. Minn. Stat. § 10A.01, subd. 5.

3. Gifts

Minnesota Statutes section 10A.071, subdivision 2 prohibits Public officials from accepting any gifts whatsoever from lobbyists or their employers, with very minor exceptions. Most professional associations are lobbyists, or employers of lobbyists, for these purposes.

A gift is defined as "money, real or personal property, a service, a loan, a forbearance or forgiveness of indebtedness, or a promise of future employment, that is given and received without the giver receiving consideration of equal or greater value in return." This broad rule includes entertainment, loans of personal property for less than payment of fair market value, preferential treatment for purchases or honoraria, and food or beverages provided at a meeting, unless the Public official is appearing to make a speech or answer questions as part of a program.[7]

Again, Minn. Stat. § 43A.38 has substantially similar provisions prohibiting all executive branch employees from accepting any payment of expense, compensation, gift, reward, gratuity, favor, service or promise of future employment or other future benefit from *any source,* except the state, for any activity related to the duties of the employee unless otherwise provided by law. Specific exceptions to the prohibition are enumerated in the statute. There is also a prohibition on gifts related to state contracts. *See* Minn. Stat. § 15.43, subd. 1.

4. Lobbyist Registration

Minnesota Statutes section 10A.03 requires lobbyists to register with the CFPDB. A lobbyist is defined by Minn. Stat. § 10A.01, subd. 21 and does not include state employees or "public officials." Therefore, in general, members and employees of state boards appearing

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[7] Some exceptions to the gift prohibition include:

a. services to assist an official in the performance of official duties,
b. services of insignificant monetary value,
c. a plaque or similar memento recognizing individual services in a field of specialty or to a charitable cause,
d. a trinket or memento of insignificant value, or
e. informational material of unexceptional value.

before the Legislature in connection with board business are not considered lobbyists under the statute and need not register with the CFPDB. However, if a state board member appears before the Legislature under other circumstances, registration as a lobbyist may be required by section 10A.03.

5. Use of State Time, Resources and Information

a. Confidential Information

Minnesota Statutes section 43A.38, subdivision 3 prohibits an executive branch employee from using confidential information to further the employee's private interest and from accepting outside employment or involvement in a business or activity that will require the employee to disclose or use confidential information.

b. Property, Time and Supplies

Section 43A.38, subdivision 4 prohibits a state employee from using or allowing the use of state time, supplies, property or equipment to be used for the employee's private interests or any other use not in the interest of the state, except as provided by law. This includes the use of state stationery, postage, telephones, WATTS lines, electronic mail, fax machines and photocopying equipment. The fact that the non-state use does not increase the cost to the state is not an exception to the rule, nor is prompt reimbursement of any costs that may be inadvertently incurred.

One small exception to this general rule has been carved out regarding use of electronic communication (i.e., electronic mail). Executive branch employees may use state time, property or equipment to communicate electronically with other persons provided the use, including the value of the time spent, results in no incremental cost to the state or results in an incremental cost that is so small as to make accounting for it unreasonable or administratively impracticable. The Commissioners of Administration and Employee Relations have been directed by the statute to issue a statewide policy on the use of electronic mail, etc., but as yet, have not issued such a policy.

6. Political Activity

The Fair Campaign Practices Act, Minn. Stat. § 211B.09, provides that an employee or official of the state may not use official authority or influence to compel a person to apply for membership in or become a member of a political organization, to pay or promise to pay a political contribution, or to take part in political activity. Using an official position to influence political activity is also prohibited in Minn. Stat. § 43A.32, subd. 1.

7. Gubernatorial Appointees

Past governors have issued executive orders which establish a code of ethics for appointees of the governor. The past orders have strongly paralleled the code of ethics for executive branch employees in the areas of conflict of interest, gifts, use of state time, resources and information, and political activity. In the past, some executive orders have contained stricter provisions. To date, Governor Pawlenty has not issued a similar order.

The provisions discussed above establish ethical principles to preserve public confidence in the integrity of government officials. The intent is to eliminate any potential conflicts of interest, the appearance of impropriety, or influence in government. All board members are encouraged to be cognizant of these prohibitions. Questions about the Act's implications may be addressed to the board's general counsel.

D. The Equal Access to Justice Act

The Equal Access to Justice Act, Minn. Stat. § 15.471 *et seq.* was enacted by the Legislature in 1986. The key provision of the Act is found at Minn. Stat. § 15.472 (a), which states:

> If a prevailing party other than the state, in a civil action or contested case proceeding other than a tort action, brought by or against the state, shows that the position of the state was not substantially justified, the court or administrative law judge shall award fees and other expenses to the party unless special circumstances make an award unjust.

The term "party" in the above section is defined by statute to mean a person named or admitted as a party in a court action or contested case proceeding, who is a small business,

including a partner, officer, shareholder member or owner. Minn. Stat. § 15.471, subd. 6. The term "state" is defined as "the State of Minnesota or an agency or official of the state acting in an official capacity." Minn. Stat. § 15.471, subd. 7. The term "fees" includes attorney fees not to exceed $125.00 per hour. Minn. Stat. § 15.471, subd. 5(c). The term "substantially justified" is defined as "the state's position had a reasonable basis in law and fact, based on the totality of the circumstances before and during the litigation or contested case proceeding." Minn. Stat. § 15.471, subd. 8. The fact that a party prevailed on the merits in an action against the state does not automatically mean that the state's position was not "substantially justified." *Donovan Contracting v. Minnesota Dep't of Transportation,* 469 N.W.2d 718, 720-21 (Minn. Ct. App. 1991) (citing Minn. R. 1400.8401, subp. 3(A)(2)(c) (1989)).

There is some question whether this statute applies in licensing proceedings, since the law focuses on small businesses and a license is typically held in a person's individual capacity. However, licensees could argue that it does apply to them. Thus, if a complaint committee brings a disciplinary case and does not prevail, the licensee may bring an action under the Equal Access to Justice Act for costs and attorney fees. However, to succeed, the licensee must demonstrate that the complaint committee's position had no reasonable basis in law and fact and that the licensee is a "party" as defined in the Act.

The term "expenses" includes filing fees, subpoena fees and mileage, transcript costs and court reporter fees, expert witness fees, photocopying and printing costs, postage and delivery costs, and service of process fees. It also includes the reasonable cost of any "study, analysis, engineering report, test or project" incurred by a party in the litigation. Minn. Stat. § 15.471, subd. 4.

E. Tort Claims

A "tort" is a non-contractual civil wrong that is generally defined as the violation of a duty of care owed to a party which results in damage to property, personal injury, or death. The

liability of board members for tortuous acts is controlled by Minn. Stat. § 3.732 *et seq.*. Section 3.736, subdivision 1, provides as follows:

> The state will pay compensation for injury to or loss of property or personal injury or death caused by an act or omission of an employee of the state while acting within the scope of office or employment . . . and who is acting in good faith . . . under circumstances where the state, if a private person, would be liable to the claimant, whether arising out of a governmental or proprietary function. Nothing in this section waives the defense of judicial or legislative immunity except to the extent provided in subdivision 8.

For purposes of section 3.736, "state" is defined to include each of the departments, boards, agencies, commissions, courts, and officers in the executive, legislative, and judicial branches of the State of Minnesota. Minn. Stat. § 3.732, subd. 1(1). An "employee of the state" means all present or former officers, members, directors, or employees of the state. Minn. Stat. § 3.732, subd. 1(2). However, rulings of personal liability against board members are rare.

Under the above definitions, state boards are the "state" and their members and employees are "employees of the state" for purposes of the Tort Claims Act.

1. Liability Under Minnesota Statutes and Common Law

a. Statutory exclusions from liability

The Tort Claims Act contains several exclusions so that boards and board members are immune from tort liability for several kinds of conduct. The following exclusions apply to the activities of state boards: good faith immunity; discretionary immunity; and (when applicable) licensing immunity. Minn. Stat. § 3.736, subd. 3.

i. Good faith immunity

Good faith immunity provides immunity for "a loss caused by an act or omission of a state employee exercising due care in the execution of a valid or invalid statute or rule." Minn. Stat. § 3.736, subd. 3(a). Good faith immunity applies when, as a matter of law, an employee of the state has a duty to act and does so exercising due care in the execution of that duty. *Johnson v. Dirkswager,* 315 N.W.2d 215, 223 (Minn. 1982).

ii. Statutory discretionary immunity

Statutory discretionary immunity provides immunity for "a loss caused by the performance or failure to perform a discretionary duty, whether or not the discretion is abused." Minn. Stat. § 3.736, subd. 3(b). The doctrine of statutory discretionary immunity recognizes that the courts, through the vehicle of a negligence action, are not an appropriate forum to review and second guess the acts of government which involve the exercise of judgment or discretion. *Cairl v. State,* 323 N.W.2d 20, 24 (Minn. 1982). In determining whether statutory discretionary immunity will shield the state and its employees, the Minnesota Supreme Court has distinguished between "planning" and "operational" decisions. *Holmquist v. State,* 425 N.W.2d 230, 232 (Minn. 1988); *Hansen v. City of St. Paul,* 214 N.W.2d 346, 350 (Minn. 1974). "Decisions intended to be protected by discretionary immunity are those made upon the planning level of conduct." *Larson v. Ind. School Dist. No. 314, Braham,* 289 N.W.2d 112, 120 (Minn. 1979).

"Planning level decisions are those involving questions of public policy, that is, the evaluation of factors such as the financial, political, economic, and social effects of a given plan or policy. . . . Sometimes the implementation of a policy itself requires policy-making." *Holmquist v. State,* 425 N.W.2d 230, 232, 234 (Minn. 1988). In contrast, "operational level" decisions include scientific or professional decisions that do not involve balancing of policy with political, economic and social considerations. *Nusbaum v. Blue Earth County,* 422 N.W.2d 713, 720 (Minn. 1988).

In response to misconduct allegations, the Minnesota Court of Appeals stated:

> Determinations ... [of] ... appropriate action to take under these circumstances were necessarily beset with policy-making considerations. For example, management needed to consider the importance of maintaining a workplace free of sexual harassment and the importance of deterring future misconduct. But while considering these policies, management may also have weighed competing policies, such as avoiding unnecessary disruption of the workplace and imposing discipline for alleged harassment only upon the establishment of substantial cause, both for the sake of staff and for protection from expense associated with proceedings premised on a claim of wrongful discipline.

> ... [I]vestigation and disciplinary decisions involved the type of legislative or executive policy decisions that we believe must be protected by discretionary immunity. The center's decisions did not simply require the application of professional judgment to a given set of facts, but were necessarily entwined in a layer of policy-making that exceeded the mere application of rules to facts.

See Oslin v. State, 543 N.W.2d 408, 416 (Minn. Ct. App. 1996).

Statutory discretionary immunity does not apply to whistleblower claims against boards. *See Janklow v. Minn. Bd. of Exam'rs,* 552 N.W.2d 711, 716-718 (Minn. 1996) (holding that the Whistleblower Act operates as an implied waiver of the statutory immunity provision of Minn. Stat. § 3.736); *Carter v. Peace Officers Standards and Training Bd.,* 558 N.W.2d 267, 269 (Minn. Ct. App. 1997) (concluding that statutory immunity is not available to the Board as a defense to the Whistleblower Act).

iii. Licensing immunity

Licensing immunity provides immunity for "a loss based on the failure of a person to meet the standards needed for a license, permit, or other authorization issued by the state or its agents." Minn. Stat. § 3.736, subd. 3(k). The application of licensing immunity is not limited to actions taken with respect to the issuance of a license.

Minnesota Statutes section 3.736, subdivision 3(k) also immunizes the State and its employees against allegations arising from its licensing activities, including inspections, evaluations, supervision and related functions. *See Andrade v. Ellefson,* 391 N.W.2d 836, 837 (Minn. 1986) (county immune from liability for claims of negligent licensing, inspection and supervision) and *Gertken v. State,* 493 N.W.2d 290, 292-93 (Minn. Ct. App. 1992) (state immune from liability for claims of negligent advice related to licensing standards during licensing inspection). In short, immunity applies if the actions in question were directly related to the scope of the subject matter considered or involved in the issuance of the license. *Id.* at 292.

In addition to those immunities provided by the Tort Claims Act, a second source of statutory immunity provided by the Legislature to protect boards and their members is found in

the individual practice acts of the boards. For example, Minn. Stat. § 147.121, subd. 2 provides immunity from civil liability and criminal prosecution for members of the Board of Medical Practice and employees and consultants retained by the board for actions taken relating to their duties under the practice act.

b. Common Law Exclusions From Liability

In addition to statutorily afforded immunity for tort actions, board members are entitled to the application of certain common law immunities as a protection against claims of allegedly tortuous conduct. The most applicable of these immunities are discussed below.

i) Official immunity

The doctrine of official immunity protects from personal liability a public official charged by law with duties that call for the exercise of judgment or discretion unless the official is guilty of a willful or malicious wrong. *Elwood v. County of Rice,* 423 N.W.2d 671, 677 (Minn. 1988); *Rico v. State,* 472 N.W.2d 100, 106-07 (Minn. 1991). Although the discretionary immunity afforded under the Tort Claims Act and the common law doctrine of official immunity both protect discretionary acts, "discretion" has a broader meaning in the context of official immunity. "Official immunity involves the kind of discretion which is exercised on an operational rather than a policymaking level, and it requires something more than the performance of 'ministerial duties.'" *Pletan v. Gaines,* 494 N.W.2d 38, 40 (Minn. 1992).

Official immunity is not granted for ministerial duties. *Ireland v. Crow's Nest Yachts, Inc.,* 552 N.W.2d 269, 272 (Minn. Ct. App. 1996). Ministerial duties have been defined as duties "in which nothing is left to discretion . . . a simple, definite duty arising under and because of stated conditions and imposed by law." *Cook v. Trovatten,* 200 Minn. 221, 223, 274 N.W. 165, 167 (1937).

The discretionary immunity provided by the Tort Claims Act is designed primarily to protect the separation of powers by insulating executive and legislative policy decisions from judicial review through tort actions. Official immunity, however, is "intended to insure that the

threat of potential personal liability does not unduly inhibit the exercise of discretion required by public officials in the discharge of their duties." *Holmquist v. State,* 425 N.W.2d 230, 233 n. 1 (Minn. 1988); *Rico,* 472 N.W.2d at 107. While official immunity ordinarily applies to the decisions of individuals, it was recently extended by the Minnesota Supreme Court to a policy adopted by a committee. *Anderson v. Anoka Hennepin Indep. School Dist.,* 678 N.W.2d 651 (Minn. 2004) (policy adopted by committee of shop leaders on use of table saws).

ii) Vicarious official immunity

The doctrine of official immunity can be extended to protect the government employer from liability for the acts of its employees. In this regard, the Minnesota Supreme Court has recognized the doctrine of vicarious official immunity in order to avoid defeating the purpose of official immunity in cases where a claimant brings suit against the governmental employer based upon the alleged negligence of the government employee. *Pletan* 494 N.W.2d at 42. The decision of whether to extend official immunity to the government employer is a policy question. *Ireland,* 552 N.W.2d at 272. In determining whether official immunity should be extended to the government employer, "[t]he relevant inquiry is whether, if no immunity were granted, the public employee would think that his performance was being evaluated so as to 'chill' the exercise of his independent judgment." *Id.* (citing *Leonzal v. Grogan,* 516 N.W.2d 210, 214 (Minn. Ct. App. 1994)).

iii) Quasi-Judicial immunity

"[J]udicial immunity is an immunity from suit, not just from ultimate assessment of damages." *Mireles v. Waco,* 502 U.S. 9, 11, 112 S. Ct. 286, 288 (1991). The only two circumstances in which judicial immunity is unavailable are: (1) when a judge's action is not taken in the judge's judicial capacity; and (2) when a judge's action is taken in the complete absence of all jurisdiction. *Id.* But for these two narrow exceptions, judicial immunity completely protects a judge from suit based on judicial decision making.

Licensing boards act in a quasi-judicial capacity when making decisions involving the imposition of remedial sanctions against a licensee. When performing this function, there is a strong argument licensing boards and their members are entitled to quasi-judicial immunity. This immunity is the functional equivalent of judicial immunity and it would provide complete protection for a board and its members.

c. Punitive damages

As a general rule, punitive damages may not be assessed against a governmental entity in the absence of statutory authority. *See generally,* 1 American Law Reports 4th 448, 453. Under the Minnesota Tort Claims Act the state is immune from payment of punitive damages. Minnesota Statutes section 3.736, subdivision 3 specifically states: "The state will not pay punitive damages." The Attorney General's Office has argued in certain court cases that because punitive damages are normally awarded to punish a guilty party for the benefit of society, recovery of punitive damages against the government would contravene public policy in that payment of said damages would be forced upon innocent taxpayers.

While it is clear that the state cannot be forced to pay punitive damages for tort claims, since there have been no court decision on the point, it is less clear whether this prohibition applies to punitive damages awarded against individual employees, since there are no cases on point. Arguably, the statutory prohibition of punitive damages against the state must also apply to state employees acting within the scope of their authority.

d. Liability limits

Minnesota Statutes section 3.736, subdivision 4 establishes that the total liability dollar cap of the state and its employees acting within the scope of their employment on any tort claim shall not exceed $300,000 per individual and $1,000,000 for any number of claims arising out of a single occurrence. On January 1, 2008, the limit will rise to $400,000/$1.2 million and on July 1, 2009, the limits will rise again to $500,000/$1.5 million.

Although municipalities, counties, and school boards often purchase liability insurance to cover tort claims, the state generally does not. Pursuant to Minn. Stat. § 3.738, subd. 8, the purchase of insurance waives the state's liability limits under the Tort Claims Act "to the extent that valid and collectible insurance . . . exceeds those limits and covers the claim." *Id.*; *see also Pirkov-Middaugh v. Gillette Children's Hosp.,* 495 N.W.2d 608, 611 (Minn. 1993).

In 2003, the Legislature amended Minn. Stat. § 604.02, subd. 1 to eliminate joint and several liability for defendants found to be less than 50 percent at fault. Previously, a defendant had been required to pay up to the entire award when another at-fault party was insolvent.

e. Indemnification

The Tort Claims Act requires the State of Minnesota to defend, save harmless, and indemnify any employee of the state against expenses, attorney's fees, judgments, fines, and amounts paid in settlement in connection with any tort, civil, or equitable claim or demand. Minn. Stat. § 3.736, subd. 9. Pursuant to this general rule, the State of Minnesota has agreed to indemnify state officials and employees provided that certain criteria are met. In summary, those conditions require that the officer or employee: (1) meet the definition of "employee of the state," which includes board members; (2) has been acting within the scope of his or her employment; and (3) provide complete disclosure and cooperation in the defense of the claim or demand. Minn. Stat. § 3.736, subd. 9.

"'Scope of office or employment' means that the employee was acting on behalf of the state in the performance of duties or tasks lawfully assigned by competent authority. Minn. Stat. § 3.732, subd. 1 (3). The definition of "scope of office or employment," however, limits the application of the statute to those acts of board members which constitute the lawful duties or tasks of the boards as set out in the boards' practice acts, chapter 214, the Administrative Procedure Act, and other statutes which give boards their authority.

The Tort Claims Act does not require the state to indemnify employees or officers in cases of malfeasance, willful or wanton actions, neglect of duty, nor for expenses, attorneys'

fees, judgments, fines, and amounts paid in settlement of claims for proceedings brought by or before responsibility or ethics boards or committees.

Except for elected officials, an employee of the state is conclusively presumed to have been acting within the scope of employment if the employee's appointing authority issues a certificate to that effect. This determination may be overturned by the Attorney General. The final determination, however, of whether an employee of the state was acting within the scope of employment is a question of fact to be determined by the trier of fact, based on the circumstances of each case. Minn. Stat. § 3.736, subd. 9. If a state board is considering denying certification, the board should contact its Assistant Attorney General before taking any action for advice on whether denying certification is appropriate and what steps are required to provide sufficient due process.

Minnesota Statutes section 8.06 provides that the Attorney General is to be the attorney for all state boards. The Attorney General's Office generally provides the legal defense in most claims against state officials. Exceptions would be those claims not covered by the Tort Claims Act, such as claims for willful and wanton acts or malfeasance. In addition, the Attorney General also has broad discretionary powers to represent the interests of the state and state officials. *See Slezak v. Ousdigian,* 260 Minn. 303, 110 N.W.2d 1, 5 (1961). The Attorney General has discretion to decide whether to represent state officials or employees. Occasionally, in instances of conflicts or when special expertise is needed, outside counsel is appointed. Minn. Stat. § 8.06.

If a party brings an action under section 3.736 against an employee of the state and obtains a judgment, the party is barred from bringing any action against that employee for the same conduct in any other proceeding. Minn. Stat. § 3.736, subd. 10.

F. Violations Of Federally Protected Rights (Section 1983 Actions)

1. What is a Section 1983 Action?

A federal statute, 42 U.S.C. § 1983, creates a right to sue for the deprivation of rights established by the United States Constitution or by federal statutes. Section 1983 establishes no substantive rights but merely creates the right to sue for a violation of rights established elsewhere. Potential defendants in a section 1983 suit are those persons who act "under color of any statute, ordinance, regulation, custom, or usage, of any State. . . ." Since board members act under color of state law, board members are potential defendants in section 1983 actions.

2. Defense, Indemnification, and Scope of Liability

The state has applied the indemnification and defense provisions of the Tort Claims Act to section 1983 actions. Accordingly, for the state to provide defense and indemnification, the act complained of must have been within the course of the defendant's employment. Further, as in an action based on a tort claim, the state's indemnity for defendants in section 1983 actions does not extend to punitive damages. Consequently, a board member will be personally responsible for any punitive damage award. Unlike tort claims, however, there is no cap on money damages in a section 1983 lawsuit because the liability limits in the Tort Claims Act are preempted by federal law. In addition, pursuant to 42 U.S.C. § 1988, a prevailing plaintiff in a section 1983 action is entitled to reimbursement of reasonable costs and attorneys' fees. An attorneys' fees award is also not subject to the liability limits of the Tort Claims Act.

3. Board Member Immunity

Both judicial and legislative immunity are available defenses to a section 1983 suit. A disciplinary proceeding is a quasi-judicial process. Quasi-judicial immunity applies to those who exercise quasi-judicial authority and to persons integral to the judicial process who must perform their functions without the chilling effect of potential lawsuits. Actions that are legislative in nature, such as rulemaking, are considered quasi-legislative. When state employees are performing quasi-judicial or quasi-legislative functions they are entitled to absolute immunity.

Qualified immunity is a more limited kind of immunity granted for administrative and investigative acts. Qualified immunity is available in a section 1983 action if the state official did not violate any clearly established statutory or constitutional right which a reasonable person should have known. *Johnson v. Morris,* 453 N.W.2d 31, 38-39 (Minn. 1990).

The question of law in section 1983 suits against board members is whether they are analogous to judges and prosecutors and thus possess absolute immunity. If board members are viewed as analogous to administrators or investigators, they will only have qualified immunity. The difference between these two types of immunities is that absolute immunity defeats a lawsuit at the outset without the necessity of arguing the substance of the claims. Qualified immunity, on the other hand, does not avoid a review of the merits of a particular claim, but may ultimately be a defense to the imposition of liability on an official.

Even if a board member is entitled to absolute immunity, that immunity extends only to money damages. A party who believes that a federally-protected right is being, or is about to be, violated may sue for prospective injunctive relief. An example of such relief would be a lawsuit in which the plaintiff asks that the court declare a rule of the board invalid because it violates the U.S. Constitution.

The United States Supreme Court has held that when a plaintiff prevails in a section 1983 suit for prospective declaratory relief, judicial immunity does not bar an award of attorney's fees under 42 U.S.C. § 1988 against a judicial officer. *Pulliam v. Allen,* 466 U.S. 522, 104 S. Ct. 1970, 1981-82 (1984).[8] Therefore, if a plaintiff obtains injunctive or declaratory relief against a board or a board member, the board or board member could be liable for an award of costs and reasonable attorney's fees. However, Minn. Stat. § 3.736, subd. 9 provides for indemnification

[8] On October 19, 1996 Congress enacted the Federal Courts Improvement Act of 1996 ("FCIA"), Pub. L. No. 104-317, which purported to legislatively reverse the *Pulliam* decision. Section 309 of the FCIA appears to bar awards of costs or attorney's fees against judges in cases based on their judicial acts. It also appears to bar actions for injunctive relief against a judicial officer.

of a board member or employee from any personal liability for the award for any act within the scope of the board member's or employee's duties.

4. Insurance Against Section 1983 Liability

Some local government entities, such as municipalities, counties, and school boards, purchase special insurance policies to cover liability for section 1983 actions. The state, however, has remained either uninsured or self-insured. The Department of Administration, Risk Management Division, is a resource for state boards to contact about insurance questions. The Risk Management Division can make recommendations to a state board about appropriate insurance coverage based on the board's specific needs and obtain insurance quotes for a board before insurance is purchased.

VIII. OTHER POTENTIAL BASES FOR BOARD LIABILITY

A. Antitrust Actions

Antitrust actions against state boards generally arise in one of two ways. First, a government enforcement agency (Department of Justice, Federal Trade Commission or state Attorney General) may bring a complaint against a board if the statutes or rules under which the board acts constitute an unreasonable restraint on competition. Second, an individual injured by board action may bring an action against the board claiming a rule as applied to him or her violates the state or federal antitrust laws.

B. Defamation

1. Elements of a Defamation Claim

For a statement to be considered defamatory "it must be communicated to someone other than the plaintiff, it must be false, and it must tend to harm the plaintiff's reputation and to lower him in the estimation of the community." *Stuempges v. Parke Davis & Co.*, 297 N.W.2d 252, 255 (Minn. 1980); Restatement (Second) of Torts §§ 558-559.

Based on this definition of a defamatory communication, the following are the common law elements of a defamation claim:

1. The statement must be defamatory.
2. The statement must be false.
3. The statement must refer to the plaintiff.
4. The statement must be published.

2. Defenses to a Defamation Claim

The two defenses to a claim of defamation are truth and privilege. Truth is an absolute defense to a defamation claim. A defense based on privilege may be applicable when a state board is the defendant in a defamation action. If an absolute privilege applies, immunity is given even for intentionally false statements made with malice. *Matthis v. Kennedy,* 243 Minn. 219, 67 N.W.2d 413, 416 (1954).

3. Immunities

Not all immunities apply to defamation claims. In *Johnson v. Dirkswager,* 315 N.W.2d 215, 223 (Minn. 1982), the Minnesota Supreme Court held that Minn. Stat. § 3.736, subd. 3(a) (good faith immunity) immunized the State and its employees from defamation claims. In *Bird v. Dep't of Pub. Safety,* 375 N.W.2d 36, 41 (Minn. Ct. App. 1985), the Minnesota Court of Appeals held that Minn. Stat. § 3.736, subd. 3(b) (discretionary immunity) does not apply to defamation cases. In *Bauer v. State,* 511 N.W.2d 447, 448 (Minn. 1994), the Minnesota Supreme Court held that official immunity does not apply to a defamation action against public officials.

4. Opinions

The Supreme Court has made clear that not all opinions are protected under the First Amendment. *Milkovich v. Lorain Journal Co.,* 497 U.S. 1, 18-21, 110 S. Ct. 2695, 2705-07 (1990). Only statements about matters of public concern not capable of being proven true or false and statements that cannot be interpreted reasonably as stating facts are protected from defamation actions under the First Amendment. *Id.; see also Geraci v. Eckankar,* 526 N.W.2d 391, 397 (Minn. Ct. App. 1995).

5. Qualified Privilege

Qualified privilege protects the state and its employees from liability for allegedly defamatory statements on matters that are related to their duties as public officials. *See Bird,* 375 N.W.2d at 41. Qualified privilege also exists for all defendants if the defendant establishes that the allegedly defamatory statement was made on a proper occasion, for a proper purpose, and upon reasonable grounds for believing the truth of the statement. *Stuempges,* 297 N.W.2d at 256-57.

6. Absolute Privileges

a. Publications required by law

Public officials and public bodies, such as state boards, have an absolute privilege to publish defamatory matter when required by law to do so. This rule is set forth in the Restatement (Second) of Torts § 592A as follows: "One who is required by law to publish defamatory matter is absolutely privileged to publish it." Because some boards' practice acts require publication of all disciplinary measures taken by the board, those boards and their members have an absolute privilege against a defamation claim based on the contents of the published disciplinary action. *See, e.g.,* Minn. Stat. § 147.02, subd. 6; *LeBaron v. Minn. Bd. of Pub. Def.,* 499 N.W.2d 39 (Minn. Ct. App. 1993) (statement in letter by district public defender to Board of Public Defense regarding the reasons for termination of an employee were absolutely privileged because Minn. Stat. §§ 611.26 and 611.215 require the district public defenders to report to the State Board of Public Defense regarding the standards of competency of public defenders). In addition, Minn. Stat. § 13.41, subd. 4, classifies a licensing board's final disciplinary action as public data, thereby requiring a board to disclose its final decision as public data. The absolute privilege extends to a board and its members for disclosing public data.

b. Judicial and quasi-judicial proceedings

There is an absolute privilege for communications made in a judicial or quasi-judicial proceeding. *See Matthis v. Kennedy,* 243 Minn. 219, 224, 67 N.W.2d 413, 417 (1954). In *Freier v. Ind. Sch. Dist. No. 197,* 356 N.W.2d 724 (Minn. Ct. App. 1984), a school board and its members were not liable for defaming a teacher when they published a termination decision which was subsequently reversed on appeal. The court reasoned that teacher discharge proceedings were quasi-judicial proceedings and communications incidental to judicial proceedings are absolutely privileged, whether or not they are defamatory. *Freier,* 356 N.W.2d at 728-29. From this case it appears to follow that a state board will not be held liable for

defamation for disclosing the results of a disciplinary action. However, as discussed earlier, the Data Practices Act or the board's practice act may prohibit disclosure of certain information.

c. Legislative proceedings

There is an absolute privilege for all statements made during the course of legislative proceedings stemming from the speech and debate clause of the Minnesota Constitution, Article IV, section 10. *See Carradine v. State,* 511 N.W.2d 733, 734-35 (Minn. 1994).

C. Violations of the Minnesota Governmental Data Practices Act

The Minnesota Governmental Data Practices Act ("MGDPA"), Minn. Stat. ch. 13, has become an increasing source of litigation in recent years. The Act governs nearly every aspect of a government entity's collection, creation, storage, maintenance, or dissemination of information and provides for the recovery of civil damages, punitive damages, and attorneys' fees for violations. Minn. Stat. § 13.08, subd. 1. The MGDPA specifically waives the state's immunity from liability and government entities have been held liable for releasing or refusing to release information. *See, e.g., Navarre v. S. Washington County Schs.,* 652 N.W.2d 9 (Minn. 2002) ($520,000 jury award for loss of reputation and emotional distress after information released about complaints concerning teacher's competency); *Wiegel v. City of St. Paul,* 639 N.W.2d 378 (Minn. 2002) (city liable for attorneys' fees for failing to disclose interviewers' notes about applicants who failed civil service exams).

A government entity may request an advisory opinion from the Commissioner of the Department of Administration concerning the application of the MGDPA. Minn. Stat. § 13.072, subd. 1. Although the opinion is non-binding, acting in conformance with the opinion provides an agency immunity for paying damages, penalties, or attorneys' fees. *Id.*, subd. 2. This provision was amended in 2003 to require a court to award attorneys' fees to a prevailing party if

the government entity failed to act in conformance with an opinion issued by the Commissioner. Act of May 30, 2003, ch. 8, art. 2, § 3, Minn. Laws Ex. Sess. 1502.

With some exceptions, the MGDPA classifies most data held by the government as public data. *See* Minn. Stat. § 13.03, subd. 1. The MGDPA provides that, upon request, a government entity must provide access to public data at a reasonable time and place. Minn. Stat. § 13.03, subd. 3(a). A request by a person who is the subject of the information must be honored immediately, or within ten days of the date of the request if immediate compliance is not possible. Minn. Stat. § 13.04, subd. 3.

Particular attention should be paid to the treatment of personnel data. Certain types of personnel data are public -- e.g., name, salary, job title, education, etc. Minn. Stat. § 13.43, subds. 1 and 2. Most other types of personnel data are private, including the specific reasons and data documenting the basis for a complaint or charge about an employee until there has been a "final disposition of any disciplinary action." Minn. Stat. §§ 13.43, subd. 2(a)(5); subd. 4. During such an investigation, the MGDPA "only authorizes the disclosure of the existence and status of complaints *and nothing more*. The type of complaint is separate and distinct from its existence and status." *Navarre,* 652 N.W.2d at 22 (emphasis added).

IX. CONTRACTING

Although most state contracting laws are contained in Minn. Stat. ch. 16C, there are numerous other statutorily required contract clauses scattered throughout the statutes that must be included in specific contracts. Every state agency must contract in accordance with the state procurement statutes. For purposes of chapter 16C, an agency means any state officer, employee, board, commission, authority, department, entity, or organization of the executive branch of state government. While there are a few specific state organizations such as public corporations that are exempt from the requirements of chapter 16C, most state boards are subject to the requirements.

A. WHO IS RESPONSIBLE FOR WHAT

Minnesota Statutes divide the responsibility for contracting for services primarily with the agency head requesting the contract and the Commissioner of Administration.

1. Agency Head

Unless altered by statute, the agency head has the responsibility to:

1. Identify the need and specifications for a contract and determine who the contractor will be;

2. Draft the contract;

3. Encumber the funds in the Minnesota Accounting and Procurement System (MAPS) before the contract can be valid. Minn. Stat. §§ 16C.05, subd. 2(3) and 16C.08, subd. 2(5); and

4. Ensure that the terms and conditions of the contract and state law are met, that all funds expended under the contract are expended in accordance with the contract and state law, and that the results of the contract (the product delivered or the service provided) meet all the requirements of the contract.

If the contract is for professional or technical services valued in excess of $5,000, the agency head must provide information and certify to the Commissioner of Administration that a specific set of circumstances exist or have been met before the contract will be valid. Minn. Stat.

§ 16C.08, subd. 2. These certifications are listed below in section B.1 "Contracts for Professional or Technical Services."

2. Commissioner of Administration

The Commissioner of Administration approves or disapproves the decision of a state agency to contract for goods or services and its selection of a contractor. Minn. Stat. §§ 15.061, 16C.05, subd. 2(a)(2), and 16C.08, subd. 3. The Department of Administration must sign all certifications for contracts valued over $5,000 (calculated over the entire life of the contract, including any potential extensions).

3. Attorney General

The Attorney General's Office no longer is required to review state contracts for form and execution. Minn. Stat. § 16C.05, subd. 2(2). Even though the Attorney General's Office is no longer legally required to execute contracts for form and execution, the Attorney General's Office will provide legal advice to agencies when requested on contract issues. Upon request, the Attorney General's Office will review revisions to State form contracts and review vendor prepared contracts such as software license agreements and rental agreements in order that those contracts be consistent with State laws.

B. TYPES OF CONTRACTS

1. Contracts For Professional or Technical Services

"Professional or technical services" means services that are intellectual in character, including consultation, analysis, evaluation, prediction, planning, programming, or recommendation, and result in the production of a report or the completion of a task. Professional or technical contracts do not include the provision of supplies or materials except by the approval of the Commissioner of Administration or except as incidental to the provision of professional or technical services. Minn. Stat. § 16C.08.

For all professional or technical services contracts, the Commissioner of Administration must be able to determine that, among other things:

1. The contract will not establish an employment relationship between the state or the agency and any persons performing under the contract;

2. The contractor and agents are not employees of the state;

3. The contracting agency has specified a satisfactory method of evaluating and using the results of the work to be performed; and

4. The term of the contract does not exceed two years. No state contract can have a term longer than two years unless the Commissioner of Administration determines that a longer duration is in the best interest of the state, but in no event may the term of the contract, including any potential amendments, exceed five years unless otherwise provided for by law.

Two statutorily required provisions that must be included in all contracts for professional or technical services are:

1. A professional or technical services contract must by its terms permit the Commissioner of Administration to unilaterally terminate the contract prior to completion with or without cause, upon payment of just compensation. The statute does not specify the length of notice required to invoke the cancellation clause and does not prohibit the agency/board from also having the power to unilaterally terminate the contract prior to completion with or without cause, upon payment of just compensation. It is in the agency/board's discretion whether to allow the contractor to terminate the contract prior to completion of the contract.

2. The terms of a professional or technical services contract must provide that 10% of the amount due under the contract be retained by the state agency/board until it certifies to the Commissioner of Administration that the contractor has satisfactorily fulfilled the terms of the contract, unless specifically excluded in writing by the Commissioner of Administration.[9]

For professional or technical services contracts with a value under $5,000, no advertised solicitation is required. The state agency may choose a contractor, draft the contract, and

[9] Minnesota Statutes section 16C.08, subd. 5(b) also provides that the 10% retainage requirement does not apply to contracts for professional services as defined in Minn. Stat. §§ 326.02 to 326.15, regarding the regulation of architects, engineers, surveyors, landscape architects, geoscientists, and interior designers.

encumber funds. When the agency is satisfied with the contract language, the contractor and the agency head or a designee sign the agreement and send it to the Department of Administration for external review.

For professional or technical services contracts with a value over $5,000, the agency must complete a Contract Certification Form and obtain the Commissioner of Administration's approval before sending out a Request for Proposals, either informal ($5,000 - $50,000) or formal (over $50,000). Informal Requests for Proposals for technical professional services from $5,001 to $50,000 may be published in the State Register or posted on the Department of Administration Material Management Web page, but the responses are not required to be sealed like responses to formal Requests for Proposals. *See* Minn. Stat. § 16C.06, subd. 1.

When submitting this certification form, the agency is making, among other things, the following assurances in addition to the determinations listed above.

1. No current state employee is able and available to perform the services called for by the contract;

2. The normal competitive bidding mechanisms (best value) will not provide for adequate performance of the services;

3. Reasonable efforts were made to publicize the availability of the contract to the public;

4. The agency will develop, and fully intends to implement a written plan for the assignment of specific agency personnel to manage the contract, including a monitoring and providing liaison, periodically reviewing interim reports or other performance indicators, and reviewing ultimate use of the final product of the services; and

5. The agency will not allow the contractor to begin work before the contract is fully executed unless an exception under Minn. Stat. § 16C.05, subd. 2, has been granted by the Commissioner of Administration and funds are fully encumbered and the contract is fully executed.

2. Contracts For Goods Or Non-Professional or Technical Services Contracts

The Materials Management Division of the Department of Administration offers procurement training programs during the year to state personnel. The training covers purchasing policies and procedures. If you are interested in any of the classes, please contact the Materials Management Division's training coordinator at (651) 201-2409.

3. Grants or Loans

Grants and loans are a class of contracts which provide funding to an outside entity to provide services or support to a third party who is not employed by the state. State agencies do not have general or automatic grant or loan making authority. The authority for grants and loans must be specifically stated in the statutes and is generally directly related to the appropriations that fund them.

4. Interagency Agreements/Joint Powers Agreements

Agreements with other governmental units are contracts. They may be for services, grants, or loans, but they should be treated like contracts. The authority of state agencies to enter into agreements with other state agencies is, in most cases, not clearly defined. In fact, most state agencies do not have specific authority, instead their authority is defined in the Joint Powers Act which gives governmental units broad authority to enter into agreements with each other. Minn. Stat. § 471.59. "Governmental unit" is defined as "every city, county, town, school district, other political subdivision of this or another state, another state, and any agency of the state of Minnesota or the United States, and includes any instrumentality of a governmental unit." Interagency agreements are between two or more state agencies, while joint powers agreements are between two or more governmental units. Under the Joint Powers Act, the governing body of any governmental unit may enter into agreements with any other governmental unit to perform on behalf of that unit any service or function which the governmental unit providing the service or function is authorized to provide for itself. A governmental unit participating in a joint enterprise or cooperative activity with another

governmental unit will not be liable for the acts or omissions of the other governmental unit unless it has agreed in writing to be responsible for them. Minn. Stat. § 471.59, subd. 1a (2006).

C. Basic Elements of a State Contract

State agencies are encouraged to use state approved contract forms when possible. The forms contain required statutory language and other contract terms which are generally in the state's best interests. The Department of Administration's publication *Contracts Manual, Including Professional/Technical Services Contracts* is a helpful resource. For sample contract forms, refer generally to the Department of Administration's web site at *http/www.mmd.admin.state.mn.us/mn05000.htm.* Since these forms are generic, there are situations where additional clauses may be necessary. The *Contracts Manual* is helpful for identifying these special situations. Some specific contracting considerations follow.

1. Authority

The state agency must have the statutory authority to enter into the particular contract. The contractor is presumed to have authority to enter into the contract unless it is another public agency.

2. Solicitation Process

Minnesota Statutes sections 16C.06, 16C.08, 16C.09, 16C.095, and 16C.10 govern the requirements for competitive solicitation. Refer to the Department of Administration's publication *Contracts Manual, Including Professional/Technical Services Contracts* for further assistance on requirements for advertising, consideration, and award.

3. Encumbrance of Funds

The state cannot agree to an expense unless the money has been encumbered. "Encumbered" means that the source of the funds to pay the expense have been identified and that the funds will be available when the payment is due. Generally, this also means that the state cannot agree to pay reasonable court costs, attorney's fees, penalties, economic harm caused to contractor, etc., or indemnify. *See* Minn. Const. art. XI, § 1.

4. Non-Appropriations Clause

Contracts that extend beyond the appropriations period should contain language addressing the possibility of non-appropriations. The following statement is recommended: "Continuation of this Agreement beyond June 30 of any year is contingent upon continued legislative appropriation of funds for the purpose of this Agreement. If these funds are not appropriated, the State will immediately notify Contractor in writing and the Agreement will terminate on June 30 of that year. State shall not be assessed any penalty if the agreement is terminated because of the decision of the legislature not to appropriate funds." An agency may only agree to pay a penalty under specified circumstances if the agency first encumbers the money to pay the potential penalty.

5. Advance Payment

Minnesota Statutes section 16A.41, subdivision 1 prohibits a state agency from obligating the state to pay in advance for goods or services. Pursuant to Minn. Stat. § 16A.065, the only advance payments that can be made are for software or software maintenance services, for state-owned or leased computer equipment, sole source maintenance agreements, exhibit booth space or boat slip rental, subscription fees for newspapers and magazines. Prepayments can also be made to the Library of Congress and the Federal Supervisor of Documents.

6. Audit Clause

Minnesota Statutes section 16C.05, subdivision 5 requires the state audit clause to be in all state contracts even when the state is receiving money. The only exception is when the state is selling, leasing or licensing its own software or data to a purchaser.

7. Data Practices Act

If the contractor will have access to the agency's private and confidential data, the contract must address the contractor's responsibility for handling such data in accordance with the agency's responsibilities under the Minnesota Data Practices Act. The agency cannot agree

to keep the contractor's data confidential except in accordance with the Data Practices Act. *See* Minn. Stat. ch. 13.

8. Term

No contract of any type shall exceed two years unless the Commissioner of Administration determines that a longer duration is in the best interests of the state. No contract and any amendments to the contract shall have a combined term longer than five years without specific approval of the Commissioner of Administration pursuant to written standards or unless otherwise provided by law. The term of a contract may be extended for a time longer than the time specified in Minn. Stat. Ch. 16C, up to a total term of ten years, if the Commissioner of Administration, in consultation with the Commissioner of Finance, determines that the contractor will incur upfront costs under the contract that cannot be recovered within a two-year period and that will provide cost savings to the state and that these costs will be amortized over the life of the contract. Minn. Stat. §§ 16C.03, subd. 17, 16C.05, subd. 5, and 16C.09.

9. Intellectual Property Rights

If the contract is for services that will produce intellectual property, the contract should contain language protecting the intellectual property rights.

10. Affirmative Action

For all contracts for goods and services in excess of $100,000 it may be necessary for the contractor to have a certificate of compliance with Minnesota human rights laws or to certify its compliance with federal affirmative actions laws. The agency cannot accept a bid or proposal in excess of $100,000 if the Contractor has more than 40 employees in Minnesota and the Commissioner of Human Rights is not in receipt of the Contractor's business affirmative action plan. *See* Minn. Stat. § 363A.36, subd. 2. All state contracts in excess of $100,000 must contain the language in Minn. R. 5000.3550 regarding affirmative action for disabled individuals.

11. Execution

The state has developed the following routing procedure for examination and execution of contracts: 1) Other party (e.g., contractor, consultant, etc.); 2) State agency (entering into the contract and also encumbering the funds for the contract); and 3) Department of Administration (comprehensive scope, substance and fiscal review - not grants or interagency agreements). Minn. Stat. § 16C.05, subd. 2.

If a subordinate member or agency employee signs the contract, he or she must be lawfully delegated the authority to do so. *See* Minn. Stat. §§ 15.06, subd. 6 and 16C.05, subd. 2(a)(1). The Secretary of State maintains a complete list of state personnel legally authorized to enter into certain agreements for their respective state agencies.[10] For contractors that are corporations, at least one corporate officer must sign the contract. Two corporate officer signatures are preferable. If persons other than corporate officers have signed, you must obtain a corporate board resolution authorizing the subject signatures must be obtained.

12. Amendments

An amendment to a prior agreement must be in writing and it must clearly reference the prior agreement. The amendment is subject to the same signature process as the original contract.

D. Data Practices Act

Minnesota Statutes section 13.05, subdivision 11 provides that when a government entity enters into contracts with private persons to perform any of the entity's functions, the contract must include terms that make clear that data created, collected, received, stored, used, maintained, or disseminated by the private persons in performing those functions is subject to the

[10] The statutes for certain boards require contracts to be approved by a majority of the members of the board and executed by the chair and the executive director. *See, e.g.,* Minn. Stat. § 3.922, subd. 5 (Indian Affairs Council); Minn. Stat. § 3.9223, subd. 5 (Council on Affairs of Chicano/Latino People); Minn. Stat. § 3.9225, subd. 5 (Council on Black Minnesotans); and Minn. Stat. § 3.9226, subd. 5(a) (Council on Asian-Pacific Minnesotans).

requirements in chapter 13 and that the private persons must comply with those requirements as if they were a government entity. However, the private persons do not have a duty to provide access to public data to the public if the public data are available from the government entity, except as required by the terms of the contract. *See* Minn. Stat. § 13.05, subd. 11.

X. COMPENSATION OF BOARD MEMBERS AND ADVISORY COUNCILS AND COMMITTEES

In general, board members and members of advisory councils and committees are compensated by a per diem set at the rate of $55 for each day spent on board activities, when authorized by the board, plus expenses in the manner and amount as authorized by the Commissioner's Plan. Minn. Stat. §§ 15.0575, subd 3; 15.059, subd. 3; and 214.09, subd. 3.

Key language in the above sections indicates that expenses and per diems can only be paid when authorized by a board, council or committee. However, the board, council or committee may authorize per diems and expenses in various ways so that the work can be accomplished without having to authorize every single request for a per diem or expense. For example, a board may delegate to the executive director and/or the president of the board the authority to approve per diems for board members engaged in disciplinary work or rulemaking. Such a delegation may include establishing a minimum number of hours, such as five or six, which must be accumulated before a per diem can be claimed. The executive director and/or president may also be authorized to set the maximum number of per diems that can be claimed for a single project, such as the review of a contested case record prior to a hearing before the board. Most boards, councils and committees however, reserve the authority to approve per diems and expenses for members traveling to and from conferences and conventions.

In general, a board, council or commission member who is also an employee of the state or a political subdivision of the state may not be compensated by both the board and the employer for time spent on board activities. The statutes discussed below are intended to prevent "double dipping." The statutes are very clear, however, that a state or political subdivision employee shall suffer no loss in compensation or benefits as a result of service on a board, council or commission and shall receive expenses unless the expenses are reimbursed from another source. Generally, child care expenses may only be reimbursed for state and political subdivision employees for time spent on board activities that are outside normal working hours.

Minnesota Statutes Section 15.0575, 15.059 or 214.09

A state or political subdivision employee who is also a member of an administrative board, agency, committee, council, or commission governed by Minn. Stat. §§ 15.0575, subds. 3, 15.059 or 214.09, may not receive the daily payment for activities that occur during working hours for which the person is compensated by the state or political subdivision. However, a state or political subdivision employee may receive a daily payment if the employee uses vacation time for board, agency, committee, council, or commission activities. Each board, agency, committee, council, or commission must adopt internal standards prescribing what constitutes a day spent on official activities for purposes of paying per diem. Those standards may be incorporated in a delegation of authority to the executive director or president to approve daily payments.

Minnesota Statutes Section 129D.02

Specific language independent from the above statutes applies to the State Arts Board. Pursuant to Minn. Stat. § 129D.02, subd. 3, members of the Arts Board are compensated at the rate of $35 per day spent on board activities and are reimbursed for expenses in the same manner and amount as state employees. Members who are also employees of the state or its political subdivisions are not entitled to a per diem.

It is important that state and political subdivision employees understand the specific statute that applies to their board, council or commission when determining whether they are entitled to receive a per diem from the board, council or committee.

It is not always clear whether someone is a full-time state *employee* or *employee* of a political subdivision. For instance, it is sometimes difficult to categorize elected officials. There have been no cases under the four statutes as to whether there is a difference between employees and officers, but a difference between public officials and employees has been recognized in other contexts. It has been held that a public officer or official is distinguished from a public employee in the greater "importance, dignity and independence" of the official's position. *Tillquist v. Dept. of Labor and Indus.*, 216 Minn. 202, 12 N.W.2d 512, 514 (1943). In *Cahill v.*

Beltrami County, 224 Minn. 564, 29 N.W.2d 444 (1947), the court concluded that an elected sheriff was a public officer and as such, rules governing contractual relations in ordinary cases were inapplicable. Certain statutes contain references to employees and to officers or public officials. *See, e.g.,* Minn. Stat. § 15.054. On the other hand, it can sometimes be argued that an elected official is paid about the equivalent amount of money as a full-time salary for some employee positions. Thus, it could be argued that the spirit of the law would preclude payment to a public official. *See, e.g., Jerome v. Burns,* 202 Minn. 485, 279 N.W. 237 (1938) (city clerk not entitled to additional compensation for services rendered as city commissioner of registration). Anyone with questions regarding whether a member is a state or political subdivision employee, should contact the assistant attorney general assigned to the board.

At times an executive director must contact a board member with a question about a request for a per diem or expense reimbursement. When that happens, two things should be kept in mind. First, the executive director is in the uncomfortable position of asking his or her "boss" to explain himself or herself. Second, board member compensation is thoroughly scrutinized by the legislative auditors. The executive director's questions protect the board and its members from embarrassment by clearing up these matters in advance of an audit.

Minnesota Board of Water & Soil Resources

February 20, 2007

Brad Moore, Commissioner
Minnesota Pollution Control Agency
520 Lafayette Road North
St. Paul, MN 55155

Dear Commissioner Moore:

CLEAN WATER LEGACY COUNCIL – BWSR REPRESENTATIVE

Effective March 19, 2007, and continuing indefinitely, Doug Thomas, Assistant Director, will represent the Board of Water and Soil Resources (BWSR) on the Clean Water Legacy Council.

Doug has served on the inter-agency group that developed the initial roll-out of the Clean Water Legacy Act FY07 funding. Doug will work with the Board, our staff, and agency partners to bring in broader ideas and suggestions in support of the Council's work.

Steve Woods will serve as an alternate for BWSR.

Sincerely,

John Jaschke
Executive Director

cc: BWSR Board Members
BWSR Senior Management Team

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Minnesota Board of Water & Soil Resources

February 22, 2007

TO: Jill Schlick, Counsel, Appellant
Gerald Von Korff, Counsel, Applicant

FR: Jim Haertel, Water Management Specialist

RE: Briefing and Hearing Schedule
WCA Appeal of an Exemption Determination
Cass County, File 06-26

At the pre-hearing conference the briefing and hearing schedule was set as follows:

March 14 – Appellants' brief mailed to Mr. Von Korff, Mr. Sumption and seven to BWSR.

April 4 – Respondents' brief mailed to Ms. Schlick, Mr. Sumption and seven to BWSR.

April 20 – Appellants' reply brief mailed to Mr. Von Korff, Mr. Sumption and seven to BWSR.

May 8 – Oral arguments before Dispute Resolution Committee

You are advised that all written briefs must be mailed in the U.S. Mail on or before the prescribed date and an Affidavit of Mailing must accompany the seven (7) briefs that are mailed to me. Failure to comply with these requirements may jeopardize the matter being considered by the Dispute Resolution Committee. Please note the enclosed mailing list.

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Hearing Notice: Notice is hereby given that a hearing on the above referenced appeal is scheduled to take place before the BWSR Dispute Resolution Committee on **Tuesday, May 8, at 10:00 AM** in Room 114, 110 Second Street South, Waite Park. The hearing location is in the Marketplace Mall where the Stearns SWCD offices are. (Map enclosed)

Please feel free to contact me at (651) 297-2906 or at the Saint Paul address if you have any questions or should you wish to discuss this matter further.

Enclosures – Mailing List for Briefs (Addressees Only)
Map (Addressees and DRC Members Only)

cc: John Sumption, Cass County Environmental Services Dept.
Tom Overton, Office of the Attorney General
DRC Members
John Overland, BWSR
John Jaschke, BWSR
Dave Weirens, BWSR
Ron Shelito, BWSR

Contact:
Terry Bish (202) 720-5974
Keith Williams (202) 720-4623

USDA ANNOUNCES CHRISTINA MUEDEKING AS
NRCS REGIONAL ASSISTANT CHIEF

WASHINGTON, February 26, 2007 - The U.S. Department of Agriculture today announced the selection of Christina Muedeking as Regional Assistant Chief for the Natural Resources Conservation Service (NRCS).

"Christina is a great addition to the NRCS team with her strong background in agriculture and conservation policy. Her diverse professional experiences, strong managerial skills and understanding of the needs of our nation's farmers and ranchers will serve the agency well, "said Arlen L. Lancaster, NRCS Chief.

Prior to her appointment, Muedeking served as Deputy Chief of Staff to Representative Tom Osborne for six years managing staff and agriculture policy for the Congressman including work on the 2002 Farm Bill. Her experience with Capitol Hill also includes work as Legislative Counsel for Representative David Minge where among other duties she drafted legislation for the 1996 Farm Bill including a marketing loan program and a wetlands policy reform proposal.

NRCS is organized into three regions-East, Central and West with each region headed by a Regional Assistant Chief. Regional Assistant Chiefs are management representatives of the Chief and are responsible for providing overall direction of NRCS programs and activities consistent with the Chief's guidance and overseeing NRCS State Conservationists.

Muedeking will serve as Regional Assistant Chief for the NRCS Central Region which is currently comprised of: Arkansas, Illinois, Iowa, Kansas, Louisiana, Minnesota, Missouri, Nebraska, North Dakota, Oklahoma, South Dakota, Texas and Wisconsin. She succeeds Merlin Bartz who returned to his native Iowa after serving in the Bush Administration at USDA since 2001.

Muedeking, a native of Minnesota, grew up on the family farm outside Tracy, Minnesota. She graduated from the University of Minnesota, Morris, with a degree in political science and earned her law degree from George Washington University in 1995. In addition to her legislative experience Muedeking worked for Koch Industries as a Program Officer and for National Pork Producers as International Trade Specialist.

An avid outdoorsman and runner, she and her husband Bryan Dierlam reside in Washington, D.C.

State Rep. Rick Hansen
NEWS RELEASE

Minnesota House of Representatives
District 39A (651) 296-6828
401 State Office Building, St. Paul, MN 55155

Contact: Matt Swenson
(651) 297-8406
matt.swenson@house.mn

January 25, 2007

REP. RICK HANSEN NAMED CHAIR OF SUBCOMMITEE ON WETLANDS, WATERSHEDS, AND BUFFER PROTECTION

ST. PAUL – State Representative Rick Hansen (DFL – South St. Paul) was named Chair of the Subcommittee on Wetlands, Watersheds, and Buffer Protection today. This subcommittee will be part of the Environment and Natural Resources Finance Division. It will review the Board of Water & Soil Resources budget and consider reform recommendations from the Office of the Legislative Auditor on efforts to protect Minnesota's lakes, streams, and water supply.

"I have dedicated much of my life to conservation efforts," said Hansen. "I am excited to use this new role as another avenue of progress for the protection of our environment."

Hansen has led a long career in working to protect the environment and brings valuable experience to this new post. Hansen received Master's Degree in Soil Management from Iowa State University and then went on to work for the Minnesota Department of Agriculture from 1988 – 2005. During that time he was elected to the Dakota County Soil and Water Conservation District where he served from 1997 – 2005. In this role he worked in coordination with state and national agriculture, soil, and water committees across the country to develop solutions to common environmental concerns.

Hansen was raised on a farm in Freeborn County, and owns a farm in Fillmore County where he hunts deer and turkeys. He is an avid canoer and outdoor enthusiast. His broad understanding of environmental issues facing all regions of the state as a farmer, hunter, outdoor enthusiast, and conservationist will serve him well in this position.

"My academic background, career, and experience with local, state, and federal conservation efforts has provided me the unique capability of leading this important and challenging task," said Hansen.

Speaker of the House, Margaret Anderson-Kelliher and Rep. Jean Wagenius – Chair of the Environment and Natural Resources Finance Division – are also confident in Rep. Hansen's ability to lead this effort effectively.

"Rick is the right person for the job," said Kelliher. "His expertise and passion for the environment have led him to be an outstanding advocate for conservation in his community, this state, and the nation at large."

Rep. Wagenius voiced her support for Hansen's appointment in saying, "This important work requires somebody who fully understands the issues at hand. I am glad we can count on Representative Hansen's informed and genuine leadership in this effort."

Under Hansen's leadership, the Subcommittee on Wetlands, Watersheds, and Buffer Protection will now begin working to evaluate the Legislative Auditor's findings and recommendations and implement changes in policy and budget.

-30-

Rep. Hansen's

Subcommittee Schedule

Tuesday, February 27th
Soil and Water Day
HF 374 (Hansen)

Tuesdays 12:30
500 S.

Friday, March 2nd → 9 AM 500 S.
Open Forum

Tuesday, March 6th
BSWR Budget

Friday, March 9th → 9 AM 300 N.
BSWR Budget

Tuesday, March 13th
bills

Friday, March 16th → 9 AM 300 N.
bills

MINNESOTA
HOUSE OF REPRESENTATIVES

Jenna Duwenhoegger
Committee Administrator

DFL Caucus
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100 Rev. Dr. Martin Luther King Jr. Blvd.
Saint Paul, MN 55155-1298

(651) 296-1774
Fax: (651) 296-7189

Jenna.Duwenhoegger@house.mn

Summary of South Two River Watershed District Termination

by

Jim Haertel
February 28, 2007

April 12, 2006 – Termination Petition received

May 24, 2006 – Board Order adopted to hold public hearing

June 19, 2006 – Public hearing held in Albany

August 2, 2006 – Hearing record closes

August 8, 2006 – Hearing panel meets, termination recommended

August 24, 2006 – Board Order adopted to terminate District

September 15, 2006 – District files appeal of Termination Order with Court of Appeals

September 27, 2006 – Board Order adopted to Stay filing of Termination Order with Secretary of State

January 4, 2007 – District managers vote to withdraw appeal

January 24, 2007 – Court of Appeals dismisses appeal

February 8, 2007 – Termination Order filed with Secretary of State

A District meeting was scheduled for the evening of February 8, 2007, however, because of concerns in delay of closing district operations and proposed questionable expenditures, the Termination Order was filed with the Secretary of State earlier that day. All of the District managers were notified by telephone in the early afternoon of February 8, 2007 that the meeting was canceled. A notice was also posted at the meeting location. On February 8, 2007 the Stearns County Auditor received a check from the District for all remaining funds of the District. At that time the Stearns County Auditor replaced the lock on the District's building. Subsequently the Stearns County Auditor retrieved all real property and Board staff retrieved all District records from the District's building. The Stearns County Board of Commissioners will pay the remaining bills of the District. When all of the bills have been paid, the proportionate share of remaining funds will be transferred to Morrison County.

Minnesota Board of Water & Soil Resources

DATE: March 19, 2007

TO: Board of Water and Soil Resources Members, Advisors, and Staff

FROM: John Jaschke, Executive Director

SUBJECT: March 28, 2007, Board Meeting Notice

The Board of Water and Soil Resources (BWSR) will meet on Wednesday, March 28, 2007, beginning at 9:00 a.m. The meeting will be held in the second floor conference room, at 520 Lafayette Road North, in St. Paul. Parking is available in the lot directly in front of the building (use hooded parking areas).

The following information pertains to agenda items:

COMMITTEE RECOMMENDATIONS

Northern Region Water Planning Committee

1. **Final Review – Itasca County Local Water Management Plan** - Itasca County submitted their Revised Local Water Management Plan for final state review and comment. The Northern Water Planning Committee met on March 12th, after the state agencies comment period ended. The Committee's recommendations or requirements will be presented at the regular board meeting for action. See attached. ***DECISION ITEM***

2. **Koochiching County Priority Concerns Scoping (PCSD) Document** - The purpose of this agenda item is to approve the Koochiching County Priority Concerns Scoping Document as required for updating their Comprehensive Local Water Management Plan. Koochiching County is currently operating under an extension of their 2000 Local Water Management Plan. The extension will expire on July 27, 2007. Notification requirements have been met and the Northern Region Water Planning Committee met and approved the PCSD at a meeting on March 12, 2007, in Grand Rapids. See attached. ***DECISION ITEM***

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NEW BUSINESS

1. **Petition for Enlargement, Name Change and Increase in Number of Managers of Carnelian-Marine Watershed District** - Washington County filed a petition with the Board on December 22, 2006, to enlarge the Carnelian-Marine Watershed District (District), change the name and to increase the number of managers. Washington County is qualified to file the petition because Washington County contains all of the area in both the current and proposed District. The proposed area to be added to the District includes the Marine on St. Croix Watershed Management Organization (WMO) and other areas that are not presently covered by a watershed management plan.

   Watershed management planning is required for all areas in the seven county metro area. Washington County seeks the proposed action based on their Water Governance Study. Washington County has been working on this for a number of years and has built strong support in the affected area for the proposed action. Washington County filed a similar petition with the Board six years ago that was denied because the Marine on St. Croix WMO existed and would not dissolve. Case law does not support a watershed district being expanded into an area covered by a WMO. Now the Marine on St. Croix WMO member communities have passed a joint resolution to dissolve the WMO contingent on the Board approving the proposed action. The Board's Metro Water Planning Committee presided over a public hearing on February 22, 2007. The hearing record remained open for two weeks. The hearing record contains strong support for the proposed action and no opposition. The Metro Water Planning Committee met on March 9, 2007 and, based on the record, decided to recommend the petition be approved contingent on the Marine on St. Croix WMO being dissolved per the attached draft Order. ***DECISION ITEM***

2. **Update on Army Compatible Use Buffer Program** - BWSR has been working with Camp Ripley and the Morrison SWCD to implement easements through the Army Compatible Use Buffer (ACUB) Program. Project staff presented the ACUB project to the Board at the March 23, 2005, Board meeting. Since that time, BWSR and the local SWCD's have become active partners in the ACUB project. Marty Skoglund, Camp Ripley Environmental Supervisor; Helen McLennan, Morrison SWCD Manager; and Dan Steward, BWSR Board Conservationist, will present the update. ***INFORMATION ITEM***

3. **2006 DNR Enforcement Wetland Flyovers**- In 2006, DNR Enforcement conducted a campaign to identify potential wetlands and aquatic plant management violations via flyovers of selected areas of the State. The focus was in the central and northern areas of the State. This presentation will provide background on the project and on the status of the potential violations identified. ***INFORMATION ITEM***

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4. **Guidance for Management of Forested Wetland Mitigation Sites** - The purpose of this guidance paper is to provide landowners and Local Government Units (LGUs) with guidance for determining allowable long-term vegetative management for forested wetland mitigation sites under the Wetland Conservation Act. The goal of a forested wetland mitigation project is to establish an ecologically diverse wetland that provides the functions typical of a reference wetland typical of the same type as is being impacted. Local government units or landowners responsible for achieving wetland mitigation should use the guiding principles included in this guidance in developing management plans. Forest management activities on a forested wetland mitigation site may be allowed under a Forest Management Plan recommended for approval by the Wetland Conservation Act Technical Evaluation Panel (see Minnesota Rules 8420.0240), provided the management helps achieve the goal of replacing the functions and values of a wetland that is drained or filled. It is recommended that forest management activities for forested wetland mitigation sites be described in the vegetation management plan section of the wetland replacement plan and be considered in the Wetland Replacement Plan or Wetland Banking Plan decision by the LGU. ***INFORMATION ITEM***

5. **Legislative Update** – John Jaschke – ***INFORMATION ITEM***

If you have any questions regarding the agenda, please feel free to give me a call at 651-296-0878. The meeting will adjourn about 12:30 p.m. I look forward to seeing you on March 28th!

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BOARD OF WATER AND SOIL RESOURCES
520 LAFAYETTE ROAD NORTH
2nd FLOOR CONFERENCE ROOM
ST. PAUL, MINNESOTA 55155
WEDNESDAY, MARCH 28, 2007

PRELIMINARY AGENDA

9:00 AM CALL MEETING TO ORDER

PLEDGE OF ALLEGIANCE

ADOPT AGENDA

MINUTES OF FEBRUARY 28, 2007

OPEN MIKE (10-minute agenda time, two-minute limit/person)

REPORTS

- Chair – Randy Kramer
- Executive Director – John Jaschke
- Dispute Resolution Committee – Randy Kramer
- Wetlands Committee – LuAnn Tolliver
- Grants Program & Policy Committee – Louise Smallidge
- Public Relations, Outreach & Strategic Planning Committee – Kay Cook
- Administrative Advisory Committee – Randy Kramer

COMMITTEE RECOMMENDATIONS

Northern Region Water Planning Committee

1. Final Review – Itasca County Local Water Management Plan – ***DECISION ITEM***

2. Koochiching County Priority Concerns Scoping Document – ***DECISION ITEM***

NEW BUSINESS

1. Petition for Enlargement, Name Change and Increase in Number of Managers of Carnelian-Marine Watershed District – Jim Haertel - ***DECISION ITEM***

2. Update on Army Compatible Use Buffer Program - Marty Skoglund, Camp Ripley Environmental Supervisor; Helen McLennan, Morrison SWCD Manager; and Dan Steward, BWSR Board Conservationist - ***INFORMATION ITEM***

3. 2006 DNR Enforcement Wetland Flyovers – DNR Enforcement – ***INFORMATION ITEM***

4. Guidance for Management of Forested Wetland Mitigation Sites – Dale Krystosek – ***INFORMATION ITEM***

5. Legislative Update – John Jaschke – ***INFORMATION ITEM***

AGENCY REPORTS

- Minnesota Extension Service – Jim Anderson
- Minnesota Department of Natural Resources – Mark Holsten
- Minnesota Department of Health – Dan Wilson
- Minnesota Department of Agriculture – Joe Martin
- Minnesota Pollution Control Agency – Brad Moore

ADVISORY COMMENTS

- Association of Minnesota Counties (AMC) – Annalee Garletz
- Minnesota Association of Conservation District Employees (MACDE) – Rick Reimer
- Minnesota Association of Soil and Water Conservation Districts (MASWCD) – LeAnn Buck
- Minnesota Association of Townships (MAT) – Sandy Hooker
- Minnesota Association of Watershed Districts (MAWD) – Ray Bohn
- Natural Resources Conservation Service (NRCS) – Tim Koehler
- Others

UPCOMING MEETINGS

- Next Board Meeting, April 25, 2007, St. Paul

12:30 PM **ADJOURN**

DRAFT **DRAFT** **DRAFT**

BOARD OF WATER AND SOIL RESOURCES
520 LAFAYETTE ROAD NORTH
2ND FLOOR CONFERENCE ROOM
ST. PAUL, MINNESOTA 55155
WEDNESDAY, FEBRUARY 28, 2007

BOARD MEMBERS PRESENT:
Paul Brutlag, Bob Burandt, Kay Cook, Quentin Fairbanks, Mark Holsten, DNR; Brian Kletscher, Randy Kramer, Paul Langseth, Joe Martin, MDA; Brian Napstad, Louise Smallidge, Lisa Thorvig, MPCA; Gene Tiedemann, LuAnn Tolliver, Dan Wilson, MDH.

BOARD MEMBERS ABSENT:
Dana Allen
Jim Anderson, MES

STAFF PRESENT:
Mary Jo Anderson, Dan Girolamo, John Jaschke, Kari Keating, Dale Krystosek, Sarma Straumanis, Dave Weirens, Steve Woods

OTHERS PRESENT:
Wayne Edgerton, DNR
Ray Bohn, MAWD
LeAnn Buck and Ken Pedersen, MASWCD
Tim Koehler, NRCS
Mark Lindquist, Minnesota Project
Shalini Gupta, The Izaak Walton League

Chair Kramer called the meeting to order at 9:00 a.m.

PLEDGE OF ALLEGIANCE

** 07-19 **ADOPT AGENDA** – Moved by Quentin Fairbanks, seconded by Louise Smallidge, to adopt the agenda as presented. Motion passed on a voice vote.

** 07-20 **MINUTES OF JANUARY 24, 2007** – Moved by Paul Langseth, seconded by Kay Cook, to approve the minutes of January 24, 2007, as circulated. Motion passed on a voice vote.

OPEN MIKE

- Bob Tammen from the Iron Range commented on mining issues as they relate to wetland mitigation.

- Molly Deet, volunteer with Sierra Club, commented on the northeast Minnesota wetlands mitigation strategy. She is concerned with the assumption that sites won't be found as the strategy makes allowances for mining outside of the area. She is also potentially concerned about the developing Memorandum of Understanding with the U.S. Army Corps of Engineers.

REPORTS

Chair's Report – Randy Kramer attended the EQB retreat on January 31. Chair Kramer attended several meetings at the Capitol; met with legislators, committee chairs, Bob Schroeder and Josh Gackle in the Governor's office, as well as FSA and NRCS. Chair Kramer and John Jaschke testified on the OLA report before House Environment and Natural Resources Policy Committee on January 25th, and to the Watersheds, Wetlands and Buffers Subcommittee of the House Environment and Natural Resources Policy Committee on February 20th.

Executive Director – John Jaschke reported that he's been busy meeting with numerous legislators. BWSR's budget overview is in the Senate Environment, Energy and Natural Resources Budget Division on March 5, 2007. John attended the Clean Water Cabinet meeting last week; BWSR presented the proposed drainage bill and WCA legislation was endorsed and is moving forward. John presented the final draft of the "Minnesota Watershed District Guidebook", a summary of watershed district project endeavors showing what is being done statewide. Copies will be distributed to board members when it's back from the printer. John attended the MASWCD legislative briefing meeting on February 26, 2007. John commented on the status of wetland mitigation issues noted during

the Open Mike item. BWSR is close to finalizing a memorandum of understanding with the U.S. Army Corps of Engineers. John stated that there is much more to come regarding the Wetlands Conservation Act, including forthcoming legislation.

Dispute Resolution Committee – Jim Haertel summarized the termination of the South Two River Watershed District (STRWD). The Termination Order was filed with the Secretary of State on February 8, 2007. The Stearns County Auditor received a check from the STRWD for all remaining funds of the STRWD. The Stearns County Auditor retrieved all real property and BWSR staff retrieved all STRWD records. The Stearns County Board of Commissioners will pay the remaining bills of the STRWD. When all bills have been paid, the proportionate share of remaining funds will be transferred to Morrison County.

Wetland Committee – LuAnn Tolliver reported that the Wetland Committee met yesterday at 4:00 p.m. Dave Weirens will give an overview of BWSR's proposed WCA legislation on the agenda later today. The Wetland Committee will meet again in March.

Cost-Share/Soil Conservation Committee – Louise Smallidge reported that the Committee did not meet this month.

Education Committee – Kay Cook reported that the Education Committee met last month. The Committee discussed the State Envirothon, the NEMO project, and what more the Education Committee should be doing.

Administrative Advisory Committee – Chair Kramer reported that the Administrative Advisory Committee met this morning; items will be considered later today on the agenda.

NEW BUSINESS

Northeast Minnesota Wetland Management Strategy – Dave Weirens and Dale Krystosek presented the Northeast Minnesota Wetland Management Strategy. The Strategy is a planning document intended to guide wetland mitigation in northeast Minnesota. It includes six recommended actions, of which three could involve BWSR. The Wetland Committee reviewed the Strategy on January 24, 2007. Dave presented a resolution and the two Wetland Committee recommendations: 1) Endorse the recommendations of the Northeastern Minnesota Wetland Management Strategy; and, 2) It is appropriate for BWSR to be the lead state agency for implementing elements of the Strategy. John Jaschke clarified that DNR is the state agency responsible for mining permits and

reclamation; not BWSR. Brian Napstad suggested that the siting element of the Strategy be coordinated in conjunction with LGUs.

** 07-21 Moved by Brian Napstad, seconded by Paul Langseth, to adopt the resolution to 1) accept the recommendations of the Northeast Minnesota Wetland Management Strategy; and 2) BWSR continue to be the lead state agency for implementing select recommended actions contingent on sufficient funding. Motion passed on a voice vote.

Local Water Management Challenge Grants – Dave Weirens explained that the Legislative Citizens Commission on Minnesota Resources (LCCMR) is recommending, and the Legislature may pass, an appropriation of $350,000 for Local Water Management Challenge Grants. Staff are requesting Board approval for "Guidelines for Applications for FY2008/09 Local Water Management Challenge Grants" and authority to request proposals from eligible local units of government. Dave distributed a fact sheet and gave an overview of the Local Water Resources Protection and Management Program and a map of Comprehensive Local Water Planning Challenge Grant Distribution for FY2006-2007. Joe Martin suggested including a filter of measurability and effectiveness for the projects. Dave stated that the grant allocations will be presented at the June Board meeting.

** 07-22 Moved by Paul Langseth, seconded by Louise Smallidge, to adopt the resolution that BWSR will solicit for FY2008-09 Local Water Management Planning Grants according to guidelines. The agencies represented on the Board will be invited to participate in the review and ranking of applications received, which will be completed prior to the June 2007 Board meeting. Discussion followed. Motion passed on a voice vote.

Office of the Legislative Auditor (OLA) Report: Status and Approach – John Jaschke reported that the OLA has presented their recommendations to both the House and Senate Environment and Natural Resources Committees. Randy stated that he commended the OLA staff; the assessment is a good learning tool, the intent of the report is to better BWSR. Steve Woods stated that BWSR used a district assessment tool in the past. Based on discussions with legislators and others, BWSR will work with legislators to develop an oversight proposal. Steve presented five local water management oversight and accountability principles. Dan Wilson commented on the measurability of quantitative outcomes and asked that this be considered in the process. It was suggested to start the measurability process at the preemptive stage. Quentin Fairbanks questioned the duplication of efforts, the need for coordination and targeted funding. Discussion followed.

Randy stated that BWSR will move forward on potential legislation consistent with these principles.

Board Retreat Follow-Up – Steve Woods reported that the information and analysis developed at the facilitated Board Retreat in November has been compiled. A recommendation to use those resources as a starting point for updating the agency's Strategic Plan has been developed. Steve presented a resolution that directs the Board's Public Relations and Outreach Committee and staff to undertake the following actions:

a) convene and engage the services of an outside facilitator;
b) develop a schedule and process plan that builds on the November workshop findings;
c) gather further input from stakeholders and other Board members, and
d) provide a preliminary draft for Board review by September 2007 and a final draft for consideration by the end of 2007.

Moved by Kay Cook, seconded by LuAnn Tolliver, to adopt the resolution as presented. Discussion followed.

** 07-23 Moved by Paul Langseth, seconded by Brian Napstad, to amend the resolution to strike: "a) convene and engage the services of an outside facilitator". Motion passed on a voice vote.

** 07-24 The amended resolution passed on a voice vote.

Chair Kramer called for a break in the meeting at 10: 25 a.m. The meeting reconvened at 10:38 a.m.

Board Committees – Chair Kramer stated some changes have been developed to expand the Committees' scope and add members. John Jaschke presented the Committee revisions. John stated that staff will notify board members when committee meetings are scheduled; the meetings will then be posted on BWSR's website. The finalized version of the Committees will be sent to board members and will be posted on the website.

Biofuels Update – Joe Martin introduced Michael Yost, Department of Agriculture, who presented the "Renewable Fuels and Minnesota". Brian Kletscher discussed the process of building ethanol plants, the agency interaction and collaboration with DNR, PCA, and MDA. Brian stated the experience of building an ethanol facility has been challenging, but very worthwhile as it results in additional jobs, and moves us toward energy goals,

and goals that can be achieved by the State of Minnesota. Joe Martin stated that the biomass and cellulosic ethanol potential impact to rural communities is great.

Mark Matuska, DNR, stated that DNR is interested in biofuels in the future. DNR, BWSR, and MDA has incentives and many opportunities to improve habitat, water quality standards, grasslands, and cropland. DNR will focus on appropriate land management strategies; reduce flooding potential; carbon credits; water quality credit trading; and cellulosic and biomass production on some public lands. Mark looks forward to working with the energy industry on future endeavors. DNR Commissioner Mark Holsten stated that Minnesota leads the nation in biofuels.

Mark Lindquist, Minnesota Project, and Shalini Gupta, Izaak Walton League, distributed "Clean Energy Minnesota" a fact sheet on developing an advanced biofuels industry in Minnesota. Mark presented "Policy Objectives in 2007", and a power point presentation on biofuels and conservation: Cellulose – the Conservation Opportunity. Mark gave an overview of HF 589/SF 480 legislation. Chair Kramer thanked Mark and Shalini for their presentation.

Legislative Update – John Jaschke briefly commented on SF749 – legislative proposal to expand BWSR membership. John met with Senator Skogen, author of the bill, and discussed the $6600 additional costs to BWSR for membership expansion. There is no House companion bill at this point.

John reported that HF 577/SF 642 the Drainage Buffer Bill will be presented today to the Senate Committee on Environment and Natural Resources. BWSR anticipates this legislation to move forward.

John stated that the refinements from the Wetland Committee are incorporated into the Wetland Conservation Act proposed legislation. Staff have met with various groups as this legislative bill is being pursued.

John stated that Board members received the "Legislative Members Directory 2007-2008" a reference handbook for information.

AGENCY REPORTS

Minnesota Pollution Control Agency (MPCA) – Lisa Thorvig reported that septic systems rules are being revised. Hearings have been scheduled for April 18 and April 20. Information on the proposed rule revisions are on the MPCA website.

Minnesota Department of Natural Resources (DNR) – Wayne Edgerton reported that bovine tuberculosis has been detected in a deer herd in northern Minnesota. DNR is working with MDA, Board of Animal Health, and Cattleman's Association on this issue. Challenge is for sharpshooters to receive permission from the landowners to be on their land. Wayne reported that it's now illegal for recreational deer feeding in that area.

Department of Health (MDH) – Dan Wilson commented on the legislative bill for the well program to enhance and support the use of geothermal heating systems, which take heating or cooling out of the ground, and is highly efficient.

Department of Agriculture (MDA) – Joe Martin stated that the legislative session is taking up most of his time at this point.

ADVISORY COMMENTS

Minnesota Association of Soil and Water Conservation Districts (MASWCD) – LeAnn Buck introduced Ken Pederson, newly elected President of MASWCD. LeAnn reported that MASWCD has comments regarding the OLA report on their website. MASWCD held their "Legislative Day" yesterday. MASWCD has a legislative bill to increase general services grants to SWCDs. MASWCD's leadership group will be going to Washington, D.C, next week to meet with various members of Congress.

Minnesota Association of Watershed Districts (MAWD) – Ray Bohn distributed copies of MAWD's response to the OLA report. MAWD also responded to the editorial in the Star Tribune regarding the report; he's not sure if it will be printed. Ray asked that the MAWD response be distributed to board members. The House Watersheds, Wetlands and Buffers Subcommittee has received MAWD's response also. Ray stated that the Drainage Work Group efforts have realized positive outcome, including the proposed legislation.

Natural Resources and Conservation Service (NRCS) – Tim Koehler reported that NRCS and BWSR have committed to contribution agreements to accelerate the Federal Farm Bill. Tim, on behalf of NRCS, thanked BWSR staff Karli Swenson and Carol Strojny for the great job on guidance and protocol for monitoring efforts. In addition, Karli and Carol helped coordinate WRP landowners on maintenance of their easements; it's good landowner interaction with that program. Tim also thanked Al Kean and Tom Wenzel for their assistance with engineering design on projects. NRCS appreciates BWSR's efforts on acceleration of programs. Tim reported that today is the last day of EQIP sign-up, $26M to be allocated to farmers/landowners. Tim stated that

BWSR made a special allocation to drought counties, NRCS committed $500,000; the funding was carried over to 2007, and then allocating $1M for that effort, good partnership to get conservation on the ground. $13M funded for WRP; with $60M in requests. Tim reported that USDA developed special projects funding at the national level earmarked for state government partnerships; hopefully Minnesota will received more funding. Chair Kramer thanked Tim for his report.

UPCOMING MEETINGS

- Next Board Meeting, March 28, 2007, St. Paul

** 07-25 Moved by Kay Cook, seconded by Paul Langseth, to adjourn the meeting at 12:55 p.m. Motion passed on a voice vote.

Respectfully submitted,

Mary Jo Anderson
Recorder

Dispute Resolution Report
March 15, 2007
by: Jim Haertel

There are presently 25 appeals pending. All of the appeals involve WCA except File 05-24. There have been two new appeals filed since the last report dated February 15, 2007.

File 07-6. This is a new appeal of a replacement plan decision in the City of Rochester. The appeal concerns the approval of a wetland replacement plan with a certain replacement site and the subsequent approval of a revised replacement plan with a different replacement site. No decision has been made on the appeal.

File 07-5. This is a new appeal of an exemption decision in Fillmore County. The appeal concerns the denial of a wetland exemption request on agricultural land enrolled in the Farm Program. No decision has been made on the appeal.

File 07-4. This is an appeal of a restoration order in Hubbard County. The appeal regards the filling of Type 2/7 wetland for an access road to a lake. No decision has been made on the appeal.

File 07-3. This is an appeal of a replacement plan decision in Traverse County. The appeal concerns the approval of a wetland replacement plan application. No decision has been made on the appeal.

File 07-2. This is an appeal of a restoration order in Stearns County. The appeal regards the filling, draining and excavation of Types 1, 2 and 3 wetlands. No decision has been made on the appeal.

File 06-43. This is an appeal of a restoration order in Morrison County. The appeal involves the placement of fill in wetland near a lake. The appeal has been placed in abeyance and the restoration order has been stayed pending field review by the Technical Evaluation Panel this spring.

File 06-28. This is an appeal of a restoration order in St. Louis County. The appeal regards the placement of fill in Type 7 wetland associated with construction of a road. The appeal has been remanded for TEP review of a wetland delineation and measurement of the wetland fill areas.

File 06-27. This is an appeal of a replacement plan decision in Otter Tail County. A permanent road was constructed in Type 6/7 wetland with a portion of it in the shoreland zone. A Restoration Order was issued and a replacement plan application was submitted

to retain the road. An LGU staff individual denied the replacement plan. The appeal has been remanded for a public hearing at the local level.

File 06-26. This is an appeal of a wetland exemption determination in Cass County. The LGU approved the wetland exemption. The TEP recommended the exemption not be approved. The activity involves the placement of drain tile in a Type 2 wetland that was previously hayed and is now a sod farm. The appeal has been accepted, a pre-hearing conference was held, a hearing before the DRC was scheduled but has been canceled while settlement discussions take place.

File 06-23. This is an appeal of a replacement plan decision in Kanabec County. The LGU denied the wetland replacement plan application. A previous denial of the same replacement plan application had been appealed, the appeal was remanded for a hearing, and now the current denial has been appealed. The appeal has been placed in abeyance pending the outcome of a lawsuit between the landowner and the county. The lawsuit concerns the county's possible noncompliance with the 60-day rule. The county prevailed in district court, however the decision has been appealed to the Court of Appeals.

File 06-20. This is an appeal of a restoration order in Carlton County. The appeal regards filling and grading in Type 2 and Type 6 wetlands for construction of an airplane hangar, airstrip extension and taxiway. The restoration order has been stayed and the appeal has been placed in abeyance pending TEP review of a wetland delineation and restoration plan.

File 06-17. This is an appeal of a replacement plan decision in the City of Montgomery in LeSueur County. The LGU denied an after-the-fact wetland replacement plan application based on a lack of sufficient reasons why the restoration could not be completed. The appeal has been remanded for further processing at the local level.

File 06-12. This is an appeal of a no-loss decision in Stearns County. It involves the same project and issues as File 06-6. After a restoration order was issued, a no-loss application was submitted by the developer and denied by the LGU. The appeal has been remanded for further technical evaluation.

File 06-6. This is an appeal of a restoration order in Stearns County. At issue are numerous wetlands impacted by filling, sedimentation, reduction of hydrology and lack of Best Management Practices associated with a residential development. The appeal has been denied in part. The Restoration Order has been affirmed in part and has been stayed in part.

File 06-5. This is an appeal of a wetland boundary and type decision in the City of Hermantown in St. Louis County. The appeal concerns the denial of a wetland delineation. There are issues regarding the soils and vegetation in a disturbed area. The area has been disturbed by wetland filling and a cease and desist order has been issued to the developer. The appeal has been remanded for further processing by the LGU.

File 06-4. This is an appeal of a restoration order in Carlton County. At issue is the unauthorized placement of fill in wetland for a roadway. The appeal is in abeyance pending completion of a wetland delineation during the growing season.

File 06-2. This is an appeal of a restoration order in Mille Lacs County. At issue is the unauthorized placement of fill in wetland for construction of a road. Also, unstable steep slopes exist along the edge of the fill in wetland. The appeal is in abeyance pending further technical work during the growing season.

File 06-1. This is an appeal of a replacement plan approval in Itasca County. The appeal contends that sequencing was not followed. The TEP recommended denial on a 3:1 vote. The SWCD approval was on a 3:2 vote. The application sought wetland filling for three outbuildings and lake access. The appeal has been accepted and is in abeyance pending settlement discussions.

File 05-26. This is an appeal of a replacement plan decision in Crow Wing County. The appeal concerns the denial of a wetland replacement plan application. The application was denied because there was no hardship to support approval. Upon inspection it appears a decision was made to deny a variance, however it is likely no WCA decision was made. The appeal has been accepted and is in abeyance pending settlement discussions.

File 05-24. This is an appeal, actually three appeals, of the Bois de Sioux Watershed District compensation to landowners related to a project. The appeal has been held in abeyance pending settlement discussions, was starting to be move forward for a hearing before the DRC, and now is in settlement discussions.

File 05-20. This is an appeal of a replacement plan decision in Cokato, Wright County. The decision approved the filling of a 0.2 acre Type 2 wetland on a residential lot for construction of a residence. There is a question about the alternatives proposed for sequencing. Also, no TEP was held. The appeal has been remanded for a TEP to be held and sequencing to be addressed.

File 05-17. This is an appeal of a replacement plan decision in the City of Holdingford in Stearns County. At issue is the denial of a replacement plan application relating to a residential development. Wetland impacts of 0.7 acres were proposed for construction of a road and multi-use trail. The TEP recommended approval of the application. The LGU denied the application on finding the development could proceed without wetland impacts. The Corps issued a permit for the project. The appeal has been accepted and is in abeyance pending settlement discussions.

File 05-1. This is an appeal of a replacement plan decision by the Rice Creek Watershed District. The District previously made a decision that was appealed which resulted in a remand for an expanded TEP. Now there is an appeal of the decision made under remand since the decision differed from the TEP report. At issue is a wetland delineation and the Comprehensive Wetland Protection and Management Plan that BWSR approved. After a

hearing before the DRC, the board remanded the matter for a new wetland delineation and for submission on an updated, complete replacement plan application.
File 04-26. This is an appeal of a restoration order in Spring Lake Township, Scott County. At issue is the placement of 4,300 feet of fill in a wetland for a driveway. The approved plat showed access to the lot without wetland impacts. The appeal is in abeyance pending a decision on a replacement plan application.

File 04-23. This is an appeal of a forestry exemption decision in Kittson County. Unpermitted fill was placed in a Type 7 wetland for a road. A Cease and Desist Order was issued. Additional filling has recently occurred in violation of the CDO. Corps and DNR violations also exist. The appeal has been accepted and is in abeyance pending completion of a wetland delineation and submittal of a replacement plan application.

File 04-15. This is an appeal of a wetland boundary and type decision in Anoka County. At issue is the decision by the Rice Creek Watershed District to classify a site as effectively drained. Previously a wetland delineation report identified most of the site as wetland. The appeal has been remanded for a technical evaluation panel to meet onsite. The appeal remains in abeyance under the remand.

COMMITTEE RECOMMENDATIONS

Northern Region Water Planning Committee

1. Final Review – Itasca County Local Water Management Plan – ***DECISION ITEM***

2. Koochiching County Priority Concerns Scoping Document – ***DECISION ITEM***

DATE: February 28, 2007

TO: BWSR North Region Water Plan Review Subcommittee

FROM: Dan Steward, BWSR Board Conservationist

SUBJECT: Review of Itasca County Final Local Water Management Plan (LWMP)

On June 5, 2006, BWSR and other state review agencies received the Priority Concerns Scoping Document (PCSD) from Itasca County. The North Region Review Subcommittee (Committee) met August 16, 2006, to discuss state review comments, the content of the PCSD, and recommendations for the final plan.

BWSR's August 24, 2006, letter pursuant to M.S.section 103B.313, subdivision 5, communicated the State's official comments pertaining to the priority concerns chosen by Itasca County. BWSR commended Itasca County for the process used to select the concerns and did not require any changes to the PCSD.

Itasca County's six priority concerns are:

1. Surface Water Quality
2. Land Use and Development
3. Ground Water Quality
4. Septic Systems
5. Fish and Wildlife Habitat
6. Education

Itasca County held the required public hearing on December 19, 2006, as part of a regular County Board meeting. The final draft of the updated Itasca County Water Plan was submitted on December 22, 2006, for review by state agencies. Agency comments were due to Ron Shelito by January 29, 2007.

The duration of the LWP is from March 2007 to March 2017.

The following agencies provided these comments:

- On January 23, 2007, the Minnesota Pollution Control Agency, in its comments, stated that the Plan does not violate any statutory or rule requirements administered by the MPCA, and recommended BWSR approve the Plan as submitted. MPCA encouraged the county to visit its Environmental Data access web site to review water quality monitoring information.

- On January 30, 2007, the Minnesota Department of Agriculture, it its comments, stated that the Plan does not violate any statutory or rule requirements administered by the MDA, and recommended BWSR approve the Plan as submitted.

- On January 30, 2007, the Minnesota Department of Health, in its comments, stated that the Plan does not violate any statutory or rule requirements administered by the MDH, and recommended BWSR approve the Plan as submitted. The MDH also commended Itasca County for its recognition of the importance of protecting groundwater quality and quantity.

- On February 22, 2007, the Minnesota Department of Natural Resources, in its comments, stated that the Plan does not violate any statutory or rule requirements administered by the DNR, and recommended BWSR approve the Plan as submitted. The DNR also submitted comments related to forest practices and timber harvest and affects on water quality and wildlife habitat, and the county's shallow lakes.

- No comments were received from the Minnesota Environmental Quality Board.

Jim Gustafson, the Itasca County Water Planner, and other county representatives will attend the March 12th North Region Water Plan Review Committee meeting in Grand Rapids, and make a short presentation on the final plan.

After reviewing the final plan, I find it contains all requirements of M.S. 103B.314 for content, and is consistent with the previously reviewed PCSD. The state agencies have recommended approval. I recommend the subcommittee approve the Itasca County Local Water Management Plan at their March 12th meeting prior to Board approval on March 28, 2007. Itasca County would then adopt the Plan in April, 2007.

Itasca County Local Water Management Plan

I. EXECUTIVE SUMMARY

The purpose of this plan is to address the water related issues across the entire county, regardless of jurisdictional, political, municipal or watershed boundaries. This plan should provide a means of consistency across the county and is not inconsistent with other state, regional or local planning processes. It will look at ground and surface water and those activities that may influence water quality or quantity. The plan will look specifically at the top six priority concerns that were developed through our scoping process. The concerns that were identified are addressed as county wide, however, when necessary or applicable they will be implemented on a watershed wide basis. This plan was written under the delegated authority of the Itasca County Board of Commissioners and is designed to cover the period from March of 2007 to March of 2017, with a review and update of the goals and implementation strategy scheduled for 2012. Much progress has been made over the last two decades to protect and restore water resources, and it is the intent of the county water plan to actively continue these efforts.

County Background

Itasca County is the third largest county in the state of Minnesota. It is located in the northern part of the Central Lakes Region. Dominant land uses are forest management, recreation, and private and corporate development. The county seat is located in the city of Grand Rapids.

Itasca County is very large and contains an abundance of surface water. There are over 1,000 lakes in the county, with about 950 lakes over ten acres in size, covering almost 9 percent (170,000 acres) of the total area of the county. Over 1,853 miles of streams drain the county's watersheds, including 119 miles of the Mississippi and 71 miles of the Big Fork Rivers. Itasca County is comprised of portions of 6 major watersheds the Mississippi River (Headwaters), Mississippi River (Grand Rapids), Upper and Lower Red Lake, Little Fork River, Big Fork River and St.Louis Rivers. There are 2,630 miles of lakeshore within the County; in comparison the state of California has just over 1,100 miles of coastline. Wetlands are present on over 550,000 acres, about one-third of the total land surface. Approximately 95 percent of pre-settlement wetlands still remain.

Surface and ground water quality and land use issues relating to surface water have become increasingly important to the people who live and recreate in Itasca County. Development, industry, agriculture, forestry and lake use issues are the primary factors that can affect water quality, fish and wildlife habitat, recreation and aesthetics.

The population of the county has increased substantially during the past ten years. From 1980 to 1990, the decrease in mining activity was a primary reason for a decline in population from 43,069 to 40,863. According to the most recent federal census, the population of Itasca County had increased to 44,242 by the year 2004, an increase of almost 8 percent. The population is projected to increase 8 percent for the period of 2000 to 2010. The population is expected to grow by 22 percent by 2030.

Other nearby counties, notably Aitkin and Cass, have seen even greater increases in population. Much of the increase in these three counties has been attributed to new shoreland development and conversion of seasonal to permanent residences, especially in shoreland areas. Shoreland values on some of the county's more desirable lakes have increased dramatically in the last ten years. This trend is expected to affect Itasca County as well.

Itasca County Comprehensive Land Use Plan, 2000

A major effort to develop a comprehensive land use plan was initiated by the county in 1998. Following many public meetings, reviews and revisions by a large citizen's committee and technical advisory panel, the Itasca County Board of Commissioners adopted the plan on May 23, 2000.

Many existing plans, including the county water plan, were incorporated into the county comprehensive plan. Because of the detailed attention that was paid to water resource issues in the county comprehensive plan, many of the "Implementation Tools" in the comprehensive plan are updated versions of "Action Items" of the 1995 update of the county Water Plan. It is the recommendation of the Itasca County Water Plan Implementation Committee (WPIC) that the "Implementation Tools" listed in the year 2000 County Comprehensive Land Use Plan again be considered in the 2007 Itasca County Local Water Plan Update. The public meetings conducted by WPIC have confirmed this decision. A summary of Implementation Tools considered in the water plan is listed in Attachment A.

Water Plan Strategies

Water quality monitoring has been a primary focus of the Itasca County Water Plan since its beginning in 1990. The original water plan was adopted in 1990. It was updated in 1996 and again in 2002. This update will be the fourth revision and will be completed in 2007.

Between 1990 and 2006, detailed one-year water quality assessments were completed by the county and volunteers on more than 62 lakes and 3 major rivers. Between 2000 and 2006, an additional 73 lakes have had their water quality surveyed. Many of these lakes are small to medium in size. A summary of the lake and river data shows generally very high water quality. This information has provided an important base for lake and river management decisions, such as development, land use and fisheries projects. Collection of surface water data will continue to be a priority area of focus for the county water plan.

A major goal of the water plan will be to assist local units of government, landowners and other interested groups to make wise land and water use decisions regarding potential impacts to water quality as a result of land use changes. In conjunction with water quality and lake/watershed information, computer modeling is being used and developed to make predictions and answer questions regarding the impact to surface waters from land and water use changes.

Through the continued monitoring and data collection on Itasca County's surface waters, the county will continue to strengthen its lake and river management program. In the early 1990s, the focus was on large watershed studies of impacted lakes, including Lake Winnibigoshish, Cass Lake and Trout Lake. Proactive lake management was accelerated in the late 1990s with the inclusion of Deer Lake as one of five lakes in the state's pilot "Lake Sustainability" program. Following that project, in 2001, nine of the county's 27 lake associations have completed lake management plans that also incorporates leadership training, through the "Healthy Lakes" program of the McKnight Foundation.

Shoreland and watershed management activities will focus on the most significant factors that affect lake conditions. These are primarily septic systems, near-shore land use activities, development, silvicultural practices, erosion control and water levels.

More groundwater-related projects have been completed between 2001 and 2006 than in the first years of county water plan implementation. A joint Minnesota Geological Survey (MGS), Minnesota Department of Health, Mississippi Headwaters Board and Itasca County well location verification survey has been incorporated into the new County Well Index and includes detailed well log information. The Minnesota Department of Natural Resources is heading up additional groundwater studies on the Mesabi Iron Range. Specific groundwater-related studies have also been undertaken to increase understanding of groundwater-surface water quality.

Beginning in late 2001 and completed in 2004, the surficial geology and gravel resources of Itasca County was mapped. The three-year project is a combined effort of the county highway department, MDNR and MGS. The primary goal of the project was to delineate areas favorable for road building material; however, another major benefit of the mapping will be significantly increased knowledge of groundwater resources.

In June 2003 Bemidji State University (BSU) in coordination with the Mississippi Headwaters Board completed a study, funded by the Legislative Commission on Minnesota Resources, on the relationship between property and water titled "Lakeshore Property Values and Water Quality". The major finding of this research shows that water clarity significantly affects prices paid for lakeshore properties located on Minnesota Lakes within the Mississippi Headwaters Board region, and that the relationship is positive. Their recommendations state that: 1) changes in lake water clarity will result in millions of dollars in property values—lost or gained—in this lake region of Minnesota and 2) for economic reasons alone—not to mention the ecological health and social benefits at stake—it is important to protect the water quality of all Minnesota's lakes.

Table 1.

PRIORITY CONCERNS
Summary of Actions to be Taken

Surface Water Quality
A. Update and expand data collection and monitoring by stabilizing funding through the 1000 Lakes and Rivers Fund and other grants B. Identify point and non-point sources of pollution from existing and future projects C. Support the Lake Sensitivity Project by providing data and begin implementation within three years D. Coordinate with cities on storm water management plans
Land Use and Development
A. Develop a proactive approach to major developments B. Promote the enforcement of current shoreland ordinances C. Encourage the use of Central Lakes or other Alternative Shoreland Standards D. Promote mitigation for improved water quality E. Promote riparian buffer zones F. Discourage the use of variances in shoreland impact zones and wetlands G. Support the Lake Sensitivity Project by providing data and begin implementation within three years H. Forest Management Practices
Ground Water Quality
A. Support sealing of abandoned wells B. Encourage municipal wellhead protection plans C. Develop a ground water quality and quantity database D. Increase awareness and education
Septic Systems
A. Encourage system inspections, awareness, and education B. Promote current ordinance enforcement C. Identify and increase funding sources for upgrades, including cluster systems D. Promote incentives for upgrading old systems
Fish and Wildlife Habitat
A. Promote the importance and value of fish and wildlife habitat to our residents and recreational users and to the economic viability of the county B. Increase monitoring C. Promote riparian buffer zones
Education
A. Develop presentations and/or brochures that focus on providing solutions and the positive aspects of being good land and water stewards B. Promote the development of new lake and watershed organizations

Minnesota Board of Water and Soil Resources
520 Lafayette Road North
St. Paul, Minnesota 55155

In the Matter of Reviewing the Local Water Management Plan Update for Itasca County (Minnesota Statutes , Section 103B.311, Subdivision 4 and Section 103B.315, Subdivision 5.)

ORDER APPROVING LOCAL WATER MANAGEMENT PLAN UPDATE

Whereas, the Itasca County Board of Commissioners submitted a Local Water Management Plan Update (Plan Update) to the Board on December 22, 2006, pursuant to M.S. Section 103B.315, Subd. 5, and

Whereas, the Board has completed its review of the Plan Update;

Now Therefore, the Board hereby makes the following Findings of Fact, Conclusions, and Order:

FINDINGS OF FACT

1) On June 5, 2006, the Minnesota Board of Water and Soil Resources received a Priority Concerns Scoping Document from Itasca County, pursuant to M.S. Section 103B.312.

2) On August 16, 2006, the BWSR North Region Water Plan Review Committee met with representatives of Itasca County to review the Priority Concerns Scoping Document.

3) On August 24, 2006, the Board of Water and Soil Resources approved official comments on the Itasca County Priority Concerns Scoping Document, which were mailed to the county on August 24, 2006.

4) The priority concerns, in no particular order of importance, the local water management plan addresses include:

- Surface Water Quality
- Land Use and Development
- Ground Water Quality
- Septic Systems
- Fish and Wildlife Habitat
- Education

5) On December 22, 2006, the BWSR received the **Itasca** County Plan Update, a record of the public hearing, and copies of all written comments pertaining to the plan update to the Board for final State review pursuant to M.S. Section 103B.315, Subd. 5.

6) On March 12, 2007, the North Region Water Plan Review Committee of the board reviewed the recommendation of the state review agencies regarding final approval of the Itasca County Plan Update. Recommendations of the state review agencies were:

A) Minnesota Pollution Control Agency: recommended approval;
B) Minnesota Department of Agriculture: recommended approval;
C) Minnesota Department of Health: recommended approval;
D) Minnesota Department of Natural Resources: recommended approval;
E) Minnesota Board of Water and Soil Resources staff: recommended approval;
F) Board Water Plan Review Committee Meeting recommended approval.

7) This update will be in effect for a ten year period until March 28, 2117, with the goals, objectives and actions being updated in five years.

CONCLUSIONS

1. All relevant requirements of law have been fulfilled. The Board has proper jurisdiction in the matter of approving a Local Water Management Plan Update of Itasca County pursuant to Minnesota Statutes, 103B.315, Subd. 5.

2. The Itasca County Plan Update attached to this Order states water and water-related problems within the county; possible solutions; general goals, objectives, and actions of the county; and an implementation program. The attached Plan Update is in conformance with the requirements of M.S. Section 103B.301.

ORDER

The Board hereby approves the attached update of the Itasca County Local Water Management Plan – March 28, 2007 to March 28, 2017.

Dated at St Paul, Minnesota, this twenty-eighth day of March 2007.

MINNESOTA BOARD OF WATER AND SOIL RESOURCES

_____

BY: Randy Kramer, Chair

Minnesota Board of Water & Soil Resources

March 28, 2007

Itasca County Commissioners
123 4th Street N.E.
Grand Rapids, Mn. 55744

Dear Itasca County Commissioners:

The Minnesota Board of Water and Soil Resources (BWSR) is pleased to inform you it approved Itasca County's revised Local Water Management Plan at its regular meeting held on March 28, 2007. Attached is the signed Finding of Fact, Conclusion, and Order that documents approval of the plan and indicates it meets all relevant requirements of law and rule. This update of the Itasca County Local Water Management Plan is effective for a ten-year period until March 28, 2017, with the Goals, Objectives, and Action Items amended by March 28, 2012.

The county must adopt and begin implementing the plan within 120 days (1990m M. S. 103B.08 Subd. 6, Adoption and Implementation). An example of a resolution adopting the plan can be found on BWSR's website at http://www.bwsr.state.mn.us/watermgmt/guidance/Adoption.doc. Upon adoption, please forward the resolution to your Board Conservationist.

The Itasca Soil and Water Conservation District staff and water plan advisory members are to be commended for writing a plan that clearly presents the county's water management goals, actions and priorities. With continued implementation of your water plan the protection and management of Itasca County's water resources will be greatly enhanced. BWSR looks forward to working with you as you implement this Plan and document its outcomes.

Sincerely,

Randy Kramer, Chair

Enclosures
Cc: Jim Gustafson, County Water Plan Coordinator
File copy

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Date: March 16, 2007

To: BWSR Board

From: Jeff Hrubes, B.C. Bemidji

Subject: Approval of Koochiching County PCSD

Brief Process Overview

The Koochiching County Board of Commissioners requested a two-year extension of their Comprehensive Water Management Plan on April 27th of 2005. The Board granted this extension on June 22nd of 2005. The extension is due to expire on July 26, 2007. The reason for the extension was due to staff shortages in the Environmental Services office and reorganization of the SWCD.

Starting in October of 2005, Koochiching County has actively sought input for their water plan update. BWSR has been in close contact with Koochiching County throughout the update process. A water management advisory committee was convened and reviewed the current water management plan as well as the Rainy River Basin plan to identify Priority concerns for the next Comprehensive Water Management Plan. Notification of the plan update was provided to state agencies, adjoining counties and SWCDs, cities and the Province of Ontario.

In January 2007, BWSR informed the state agencies that comments on the proposed Koochiching County PCSD were requested by February 9th, 2007. Priority Concerns input comments were received from MDH, MDA, DNR, PCA, and the BWSR.

Priority concern input from the state agencies is summarized as follows:

DNR: Promote naturalized shoreline and the alternative standards for shoreline development; provide information about the hazards of using surface waters for drinking and provide safe treatment options and alternatives; follow zoning and shoreland ordinances in riparian areas to protect the shore impact zone.

MPCA: Recommended that County identify the priority that the county places on impaired waters that are listed for the County and provided a list of waters impaired for Mercury; Koochiching County should begin to implement a county-wide ISTS program in 2007 and prepare for proposed SSTS rule changes for the 2008 construction season.

MDH: Develop and implement a comprehensive source water protection plan as a component of a broader, county-wide resource/land use management plan as several resorts and the city of International Falls rely on Rainy Lake for their drinking water supply; Consider wellhead protection areas when making land use decisions within the county.

MDA: Approves the Priority Concerns identified and identifies the process as "commendable"

BWSR: Concentrate private lands forest management along shoreline areas and with small-acreage private landowners: devote adequate resources to allow administration of existing ordinances and delivery of technical assistance; periodically review ordinances and delivery systems to assess their adequacy; Ensure BMPs for erosion and sediment control are applied during construction activities, road management and as part of stormwater management, especially in shoreland areas and concentrating on the Little Fork River, which is listed as impaired due to sedimentation.

Personal communication from the Province of Ontario commended the actions identified in the PCSD, and had some suggestions regarding format. The Canadian Department of Fisheries and Oceans requested information on the private forest stewardship plans identified in the PCSD.

Priority Concerns chosen by the County

The Koochiching County water management task force has identified six priority concerns:

1) Erosion
2) Individual Sewage Treatment Systems
3) Education
4) Monitoring
5) Water Quality
6) Forestry

I have reviewed the PCSD and it meets the state requirements. The concerns received from the various state agencies can be incorporated into the selected Priority Concerns and woven into objectives and action items of the Comprehensive Local Water Management Plan that will follow the PCSD. Koochiching County has been working closely with the MPCA to administer the requirements of Minnesota Rule Chapter 7080 even though the County has not formally adopted an ordinance. The Water Management Task Force has identified this requirement and discussed it at length. The draft objectives for implementing the Comprehensive Local Water Management Plan identify ordinance adoption as an action to be completed.

KOOCHICHING COUNTY
WATER MANAGEMENT PLAN 2007 – 2017
PRIORITY CONCERNS SCOPING DOCUMENT

INTRODUCTION

County Primer

Koochiching County has generally seen a decline in population since 1960. It is projected by the State of Minnesota to continue to decline in population through the life of this plan (see Table 1).

Table 1. 1940 to 2020 Koochiching County Population

1940	1950	1960	1970	1980	1990	2000	2010	2020
16,930	16,910	18,190	17,131	17,571	16,299	14,355	13,970	13,580

Rates of population decline roughly correspond to the number of jobs at the paper mill. This is because the paper mill has about 25 percent of the total jobs in the county. It is hoped that increases in tourist-oriented jobs, location-independent jobs and other miscellaneous types of jobs might combine to give the population a bit of a boost rather than a consistent decline.

Table 2 shows the decline in population between 1990 and 2000 occurred in the cities and not in the unincorporated portion of the county. It is generally believed the 2,252 decline in International Falls is overstated. The 1990 Census counted many people as permanent residents when, in fact they were "temporary" residents working at the mill from 1989 to 1991. When they moved, International Falls' population declined and this decline was reflected in the year 2000 Census.

Lake and riverfront property attract new construction and it is along Rainy Lake, and the Little Fork, Big Fork and Rainy Rivers, that most of the county's growth is occurring. New construction of seasonal and retirement housing could accelerate as the Hibbing – Grand Rapids – Bemidji tier continues to fill up, making Koochiching County more attractive for development.

Table 2. 1990 and 2000 Cities / County Population
(source: U.S. Bureau of the Census)

Jurisdiction	Population		
	1990	2000	Change
Big Falls	341	264	-77
International Falls	8,325	6,073	-2,252
Littlefork	838	680	-158
Mizpah	100	78	-22
Northome	283	230	-53
Ranier	199	188	-11
Subtotal Cites	**10,086**	**7,513**	**-2,573**
Unincorporated	**6,213**	**6,842**	**629**
Total County	**16,299**	**14,355**	**-1,944**

The dominant land use of Koochiching County is managed forest. Managed forest easily takes up about 75 percent of the county. It is important to retain long term, sustainable forests, managed both for economic production and environmental values. Agriculture plays an important land use role even though total production has declined over the years. Other land uses include urban and rural residential development. Urban development located in the cities is declining while rural residential development on the lake and rivers is increasing at a modest pace.

Water Plan Information

The Local Governmental Unit (LGU) responsible for the local Water Management Plan (WMP) is the Koochiching County Environmental Services Department. More intimately involved in technical administration and implementation of the WMP is the Koochiching County Soil and Water Conservation District. These two entities work hand-in-glove to fulfill the county's local responsibility for WMP activities.

The original WMP was adopted in early 1995. The second, and most recent update, was adopted July 27, 2000. Progress on this WMP was delayed due to staff overload and the Board of Water and Soil Resources (BWSR) agreed to extend the deadline to July 27, 2007. It is Koochiching County's intent to adopt the WMP, 2007 – 2017 by July 27, 2007.

PRIORITY CONCERNS FOR THE 2007 – 2017 PLAN

All priority concerns point in one direction: water quality. Maintaining or enhancing existing water quality is the overriding goal of all priority concerns. The six priority concerns identified in this report attempt to disaggregate the concern for water quality into somewhat logical and discrete categories. Even at that they are overlapping but they do offer a focus from which to derive goals, strategies and implementation measures. The six priority concerns are:

1. Erosion
2. Individual Sewage Treatment Systems
3. Education
4. Monitoring
5. Water Quality
6. Forestry

These concerns were developed by the WMPAC.

Erosion

Erosion is one of the key contributors to poor water quality. It is a concern for Rainy Lake and for the three major rivers in the county, Rainy, Big Fork and Little Fork. It is also a concern for all the smaller rivers and lakes.

This Plan will support:

- cost share for erosion control on private land
- technical assistance to property owners is provided by the Soil and Water Conservation District (SWCD), the Natural Resources Conservation Service (NRCS), the Department of Natural Resources (DNR), and the Minnesota Pollution Control Agency (MPCA)
- Best Management Practices for agricultural operations
- Forest Resources Council Guidelines for forestry management
- study of the Little Fork River "impaired water" due to turbidity
- the Little Fork River / Big Fork River paired river study
- increased emphasis on shoreland protection by encouraging native vegetation and discouraging lawns up to the shoreline
- implementation of National Pollution Discharge Elimination Standards (NPDES)
- consider use of NEMO (Nonpoint Education for Municipal Officials) to determine cumulative impacts of runoff due to development.

Individual Sewage Treatment Systems (ISTS)

ISTS makes up a separate category because there are several grant programs and major activities that fit under this category. It is also generally acknowledged that faulty septic systems constitute the greatest manmade threat to water

quality. With the enactment of the Clean Water Act in 1973, point sources of pollution were a major problem 30 – 40 years ago but are now under strict permit requirements. Nonpoint sources, such as ISTS, now constitute the greatest threat.

- now that Jackfish Bay sewer is under construction, direct major attention to the rest of Rainy Lake from Tilson Bay to Dove Island, and also Rainy Lake's islands
- this plan supports adoption of a local ISTS ordinance
- implement a Water Quality Cooperative, or other administrative structure, to be responsible for maintenance, repair and construction of new ISTS
- do a septic system compliance inventory
- support the development of Performance Standards for ISTS which would for a wide range of types of ISTS and for having a range of effluent quality standards to apply depending on an area's remoteness from surface water
- focus attention on both specific, localized problem areas and on issues affecting the whole county.

The Board of Commissioners supports the extension of centralized sewer east to Dove Island. This may or may not be feasible. If not, cluster systems and performance standards should be implemented.

Education/Collaboration

Education is a key component of this new Water Management Plan. We all need to be educated about water. It is well known that Minnesotans cherish their water. They want to know how to maintain or enhance their water fronts, their surface water and their groundwater. Hopefully, the centerpiece of education about water in Koochiching County will be Rainy River Community College's Water Resources Center (WRC). There, all that is known about Rainy River Basin water quality may be studied, stored and retrieved. The WRC will be an international center absorbing information from both Minnesota and Canadian sources. It is important to note that 65 percent of the Rainy River Watershed is in Ontario. Collaboration between Minnesota and Ontario is fundamentally important to protection of the Rainy Basin's water quality.

- Seeking funding for the WRC to further its principal objectives to
  a) monitor the Basin's water quality,
  b) manage collected data,
  c) disseminate collected data in informational reports,
  d) support citizen-based water quality programs such as River Watch
- emphasize education over regulation
- prepare informational brochures on groundwater, water quality monitoring, shoreland vegetation and others
- encourage MN DNR, MPCA, BWSR, Dept. of Health, Voyageurs National Park, Ontario Ministry of Natural Resources and Ontario Office of the

Environment, Ontario Ministry of Oceans and Fisheries, Rainy River First Nations to disseminate informational reports, brochures and other educational materials
- convene the Water Management Plan Advisory Committee at least one time each year to review progress on implementing the WMP 2007 – 2017.

Monitoring

Monitoring is important because it requires the active pursuit of information to develop a deeper understanding of the water resource. Generally, water quality in the Rainy Basin is considered "good" as compared to nationally accepted water quality measurement standards and to other geographic areas in Minnesota. There is information, enough to draw conclusions about the general quality of Koochiching County waters. But no body of water, except for the Big Fork River, has been systematically studied to the point where a baseline has been established. The Big Fork River has been systematically monitored by the Big Fork and Littlefork High Schools and guided by volunteer expert, Richard Lacher. The WMP will seek to expand water quality monitoring efforts.

- continue water quality monitoring of the Big Fork River
- create systematic water quality monitoring programs for Rainy River, Little Fork River, Rapid River, Rat Root River and Rainy Lake in cooperation with the Water Resources Center
- encourage citizen water quality efforts
- support funding of a Volunteer Water Monitoring Coordinator position at Rainy River Community College
- seek funding for surface water studies
- do inventories, as a form of monitoring, of wells in Koochiching County and of unused, unsealed wells
- encourage high schools to commit to doing long term water quality monitoring consistent with MPCA requirements, in cooperation with the Water Resources Center
- establish water quality baselines for Rainy Lake, Rainy River and the Little Fork River
- support studies of exotic species on Rainy Lake and other bodies of water as appropriate
- support studies of cyno-bacteria (blue green algae) toxicity in Rainy Lake
- rely on Rainy Lake's status as an Outstanding Resource Value Water (ORVW) to justify funding of studies and programs designed to enhance Rainy Lake's water quality.

Protection of Water Quality

Protection of water quality refers mostly to impacts of construction on water quality. Most construction projects in Koochiching County have the potential to affect wetlands. Wetlands are more thoroughly addressed in the Koochiching

County Wetland Flexibility Plan. The WMP will address Priority Concerns that are particularly related to impacts associated with man-made development projects.

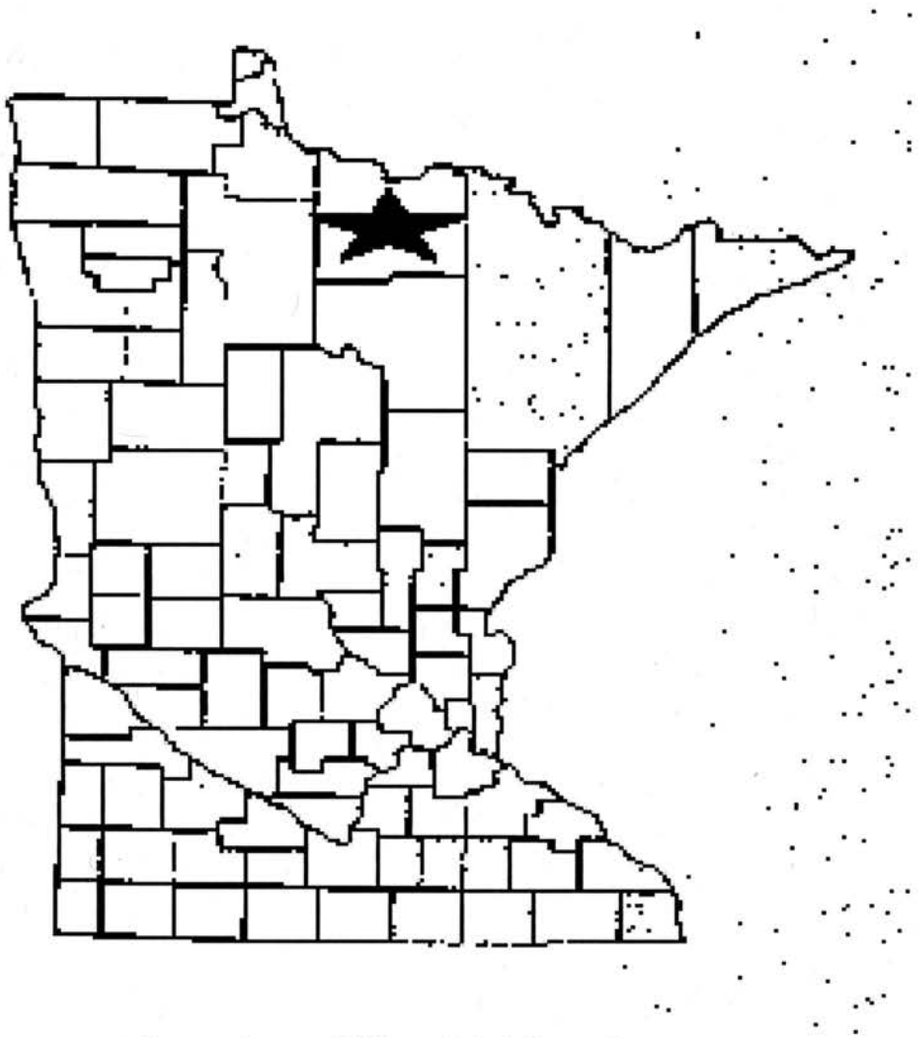
- promote planned, environmentally sensitive development in Koochiching County, designed to ensure good water quality
- preserve and enhance native vegetation on shoreland
- seek funding for wetland restoration where appropriate
- require site constraints analysis prior to designing residential or commercial/industrial projects
- seek continued State support of Koochiching County's Wetland Flexibility Plan
- insist that one size fits all is not appropriate to wetland mitigation in Minnesota
- achieve flexibility in siting wetland replacement by allowing replacement for Koochiching County projects anywhere in Minnesota
- do not require wetland mitigation be the same type of wetland as the type being affected
- avoid adverse impacts on water quality from aggregate mining and quarrying
- assist farmers in manure management
- encourage frequent use of the Technical Evaluation Panel to evaluate projects that will affect wetlands
- continue to have the SWCD provide technical assistance to Koochiching County cities and property owners
- consider setting local thresholds for water quality that are stricter than national or state standards

Forestry

Forestry is a key component of the Soil and Water Conservation District's (SWCD) work program. Since this Water Management Plan will be used as a basis for SWCD's actions, forestry is included in the Plan even though some of its components are not directly pertinent to water management.

This Plan will support:

- preparation by SWCD of Forest Stewardship Plans for private property owners
- distribution of trees throughout the county in SWCD's tree sales program
- participation in teaching forestry management educational classes at Rainy River Community College
- collaboration with federal and state agencies and the private sector in helping to assure Koochiching County has healthy, productive and sustainable forests.



Location of Koochiching County

County Seat: International Falls
Size: ~ 2,032,000 Acres
~ 1,381,000 Acres of Wetlands
90% of County is classified as forest
Public Land Ownership ~ 1,490,000 acres

Minnesota Board of Water & Soil Resources

March 28, 2007

Koochiching Co. County Commissioners
C/O Richard Lehtinen, Koochiching County P&Z
715 4th St.
International Falls, MN 56649

RE: Official Comments pertaining to the State Review of the Koochiching County Priority Concerns Scoping Document.

Dear Koochiching County Commissioners:

Pursuant to M.S. section 103B.313, subdivision 5, this letter communicates the State's official comments pertaining to the priority concerns Koochiching County has chosen to address in the update of their Comprehensive Local Water Management Plan. The Board of Water and Soil Resources, along with the state review agencies, received the Koochiching County Priority Concerns Scoping Document (PSCD) on January 15th, 2007.

The Koochiching County Water Management Advisory Committee will address the following general areas:

1. Erosion
2. Individual Sewage Treatment Systems
3. Education
4. Monitoring
5. Water Quality
6. Forestry

Comments were received from the Minnesota Department of Health, Department of, Agriculture, Department of Natural Resources, Pollution Control Agency and Board of Water and Soil Resources. The comments are summarized as follows:

DNR: Promote naturalized shoreline and the alternative standards for shoreline development; provide information about the hazards of using surface waters for drinking and provide safe treatment options and alternatives; follow zoning and shoreland ordinances in riparian areas to protect the shore impact zone.

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MPCA: Recommended that County identify the priority that the county places on impaired waters that are listed for the County and provided a list of waters impaired for Mercury; Koochiching County should begin to implement a county-wide ISTS program in 2007 and prepare for proposed SSTS rule changes for the 2008 construction season. MPCA also noted that Koochiching County has not yet adopted Minnesota Rule Chapter 7080 regulating Individual Sewage Treatment Systems although they recognize that Koochiching County implements the requirements of that rule, and that the MPCA will not recommend approval of the final Local Water Management Plan until the statutory requirement of ordinance adoption is met. Koochiching County's written response to that comment recognizes the statutory requirement and identifies that a local ordinance should be ready for review by May 2007.

MDA: Approves the Priority Concerns identified and identifies the process as "commendable".

BWSR: Concentrate private lands forest management along shoreline areas and with small-acreage private landowners: devote adequate resources to allow administration of existing ordinances and delivery of technical assistance; periodically review ordinances and delivery systems to assess their adequacy; ensure BMPs for erosion and sediment control are applied during construction activities, road management and as part of stormwater management, especially in shoreland areas and concentrating on the Little Fork River, which is listed as impaired due to sedimentation.

MDH: Develop and implement a comprehensive source water protection plan as a component of a broader, county-wide resource/land use management plan as several resorts and the city of International Falls rely on Rainy Lake for their drinking water supply; consider wellhead protection areas when making land use decisions within the county.

Koochiching County acknowledged receipt of those comments as well as others from the Province of Ontario, the Canadian Department of Fisheries and Oceans and Voyageurs National Park. Koochiching County provided a written response to all comments received and incorporated suggestions that will be further developed in the Local Water Management Plan Document.

The Northern Region Water Planning Committee met on March 12, 2007, to discuss the state review agencies comments, the content of the PCSD and recommendations for the content of the final plan. The Committee recommended approval of the PCSD.

Sincerely,

Randy Kramer
Chair, Board of Water and Soil Resources

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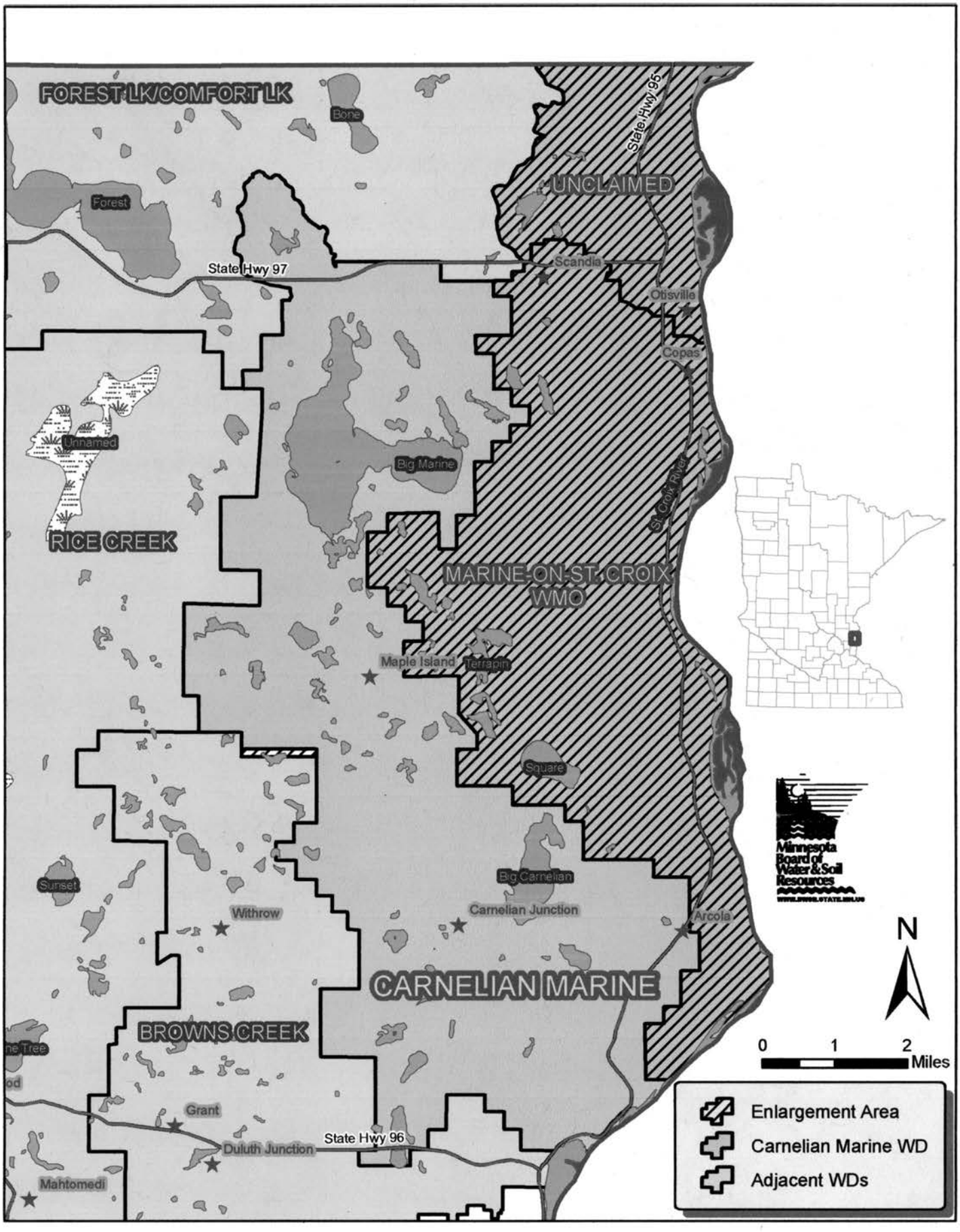
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NEW BUSINESS - *attachments*

1. Petition for Enlargement, Name Change and Increase in Number of Managers of Carnelian-Marine Watershed District – ***DECISION ITEM***

4. Guidance for Management of Forested Wetland Mitigation Sites ***INFORMATION ITEM***

Enlargement of Carnelian Marine Watershed District



Minnesota Board of Water and Soil Resources
520 Lafayette Road North
Saint Paul, Minnesota 55155

In the Matter of the Enlargement, Increase in Number of Managers and Name Change of the Carnelian-Marine Watershed District in Washington County pursuant to Minnesota Statutes §§ 103D.261 and 103D.305

ORDER ENLARGEMENT OF CARNELIAN-MARINE WATERSHED DISTRICT

Whereas, Washington County filed a Petition dated December 1, 2006 with the Board of Water and Soil Resources (Board) on December 22, 2006, to enlarge and change the name of the Carnelian-Marine Watershed District (District) pursuant to Minn. Stat. § 103D.261, and to increase the number of managers of the District pursuant to Minn. Stat. § 103D.305, and;

Whereas, the Board has completed its review of the Petition;

Now Therefore, the Board hereby makes the following Findings of Fact, Conclusions, and Order.

FINDINGS OF FACT

1. **Petition.** The Petition to enlarge, change the name and increase the number of managers of the District dated December 1, 2006, was filed by Washington County with the Board on December 22, 2006.

2. **Property Description.** The territory to be included in the watershed district, the Petitioned Area, is depicted in Exhibit A of the Petition and is an area located in Washington County entirely within the metropolitan area and is approximately 38 square miles contiguous to the Carnelian-Marine Watershed District, which includes land in the Cities of Marine on St. Croix and Scandia, and the Towns of May and Stillwater. The proposed enlarged watershed district consists of a total of 81.48 square miles, of which 27.33 square miles are located within the City of Scandia, 4.18 square miles are located within the City of Marine on St. Croix, 0.74 square miles are located within the City of Hugo, 34.58 square miles are located

within the Town of May, 0.25 square miles are located within the City of Grant, and 14.40 square miles are located within the Town of Stillwater. The Petitioned Area includes, but is not solely limited to, the Marine on St. Croix Watershed Management Organization.

3. **District Name.** The Petition specifies the name of the proposed enlarged district shall be the "Carnelian-Marine-St. Croix Watershed District".

4. **Number of Managers.** The Petition specifies the proposed number of managers shall be increased to seven (7) from the present number of five (5) managers.

5. **Petition Service.** The Petition was served on the Board and the District pursuant to Minn. Stat. § 103D.261, Subd. 1 (c).

6. **Reasons for Change.** The Petition states the enlargement and increase in number of managers is necessary due to the large number and diversity of water-related natural resources, significant high value resources, heavy use of the resources for recreational and aesthetic purposes, recharge of drinking water supplies, increased development pressures, fiscal capacity, and manager appointments to fairly represent the area. In May 1998, the Washington County Board of Commissioners authorized a Water Governance Study to identify and evaluate the best governance structure for water management for the county. In April 2002, the county developed a plan defining the expectations of watershed management organizations for actively managing the water resources of the county. Washington County has worked with representatives of each of the water management units to develop recommendations for key issues related to the enlargement, renaming and increase the number of managers of the District, such as financing policies, coordination of water management plans, water management name and board representation. Goals from the Revised Implementation Plan for Water Governance are as follows:

   a. To create a water management structure that will provide long term protection for surface and groundwater resources.

   b. To create local water management units with the fiscal capacity and authority to govern efficiently and effectively.

   c. To identify financing mechanisms that are fair and adequate to meet the needs of the county.

d. To coordinate surface water, groundwater, land use, and natural resources management to provide for a more comprehensive approach to resource management.

e. To adopt a proactive rather than a reactive approach to countywide water resources.

f. To increase the accountability of the water management structure.

7. **Hearing Order.** At its regular meeting on January 24, 2007, the Board determined the Petition met the requirements of Minn. Stat. §§ 103D.261 and 103D.305, and consequently ordered a public hearing to be held on the Petition.

8. **Hearing Notice.** Legal notice of the public hearing on the proposed watershed district enlargement, name change and increase in number of managers, pursuant to Minn. Stat. §§ 103D.261, Subd. 1 (d) and 103D.305, Subd. 4, was published in the Country Messenger on January 31, 2007, and the Stillwater Gazette on February 1, 2007. Further, a copy of the hearing notice was mailed to several addressees including the Washington County Auditor, the Washington County Board of Commissioners, all of the cities and towns in the Petitioned Area, the District, adjacent watershed districts, the SWCD, and the DNR.

9. **Public Hearing.** A public hearing was held on the Petition on February 22, 2007, at the Marine on St. Croix City Hall, 121 Judd Street, Marine on St. Croix, Minnesota. The proceedings were tape recorded. The hearing panel was the Metro Water Planning Committee which consisted of Board members Louise Smallidge, Lisa Thorvig, LuAnn Tolliver and Robert Burandt as chair.

Jim Haertel, Board staff, entered Exhibits 1 through 15 into the record by reading a brief description of each exhibit.

Exhibit 1. Letter dated December 19, 2006, from Linda Krafthefer, Assistant Washington County Attorney, with attached (a) Petition for the Enlargement of the Carnelian-Marine Watershed District dated December 1, 2006, and (b) Map of Proposed Enlargement of Carnelian-Marine Watershed District dated June 3, 2005.

Exhibit 2. Washington County Board of Commissioners Resolution Number 2006-167 dated December 19, 2006, directing the filing of the Petition, with attached (a) certification of the resolution signed by James Schug, Washington County Administrator.

Exhibit 3. Letter dated January 10, 2007 from Linda Krafthefer, Assistant Washington County Attorney, with attached (a) proof of service of the Petition on the Carnelian-Marine Watershed District.

Exhibit 4. Memorandum dated January 24, 2007 from Amanda Goebel, Washington County Department of Public Health and Environment, forwarding Exhibits 5 through 11.

Exhibit 5. Joint Resolution of the Town of May, City of Marine on St. Croix, Town of Stillwater and Town of New Scandia to dissolve the Marine on St. Croix Watershed Management Organization contingent on approval of the Petition.

Exhibit 6. Resolution number 12-4-2006 of the Carnelian-Marine Watershed District in support of the proposed enlargement.

Exhibit 7. Resolution dated November 16, 2006 of the Marine on St. Croix Watershed Management Organization in support of the Petition.

Exhibit 8. Resolution number 2006-1222 of the City of Marine on St. Croix in support of the Petition.

Exhibit 9. Resolution number 2006-16 of the Town of May in support of the Petition.

Exhibit 10. Resolution number 12-05-06-01 of New Scandia Township in support of the Petition.

Exhibit 11. Resolution number 2006-2 of the Town of Stillwater in support of the Petition.

Exhibit 12. Order of the Board of Water and Soil Resources dated January 24, 2007, setting the date, time and location of the public hearing on the Petition.

Exhibit 13. Letter dated January 25, 2007, from Jim Haertel, Board of Water and Soil Resources, to several addressees providing notification of the public hearing with attached (a) Legal Notice, (b) map of proposed enlargement, (c) list of addressees and (d) Affidavit of Mailing.

Exhibit 14. Affidavit of Publication of Legal Notice in the Country Messenger on January 31, 2007.

Exhibit 15. Affidavit of Publication of Legal Notice in the Stillwater Gazette on February 1, 2007.

Exhibit 16. Hardcopy of electronic presentation presented at the hearing by Amanda Goebel, Washington County Department of Public Health and Environment.

Exhibit 17. Letter dated February 22, 2007 from Jim Shaver, Marine on St. Croix Watershed Management Organization President, in support of the Petition.

Exhibit 18. Letter dated February 22, 2007 from John Bower, Carnelian-Marine Watershed District President, in support of the Petition.

Exhibit 19. Resolution dated April 28, 2003 from New Scandia Township in support of inclusion of an area not currently under watershed management planning into the Marine on St. Croix Watershed Management Organization.

After all people present at the public hearing were given an opportunity to speak, the hearing record was left open for two weeks until 4:30 PM on March 8, 2007, for receipt of written comments. No exhibits were received while the hearing record was open.

10. **Hearing Panel.** The Metro Water Planning Committee met on March 9, 2007. Committee members in attendance were Louise Smallidge, Lisa Thorvig, LuAnn Tolliver and Robert Burandt as chair. Based on the entire record in this matter and after due consideration, the committee decided with a voice vote to recommend to the full Board that the Carnelian-Marine Watershed District be enlarged according to the Petition. The Committee further decided with a voice vote to recommend to the full Board that the number of managers be increased from five (5) to seven (7) and that the name be changed to the Carnelian-Marine-St. Croix Watershed District. The enlargement, increase in number of managers and name change would benefit the public welfare and public interest and the purposes of Minnesota Statutes Chapters 103B and 103D would be served. The Committee noted the overwhelming support in the hearing record for the Petition and the lack of opposition to the Petition in the hearing record. Per the Joint Resolution (See Exhibit 5), approval of this Order and filing of this Order with the Secretary of State needs to be contingent on the dissolution of the Marine on St. Croix Watershed Management Organization taking place first.

CONCLUSIONS

1. The Petition for the enlargement, name change and increasing the number of managers of the Carnelian-Marine Watershed District is valid in accordance with Minn. Stat. §§ 103D.261 and 103D.305.

2. Proper notice of hearing was given and the public hearing was held in accordance with applicable laws.

3. All relevant substantive and procedural requirements of law and rule have been fulfilled.

4. The Board has proper jurisdiction in the matter of ordering a watershed district enlargement, name change and increase in number of managers.

5. The enlargement, increase in number of managers and name change of the Carnelian-Marine Watershed District as proposed in the Petition would benefit the public welfare and public interest and the purposes of Minnesota Statutes Chapters 103B and 103D would be served.

6. The Carnelian-Marine Watershed District can be enlarged into the area of the Marine on St. Croix Watershed Management Organization because the organization will dissolve per the joint resolution of its member communities upon approval of the Petition.

7. The Carnelian-Marine Watershed District enlargement, increase in number of managers and name change cannot occur before the Marine on St. Croix Watershed Management Organization is dissolved.

ORDER

The Board hereby orders that the Carnelian Marine Watershed District be enlarged according to the Petition and Exhibit A of said Petition, that the name be changed to the Carnelian-Marine-St. Croix Watershed District, and that the number of managers be increased from five (5) to seven (7), contingent on the dissolution of the Marine on St. Croix Watershed Management Organization occurring within three months from the date of this Order. The Board further orders that the Carnelian-Marine Watershed District Watershed Management Plan be amended within one year of the date of this order to include the Petitioned Area. The legal description for the Carnelian-Marine-St. Croix Watershed District is as follows:

Township 30 North, Range 19 West (Stillwater Township):

All that part of Section 6 lying westerly of the main channel of the St. Croix River, also being the easterly boundary of Washington County, Minnesota.	Section 6

Township 30 North, Range 20 West (Stillwater Township):

All that part of Section 1 lying westerly of the main channel of the St. Croix River, also being the easterly boundary of Washington County, Minnesota.	Section 1
All of Section	Section 2
All of Section	Section 3
All of Section	Section 4
All of Section	Section 5
E ½	Section 6
E ½ of the NW ¼	Section 6
E ½ of the SW ¼	Section 6
SW ¼ of the SW ¼	Section 6
E ½	Section 7

NW ¼	Section 7
N ½ of the SW ¼	Section 7
All of Section	Section 8
All of Section	Section 9
All of Section	Section 10
All that part of Section 11 lying westerly of the main channel of the St. Croix River, also being the easterly boundary of Washington County, Minnesota.	Section 11
All that part of Section 12 lying westerly of the main channel of the St. Croix River, also being the easterly boundary of Washington County, Minnesota.	Section 12
All that part of Section 14 lying westerly of the main channel of the St. Croix River, also being the easterly boundary of Washington County, Minnesota.	Section 14
All that part of Section 15 lying westerly of the main channel of the St. Croix River, also being the easterly boundary of Washington County, Minnesota.	Section 15
N ½	Section 16
SE ¼	Section 16
NE ¼ of the SW ¼	Section 16
N ½ of the NE ¼	Section 17
NW ¼	Section 17
N ½ of the SW ¼	Section 17
SW ¼ of the SW ¼	Section 17
E ½	Section 18
N ½ of the NE ¼	Section 19
NE ¼ of the NW ¼	Section 19

Township 30 North, Range 21 West (City of Grant):

SE ¼ of the SE ¼	Section 1

E ½ of the NE ¼	Section 12
NE ¼ of the SE ¼	Section 12

Township 31 North, Range 19 West (May Township, City of Marine on St. Croix):

All that part of Township 31 North, Range 19 West lying westerly of the main channel of the St. Croix River, also being the easterly boundary of Washington County, Minnesota.

Township 31 North, Range 20 West (May Township, City of Marine on St. Croix):

All of Section	Section 1
All of Section	Section 2
All of Section	Section 3
All of Section	Section 4
All of Section	Section 5
All of Section	Section 6
NE ¼	Section 7
S ½	Section 7
All of Section	Section 8
All of Section	Section 9
All of Section	Section 10
All of Section	Section 11
All of Section	Section 12
All of Section	Section 13
All of Section	Section 14
All of Section	Section 15

All of Section	Section 16
All of Section	Section 17
All of Section	Section 18
NE ¼	Section 19
N ½ of the NW ¼	Section 19
SE ¼ of the NW ¼	Section 19
N ½	Section 20
E ½ of the SW ¼	Section 20
SE ¼	Section 20
All of Section	Section 21
All of Section	Section 22
All of Section	Section 23
All of Section	Section 24
All of Section	Section 25
All of Section	Section 26
All of Section	Section 27
All of Section	Section 28
NE ¼	Section 29
E ½ of the NW ¼	Section 29
S ½	Section 29
SE ¼ of the SE ¼	Section 30
NE ¼	Section 32
N ½ of the NW ¼	Section 32
SE ¼ of the NW ¼	Section 32
N ½ of the SE ¼	Section 32
SE ¼ of the SE ¼	Section 32
All of Section	Section 33

All of Section	Section 34
All of Section	Section 35
All of Section	Section 36

Township 31 North, Range 21 West (City of Hugo):

SE ¼	Section 12
NE ¼	Section 13
N ½ of the SE ¼	Section 13
SE ¼ of the SE ¼	Section 13
NE ¼ of the NE ¼	Section 24

Township 32 North, Range 19 West (City of Scandia, City of Marine on St. Croix):

All that part of Township 32 North, Range 19 West lying westerly of the main channel of the St. Croix River, also being the easterly boundary of Washington County, Minnesota.

Township 32 North, Range 20 West (City of Scandia, City of Marine on St. Croix):

All of Section	Section 1
SE ¼	Section 2
E ½ of the NE ¼	Section 2
That part of the SW ¼ of the NE ¼ lying easterly of the centerline of County State Aid Highway No. 3 (Olinda Trail North).	Section 2
That part of the NW ¼ of the NE ¼ lying easterly of the west line of Washington County Highway Right of Way Plat No. 106; AND that part of said NW ¼ of the NE ¼ described as follows: Commencing at the northwest corner of the NE ¼ of Section 2, Township 32 North, Range 20 West; Washington County, Minnesota; thence easterly along the north line of said Section 2 a distance of 555.54 feet to the centerline of County State Aid Highway No. 3; thence deflecting to the right 64 degrees 35 minutes 36 seconds, going southeasterly along said centerline of County State Aid Highway No. 3, a distance of 387.47 feet to the point of beginning of the tract to be described; thence continuing southeasterly along said centerline	Section 2

a distance of 405.0 feet; thence deflecting to the right 115 degrees 24 minutes 24 seconds going westerly and parallel to the north line of said NE ¼, a distance of 682.24 feet; thence deflecting to the right 90 degrees 00 minutes, a distance of 365.83 feet; thence deflecting to the right 90 degrees 00 minutes going a distance of 508.48 feet, more or less, to the point of beginning.

That part of the NW ¼ of the NE ¼ and the NE ¼ of the NW ¼ described as follows: Beginning at the northwest corner of the NE ¼ of Section 2, Township 32 North, Range 20 West; Washington County, Minnesota; thence easterly along the north line of said Section 2 a distance of 555.54 feet to the centerline of County State Aid Highway No. 3; thence deflecting to the right 64 degrees 35 minutes 36 seconds, going southeasterly along said centerline of County State Aid Highway No. 3, a distance of 387.47 feet; thence deflecting to the right 115 degrees 24 minutes 24 seconds going westerly and parallel with the north line of said NE ¼, a distance of 1078.78 feet; thence deflecting 90 degrees 00 minutes to the right, a distance of 352.2 feet, more or less, going to the north line of the NW ¼ of said Section 2; thence easterly along said north line a distance of 357.0 feet, more or less, to the point of beginning. — Section 2

SE ¼ — Section 7

That part of the S ½ of the NE ¼ of the SW ¼ lying easterly of the centerline of County Road No. 15A, (Manning Trail North). — Section 7

That part of the SE ¼ of the SW ¼ lying easterly of the centerline of County Road No. 15A, (Manning Trail North). — Section 7

The south 1230.00 feet of the west 355.00 feet of the SE ¼ of the SW ¼. — Section 7

That part of the S ½ of the SE ¼ lying northeasterly of the centerline of Oakhill Road North; EXCEPT that part of the west 330 feet of said S ½ of the SE ¼ lying northeasterly of said centerline of Oakhill Road North; ALSO EXCEPT that part of the east 300 feet of the west 630 feet of said S ½ of the SE ¼ lying northeasterly of said centerline of Oakhill Road North, and lying southerly of the north 480 feet and northerly of the south 33 feet thereof. — Section 10

NE ¼ — Section 11
E ½ of the NW ¼ — Section 11
S ½ — Section 11

All of Section — Section 12

All of Section — Section 13

E ½	Section 14
E ½ of the NW ¼	Section 14
NW ¼ of the NW ¼	Section 14
That part of the SW ¼ of the NW ¼ lying northeasterly of the centerline of Oakhill Road North.	Section 14
E ½ of the SW ¼	Section 14
SW ¼ of the SW ¼	Section 14
That part of the NW ¼ of the SW ¼ lying northeasterly of the following described reference line: Beginning at the intersection of the centerline of Oakhill Road North and the north line of said NW ¼ of the SW ¼; thence southeasterly along said centerline to its intersection with the centerline of Oland Avenue North; thence northeasterly along said centerline of Oland Avenue North to its intersection with the northwesterly extension of the northeasterly line of Lot 1, Block 2 in the plat of HAWKINSON HIGHLANDS; thence southeasterly along said northeasterly line of Lot 1 and its extension, to the easterly corner of said Lot 1; thence southwesterly along the southeasterly line of said Lot 1 to the westerly corner of Outlot A in said plat of HAWKINSON HIGHLANDS; thence southeasterly along the southwesterly line of said Outlot A to the southerly corner of said Outlot A; thence southwesterly along an extension of the southeasterly line of said Outlot A to the centerline of said Oakhill Road North; thence southeasterly along said centerline of Oakhill Road North to its intersection with the south line of said NW ¼ of the SW ¼ and said reference line there terminating.	Section 14
That part of the NE ¼ lying northeasterly of the centerline of Oakhill Road North.	Section 15
S ½ of the S ½	Section 16
S ½ of the SE ¼	Section 17
SW ¼	Section 17
N ½ of the NW ¼, except the East 768.7 feet thereof	Section 17
S ½ of the NW ¼, except the East 860 feet thereof	Section 17
Part of the S ½ of the NW ¼ described as: Beginning at the southwest corner of the east 860 feet; thence north and parallel with the east line of said NW ¼ a distance of 325 feet; thence east and parallel with the south line of said NW ¼ a distance of 95 feet; thence south and parallel with the east line of said NW ¼ a distance of 325 feet to the south line of said NW ¼; thence west along the south line of said NW ¼ a distance of 95 feet to the point of beginning.	Section 17

E ½	Section 18
E ½ of the SW ¼	Section 18
That part of the E ½ of the NW ¼ lying easterly of the centerline of County Road No. 15A (Manning Trail North).	Section 18
That part of the SW ¼ of the NW ¼ lying easterly and southerly of the following described reference line: Beginning at the southwest corner of Lot 14, Block 1 of the plat of HARMONY ACRES; thence northerly along the west line of said Lot 14 to northwest corner of said Lot 14; thence northeasterly to the southwest corner of Lot 10, Block 2 of said plat; thence northerly along the west line of said Lot 10 to the northwest corner of said Lot 10; thence easterly along the north line of said Lot 10 and the north line of Lot 11, Block 2 of said plat to the northeast corner of said Lot 11; thence northerly along the east line of Lot 4, Block 2 of said plat and its northerly extension to the southerly line of Lot 1, Block 1 of said plat; thence easterly along said southerly line to the southeast corner of said Lot 1; thence northerly along the east line of said Lot 1 and the east line of Lot 2, Block 1 of said plat to the northeast corner of said Lot 2; thence easterly along the north line of said plat of HARMONY ACRES to the northeast corner of said plat and said reference line there terminating.	Section 18
That part of the NW ¼ of the SW ¼ lying northerly and easterly of the following described reference line: Beginning at the southeast corner of the plat of HARMONY ACRES; thence westerly along the south line of said plat to the southeast corner of Lot 23, Block 1 of said plat; thence northerly along the east line of said Lot 23 to the northeast corner of said Lot 23; thence northerly to the southeast corner of Lot 20, Block 1 of said plat; thence westerly along the southerly line of said Lot 20 to the southwesterly corner of said Lot 20; thence northwesterly along the westerly line of said Lot 20 to the northwest corner of said Lot 20; thence easterly along the northerly line of said Lot 20 to the southwest corner of Lot 14, Block 1 of said plat; thence northerly along the west line of said Lot 14 to the northwest corner of said Lot 14 and said reference line there terminating.	Section 18
E ½ of the NE ¼	Section 19
E ½ of the SE ¼	Section 19
SW ¼ of the SE ¼	Section 19
All of Section	Section 20

All of Section	Section 21
All of Section	Section 22
All of Section	Section 23
All of Section	Section 24
All of Section	Section 25
All of Section	Section 26
All of Section	Section 27
All of Section	Section 28
All of Section	Section 29
E ½	Section 30
SE ¼ of the NW ¼	Section 30
E ½	Section 31
All of Section	Section 32
All of Section	Section 33
All of Section	Section 34
All of Section	Section 35
All of Section	Section 36

Dated at Saint Paul, Minnesota this 28th day of March, 2007.

MINNESOTA BOARD OF WATER AND SOIL RESOURCES

By: _____
Randy Kramer, Chair

Minnesota Wetland Conservation Act
Guidance Paper 2007 – 01

Reviewed by BWSR Wetland Committee: February 27, 2007

SUBJECT: Guidance for Management of Forested Wetland Mitigation Sites

Prepared by: Minnesota Board of Water and Soil Resources with assistance from the Minnesota Department of Natural Resources, U.S. Army Corps of Engineers, Fond du Lac Reservation, St. Louis County Land Department and several Local Units of Government.

1. Purpose and applicability.

a. **Purpose.** The purpose of this guidance paper is to provide landowners and Local Government Units (LGUs) with guidance for determining allowable long-term vegetative management for forested wetland mitigation sites under the Wetland Conservation Act.

b. Applicability. LGUs and landowners are encouraged to use this guidance to help determine the appropriate long-term vegetative management on forested wetland mitigation sites including wetland banking sites and project specific wetland replacement sites.

2. General Considerations.

This guidance recognizes that the purpose of wetland replacement plans (see Minnesota Rule 8420.0500) includes "*...ensuring adequate replacement of lost public values for unavoidable wetland impacts.*" This guidance is intended to provide guidelines for the long-term management of vegetation on forested wetland mitigation sites. The goal of a forested wetland mitigation project is to establish an ecologically representative wetland that provides the functions over time, typical of a reference wetland of the desired wetland type. Local government units and landowners using this guidance should maintain this goal and utilize the guiding principles listed below.

3. Guiding Principles:

- **The long-term goal of forested wetland mitigation sites is to replace the lost wetland functions and values of similar impacted forested wetland types.**
- **Mimicking natural disturbances is the preferred method for regenerating forested wetland plant communities.**
- **When necessary, silvicultural practices, including timber harvest may be used to provide a means to maintain the ecological health of a forested wetland plant community.**

- **Ecological goals for vegetation establishment and management projects should be based on references such as the *Field Guide to the Native plant Communities of Minnesota, (Three volumes), Minnesota Department of Natural Resources; Wetland Plants and plant Communities of Minnesota and Wisconsin, Steve D. Eggers and Donald M. Reed Second Edition; and Hydrogeomorphic Approach for Assessing Wetland Functions (HGM).***
- **After a forested wetland community goal has been identified, a long-term forest management plan should be developed and submitted as part of the vegetation management plan within a Wetland Replacement Plan or Wetland Banking Plan under the Wetland Conservation Act. The Technical Evaluation Plan should make recommendations to the local government unit regarding the proposed forest management activities and whether the proposed management is suitable for the mitigation site.**
- **Extended rotation guidelines should be strongly considered when developing plans for regenerating woody vegetation on forested wetland mitigation sites in Minnesota. (*or, Extended rotation, with the goal of increasing selected wetland functions over time is preferred in most cases.)***
- **Forest management activity should be done within the context of the relevant Minnesota Forest Resources Council Landscape Plan.**
- **Forested wetland mitigation sites are subject to Minnesota Rules 8420.0541 (Actions eligible for credit) and 8420.0500 (Standards and procedures for evaluating wetland replacement plans).**
- **Forest management activities (or silvicultural practices) on a forested wetland mitigation site may be allowed under a Forest Management Plan approved by the Wetland Conservation Act Technical Evaluation Panel (see Minnesota Rules 8420.0240)**
- **The Minnesota Interagency Wetland Mitigation Memorandum of Understanding should be used to help ensure a unified approach to wetland credit allocation under the WCA and Section 404 of the Clean Water Act.**
- **Forest Management activities (or silvicultural practices) on a forested wetland mitigation site should follow the most current publication of the *Sustaining Minnesota Forest Resources: Voluntary Site-Level Forest Management Guidelines.***

4. Forested Mitigation Management Evaluation

Local Government Units may require, based on a Technical Evaluation Panel (TEP) recommendation, applicants to develop and submit a long term forest management plan that describes necessary management for a forested wetland mitigation site. This plan should be tailored for the forested wetland community goal that has been identified in the wetland mitigation plan and the long-term forest management plan should be developed using the guiding principles outlined (above) in this document. **The LGU should expand the TEP to include individuals with expertise in plant ecology, wildlife habitat, and forestry to**

evaluate the long-term forest management plan to ensure the plan meets the wetland mitigation goals.

The Minnesota Interagency Wetland Mitigation MOU discusses determination of wetland types for wetland mitigation purposes by using ***Wetland Plants and plant Communities of Minnesota and Wisconsin, Steve D. Eggers and Donald M. Reed Second Edition.*** (Eggers and Reed) To provide consistency for local government units, Board of Water and Soil Resource staff, U.S. Army Corps of Engineers staff and landowners responsible for wetland mitigation, this guidance has been developed using the same document. **Vegetation management plans for forested wetland mitigation sites should include as many native species as possible as described in Eggers and Reed (see examples below).**

Hardwood Swamp

Description: Black ash (Fraxinus nigra), yellow birch (Betula alleghaniiensis), silver maple (Acer saccharinum) and/or red maple (Acer rubrum) are dominant. Northern white cedar (Thuja occidentalis) may be subdominant. Other common species may include speckled alder (Alnus incanna ssp.rugosa), cinnamon fern (Osmunda cinnamomea), sensitive fern (Onoclea sensibilis), fowl bluegrass (Poa palustris), jewelweed (Impatiens capensis) and giant goldenrod (Solidago gigantea).

Coniferous Bog

Description: Tamarack (Larix laricinia)or black spruce (Picea mariana) are dominant, growing on a continuous sphagnum moss mat with acid, peat soils. Sedges, orchids, and heath family (Ericaceae) shrubs are common. Other species may include bog rosemary (Andromeda glaucophylla), small cranberry (Vaccinium oxycoccos), bog laurel (Kalmia polifolia), bog sedge (Carex oligosperma), and wool grass (Scirpuscyperinus).

Coniferous Swamp

Description: Northern white cedar (Thuja occidentalis) and/or tamarack (Larix laricina) are dominant, usually growing on neutral to alkaline peat/muck soils. Other common species may include yellow birch (Betula alleghaniensis), black ash (Fraxinus nigra), speckled alder, fowl manna grass (Glyceria striata), wild sarsaparilla (Aralia nudicaulis) and jack-in-the-pulpit ((Arisaema triphyllum).

Floodplain Forest

Description: Silver maple (Acer saccharinum), American elm (Ulmus americana), river birch (Betula nigra), green ash (Frainus pennsylvanica), black willow (Salix nigra) and/or eastern cottonwood (Populus deltoides) are dominant, growing on alluvial soils with riverine system. Other common species may include riverbank grape (Vitis riparia), jewelweed ((Impatiens capensis) , stinging nettle (Urtica dioica) and goldenglow (Rudbechia laciniata).

5. **Summary-** Management of vegetation on forested wetland mitigation sites should be designed to maintain the ecological health of the intended plant community. The goal of a forested wetland mitigation project is to establish an ecologically diverse, wetland that provides the functions typical of a reference wetland typical of the same type as is being impacted. Local government units or landowners responsible for achieving wetland mitigation should use the guiding principles included in this guidance in developing management plans. Forest management activities on a forested wetland mitigation site may be allowed under a Forest Management Plan approved by the Wetland Conservation Act Technical Evaluation Panel (see Minnesota Rules 8420.0240), provided the management helps achieve the goal of replacing the functions and values of a wetland that is drained or filled. It is recommended that forest management activities for forested wetland mitigation sites be described in the vegetation management plan section of the wetland replacement plan and be considered in the Wetland Replacement Plan or Wetland Banking Plan decision by the LGU.

FOR YOUR INFORMATION

March 28, 2007

- Updated Board Member Roster
- Updated BWSR Staff Roster
- "Water & Soil Conservation 2007"

MINNESOTA BOARD OF WATER AND SOIL RESOURCES
520 LAFAYETTE ROAD NORTH
ST. PAUL, MINNESOTA 55155
Phone: 651-296-3767 Fax: 651-297-5615

Appointed Members	*Appointment* ***Designation***	*Term* ***Expires***	***Telephone/Fax***	
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LuAnn Tolliver 14801 Wychewood Road, Minnetonka, MN 55345 mltolly@aol.com	**Watershed**	01-07-08	952-938-6749 952-838-1571	*Home* *Office*

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Jim Anderson 439 Borlaug Hall, 1991 Upper Buford Circle, St. Paul, MN 55108 Ander045@umn.edu	**U of M/Dept. of Soil, Water & Climate**	612-625-0279 612-625-2208	*Office* *Fax*
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March 2007

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Brigitte Grundmeier	(218) 755-4235

Statutory Responsibilities

- State soil conservation agency (M.S. 103B.101)
- Direct private land soil and water conservation programs through the action of SWCDs, counties, cities, townships, Watershed Districts, and Water Management Organizations (M.S. 103C, 103D)
- Link water resource planning with comprehensive land use planning (M.S. 103B)
- Provide resolution of water policy conflicts and issues (M.S. 103A.211, 103A.305, 103A.315, 103A.311)
- Implement the comprehensive local water management acts (M.S. 103B.201, 103B.255, 103B.301)
- Provide the forum for local issues, priorities and opportunities to be incorporated into state public policy (M.S. 103B.101)
- Administer the Wetland Conservation Act (M.S. 103G)
- Coordinate state and federal resources to realize local priorities

eLINK makes it possible to evaluate costs and benefits, track outcomes, and display data

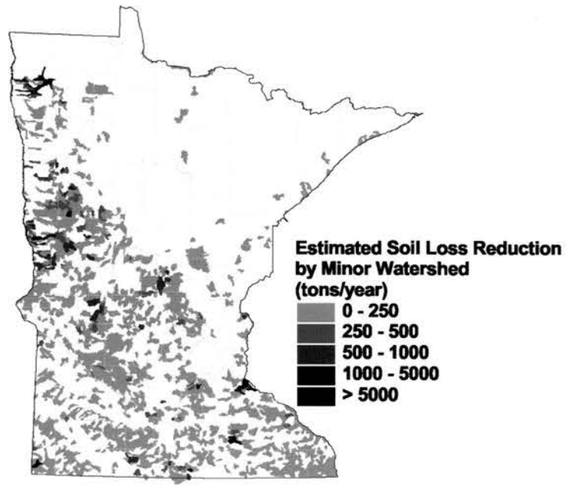
Local government units that receive funding through BWSR programs submit data that measures outcomes through a relational database called "eLINK." That data includes project location, cost, funding source(s), and pollutant reduction, which can then be displayed graphically through GIS (samples pictured right).

Implementation programs are tracked through eLINK so that stakeholders can evaluate costs and benefits of conservation programs, track where the money is being spent, how much additional money is leveraged, and what is being accomplished as a result of conservation efforts on Minnesota's privately owned lands.

Minnesota Board of Water & Soil Resources
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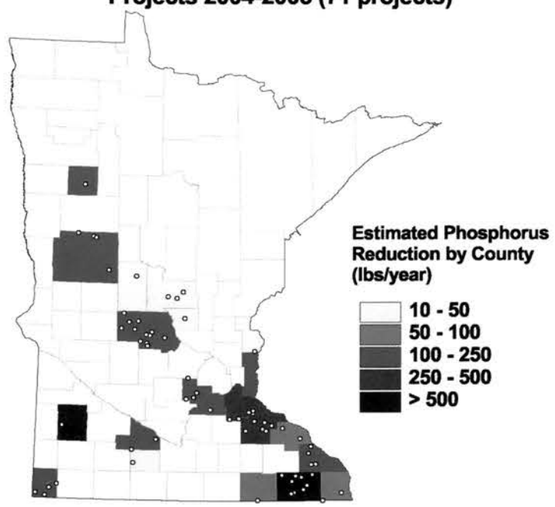


3,218 projects

- Soil Loss Reduction 136,000 tons/year
- Sediment Reduction 101,000 tons/year
- Phosphorus Reduction 199,000 lbs/year

Total Cost $16 M: Land Occupier $3.9 M, Local Government $1.1 M, State Grant $6 M, Federal Grant $3.1 M, Federal Loan $663,000

Feedlot Water Quality Management Grant Projects 2004-2005 (71 projects)



71 projects: 6,160 pounds / year phosphorous reduction

Water & Soil Conservation 2007

The Minnesota Board of Water & Soil Resources works collaboratively with local government units, federal agencies, and landowners to implement conservation projects on private, working lands. Managed wisely, these working lands – Minnesota's farms, forests and urban areas – can contribute to the state's environmental goals of cleaner air and water, abundant fish and wildlife habitat, and preservation of open spaces.

BWSR is the state's administrative agency for 91 soil and water conservation districts, 46 watershed districts, 27 metropolitan watersheds and 80 county water management organizations. The agency also coordinates state programs and policies with the Minnesota Department of Transportation, the USDA Natural Resources Conservation Service and Farm Services Agency, and the U.S. Army Corp of Engineers through various formal agreements.



Since 78 percent of the state's land is in private ownership, BWSR's private working-lands programs are critical for improving water quality and enhancing fish and wildlife habitat. (Photo: NRCS)

Using state resources to leverage federal and local funds has enabled BWSR to implement projects that have resulted in less sediment and nutrients entering our lakes, rivers, and streams; more fish and wildlife habitat; the drastic slowing of wetland losses, and reduced soil erosion. These outcomes are being achieved despite the intensification of agriculture, greater demands for forest products, and rapid urbanization in many parts of the state.

By channeling financial, technical and administrative assistance to the local level, BWSR ensures that state conservation policy is implemented with local priorities in mind.

Board membership: A forum for citizens, local and state government perspectives



The 17-member board meets 10 times per year, and members include:

- 3 citizens
- 3 County Commissioners
- 3 Soil and Water Conservation District supervisors
- 3 Watershed organization managers
- 4 state agency commissioners: Department of Agriculture, Department of Health, Department of Natural Resources and Pollution Control Agency
- University of Minnesota Extension Service

Board members are appointed to four-year terms by the Governor, and there must be at least one member from each of the eight areas in the state (pictured). The diverse board structure ensures that a broad range of interests provides input on all of the board's decisions on complex water and soil management policies.

BWSR staff collaborate with local and federal partners

BWSR has eight field offices, located in Bemidji, Brainerd, Duluth, Fergus Falls, Marshall, New Ulm, Rochester and St. Paul. Field office staff have expertise in the unique natural resource concerns in their region, making them a valuable resource for staff in local government units. Agency responsibilities are delivered with or implemented by local government partners, so that local priorities are met for water and soil conservation on private lands. BWSR also coordinates state programs and policies with the MN Department of Transportation, the USDA Natural Resources Conservation Service and Farm Services Agency, and the U. S. Army Corp of Engineers through various formal agreements.

Programs achieve cleaner air and water, create habitat, and leverage other funds

Clean Water Legacy. The 2006 legislature enacted the Clean Water Legacy Act (CWLA) to accelerate identification of impaired waters, total maximum daily load (TMDL) studies, and cleanup activities. BWSR is the lead agency for implementing non-point pollution reduction programs as part of the state's overall effort to address its impaired waters. Funding addresses project grants, technical assistance program reporting, and evaluation services.

Wetland Protection. The Wetland Conservation Act charges Minnesota to achieve no net loss in the quantity, quality, and biological diversity of Minnesota's existing wetlands. More than 350 local government units administer the Wetland Conservation Act. BWSR provides a range of assistance to those partners — through technical evaluation panels, financial assistance with grants, dispute resolution, and coordination with the U.S. Army Corps of Engineers and the U.S. Department of Agriculture. The end results are decisions about wetland protection made with local input, sound science, and due process.

Wetland Banking. BWSR works directly with individual landowners to restore wetlands through the Wetland Banking Program. WCA requires wetlands to be replaced when they are lost through safety-related repair and rehabilitation of existing public roads. Wetland banking gives landowners the option of buying wetland credits that are available from previously restored or created wetlands. BWSR restores hundreds of acres of wetlands each year on behalf of MnDOT and local government units to establish wetland banking credits. These restoration efforts have restored diverse wetlands with native vegetation on large parcels of land.

State Cost-Share. BWSR provides cost-share grants to SWCDs to help landowners offset the costs of installing conservation practices that protect water quality and control erosion. Landowners are required to match a percentage of the total project cost, using their own funds in combination with other state, federal, or local sources. Local SWCD boards set local priorities for projects in conjunction with the state's overall priorities set through BWSR.

Conservation partners:

Soil and Water Conservation Districts. SWCDs work directly with private landowners, connecting them with the financial and technical resources they need to establish conservation practices on their land. BWSR also works in partnership with SWCDs to implement federally funded conservation provisions of the Farm Bill.

Watershed Districts and Watershed Management Organizations. Watershed districts, organized on hydrologic boundaries, provide a framework to address water management issues that transcend political boundaries. Their projects and activities include flood-control structures, public drainage systems, lake level controls, septic system improvements, and construction of storm water treatment ponds and sediment basins. Watershed management organizations are found in the metropolitan area, and they deal with surface water, whereas watershed districts deal with both surface water and groundwater.

Counties. Minnesota's counties play a crucial role in developing and implementing local water plans. As a general-purpose unit of government, counties, with their planning and land-use authorities, are uniquely positioned to link many land-use decisions with local goals for surface and groundwater protection and management.

Joint Powers Boards. BWSR works with a number of joint powers boards that address regional water and soil resource management concerns.

Federal Government. BWSR works with the USDA's Natural Resources Conservation Service and the Farm Service Agency on implementing the conservation provisions of the federal Farm Bill. Efforts to optimize Farm Bill programs bring federal money into Minnesota for private lands conservation. BWSR partners with the U.S. Army Corps of Engineers and the Environmental Protection Agency on wetland regulations. These agencies continue to examine ways to achieve regulatory simplification and still achieve mutual goals of no net loss of wetlands. BWSR also restores wetlands in coorperation with the U.S. Fish and Wildlife Service.

Water & Soil Conservation 2007

Conservation Easements (Restoring Wetlands and Prairies). Reinvest in Minnesota Reserve continues to be a strong force in Minnesota's soil and water conservation efforts. RIM increases public and private investment in private lands to improve water quality and enhance habitat and flood storage. These private-land conservation activities are administered in partnership with SWCDs and focus on restoring wetlands and enrolling highly erodible, riparian, and sensitive groundwater lands. The RIM Reserve program leverages federal government dollars through the USDA. By combining RIM Reserve with the federal Conservation Reserve Program and Wetland Reserve Program, more than 180,000 acres of environmentally sensitive cropland have been retired and replaced with native prairie or restored wetlands.

State Soils Office. BWSR collaborates with the University of Minnesota and the USDA Natural Resources Conservation Service on three main areas. The first is to increase the usefulness of current soils data. Work involved in this area helps ensure that current data is digitally correct and technically reliable. Other areas involve updating aging soil surveys in the state and technical support and training to local governments.

Engineering and Technical Services. Design and engineering services are provided for wetland projects restored through RIM Reserve and the Minnesota Wetland Banking Program. BWSR Engineering and Technical Services staff also assist local units of government in permit decisions related to WCA and develops standards for soil conservation engineering practices.

BWSR engineering staff give expert input into federal and state agricultural and non-point source pollution policy discussions toward developing rules and regulations.



Design and construction of this wetland in Big Stone County was done by BWSR Engineering and Technical Services.

The 2005 Minnesota Legislature directed BWSR to conduct an assessment of the use, maintenance and benefits of required grass strips along public drainage ditches, in consultation with stakeholders. That effort produced the **Public Drainage Ditch Buffer Study**, published February 2006. BWSR now facilitates a Drainage Work Group as an outgrowth of that study.

Local Water Management. In the late 1970s, the Legislature decided that local governments, working with the state, should play a principal role in achieving the state's surface water and groundwater management objectives. The Legislature adopted water planning authorities, including the Metropolitan Surface Water Management Act (authorized in 1982), Comprehensive Local Water Planning (1985), and Metropolitan County Groundwater Planning (1987). BWSR was given oversight responsibilities to ensure that local water plans are prepared and coordinated with existing local, and state efforts and that plans are implemented effectively. All parts of Minnesota have state-approved and locally adopted plans in place.

2004-2005 Natural Resources Block Grants

- 508 Education projects
- 94 Resource inventory projects
- 222 Monitoring projects
- 305 Regulations and ordinances
- 678 Feedlot initiatives

These local plans focus on priority concerns, defined goals and objectives, and measurable outcomes. To assist counties in carrying out priority projects and programs in their plans, BWSR provides financial assistance to them through the Natural Resources Block Grant. Additional funding is available to counties, watershed districts, and watershed management organizations in the form of challenge grants, provided through the Legislative Citizen Commission on Minnesota Resources.

Farm Bill Assistance. The 2002 Farm Bill authorized unprecedented levels of funding for conservation programs on agricultural working lands nationwide. BWSR has played a key role in efforts to identify state-funded initiatives that leverage additional farm bill funding, and target state and federal resources to projects that improve water quality. BWSR continues to work with local and federal partners to market and implement federal conservation programs.

Minnesota Board of Water & Soil Resources

DATE: April 17, 2007

TO: Board of Water and Soil Resources' Members, Advisors, and Staff

FROM: John Jaschke, Executive Director

SUBJECT: April 25, 2007, Board Meeting Notice

The Board of Water and Soil Resources (BWSR) will meet on Wednesday, April 25, 2007, beginning at 9:00 a.m. The meeting will be held in the second floor conference room at 520 Lafayette Road N., St. Paul. Parking is available in the lot directly in front of the building (use hooded parking areas).

The following information pertains to agenda items:

COMMITTEE RECOMMENDATIONS

Metro Water Planning Committee

1. **Ramsey-Washington Metro Watershed District, Watershed Management Plan** – The Watershed Management Plan was filed with the Board on March 20, 2007. The highlights of the Plan and the planning process are further described in the attached draft Order. The District relied heavily on a Planning Advisory Group to obtain agency and citizen input early in the planning process to provide direction and develop Plan policies and goals. A rough draft of the Plan was circulated to review agencies and stakeholders to solicit comments prior to the formal review period. Agency comments from the formal review periods were relatively limited and were satisfactorily addressed by the District. The Metro Water Planning Committee unanimously recommends the Plan be approved per the attached draft Order. ***DECISION ITEM***

2. **Shingle Creek and West Mississippi Watershed Management Organizations' Major Plan Amendment** - A Major Amendment to the Watershed Management Plan was filed with the Board on February 23, 2007. The attached draft Order contains a summary of the planning process, the reviewing agencies' comments, and highlights of the amendment. Several comments were received during the review process that resulted in revisions to the Plan amendment. The Metro Water Planning Committee voted 4-0, with Committee Member Jim Anderson absent, to recommend the Plan be approved per the attached draft Order. ***DECISION ITEM***

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3. **Upper Rum River Watershed Management Organization, Watershed Management Plan** – The Watershed Management Plan was filed with the Board on March 21, 2007. The highlights of the Plan and the planning process are further described in the attached draft Order. Significant comments resulted from both formal review periods. Board staff provided additional review and comments prior to submittal of the final draft plan. As a result, substantial changes were made to the Plan to bring it into compliance with Minnesota Rule 8410. After much discussion, the Metro Water Planning Committee unanimously recommends the Plan be approved per the attached draft Order. ***DECISION ITEM***

Northern Water Planning Committee

1. **Wilkin County Priority Concerns Scoping Document** - Wilkin County submitted the Priority Concerns Scoping Document for state review and comment, as part of updating their Comprehensive Local Water Management Plan. The Northern Water Planning Committee of the Board met April 16th after the state agencies comment period ended. The Committee's recommendations or requirements for the content of the final plan are drafted for the Board's review and action. The state's expectations for the final plan must be sent to Wilkin County. See attached. ***DECISION ITEM***

Southern Water Planning Committee

1. **Middle Fork Crow River Watershed District (MFCRWD) Water Management Plan** -MFCRWD was established by BWSR Board Order on April 27, 2005. Minnesota Statutes 103D.401 states that a board of watershed district managers must adopt a plan for any or all reasons for which the district may be established. The MFCRWD has completed the planning process for its proposed ten-year plan: April 2007 – April 2017. The MFCRWD distributed its draft Watershed Management Plan as required for final review and comment. Comments received were considered by the MFCRWD, the Plan was revised as needed, and submitted to BWSR for approval. BWSR provided proper Notice of Filing for the Plan. This notice provided an invitation to submit written comments or a written request for a hearing if opposed to the Plan. No written comment or request was received by BWSR. The Southern Water Planning Committee met with representatives of the MFCRWD on April 5, 2007, after the state and local review period had ended. The Committee unanimously voted to recommend approval of the Plan to the full Board. BWSR Board member and Committee chairperson Dana Allen will provide a brief report and present the Committee's recommendation for Board action. See attached. ***DECISION ITEM***

NEW BUSINESS

1. **Koochiching SWCD Supervisory Boundary Change Request** - The Koochiching Soil and Water Conservation District is requesting that BWSR approve a change to Supervisor Nomination Districts. At their April 2, 2007, regular board meeting, the Koochiching board of supervisors voted to change the boundaries of supervisor

nomination districts III and V (see attached map). The purpose of this change is to increase the number of eligible supervisor candidates in Nomination District V. Koochiching County is a large rural county with a sparse population (four people per square mile). Koochiching SWCD has had trouble attracting potential supervisors to serve District V due to the low number of eligible candidates under the current boundary. The proposed change will increase the number of eligible supervisor candidates in District V from 38 to 424. The Northern Water Planning Committee will meet on April 18th to consider the proposed change. ***DECISION ITEM***

2. **Establishment Petition for Cedar River Watershed District** – On November 30, 2006, the Board received a petition from Mower County to establish the Cedar River Watershed District. The proposed district includes approximately 435 square miles in Dodge, Freeborn, Mower and Steele Counties. The major purposes for establishing the watershed district are flood control and water quality improvement. The watershed has experienced an increase in damaging floods over the last 30 years. Significant damaging floods have occurred in 2004, 2000, 1993 and twice in 1978. The 2004 flood resulted in the loss of two lives and over $17 million in property losses. The Cedar River exceeds state health standards for fecal coliform and total suspended solids.

   On December 20, 2006, the Board ordered a public hearing to be held and designated a hearing panel. The public hearing was held on January 10, 2007, in Austin. The hearing record remained open for three weeks after the hearing. Ten exhibits were received after the hearing on January 10. The hearing record consists of a total of 30 exhibits.

   There is much support in the record to establish the Cedar River Watershed District. Those opposed have recommended a joint powers board be formed as an alternative, but without a companion levy. The hearing panel was informed at the hearing that the four affected counties explored the joint powers board concept for several months and decided against it, largely because of a lack of agreement on how to fund the joint powers board. Noteworthy in the record is the lack of resolutions, or even comments, from local units of government, especially in opposition to the petition. The record shows resolutions of support for the petition from the Mower County Board of Commissioners, the Austin City Council and the Mower SWCD. The record contains nothing else, either resolutions or comments, from the other affected counties, cities, townships and SWCDs either pro or con.

   The hearing panel met on February 28, 2007, and, based on the entire record, recommend the watershed district be established per the attached draft order. ***DECISION ITEM***

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3. **Reinvest In Minnesota (RIM) Reserve Strategic Plan Update and BWSR Committee Appointment** – BWSR staff, through its ad-hoc RIM Reserve Committee is proposing to update the agency's RIM Reserve Strategic Plan. The RIM Reserve Committee will be seeking significant stakeholder participation. The updated RIM Reserve Strategic Plan will guide agency requests for future appropriations, leveraging opportunities with partners and new conservation initiatives. See attached. ***INFORMATION ITEM***

4. **Update on the MPCA Ditches and Wetland Listing Process** – As Minnesota state agencies began to implement the Clean Water Legacy Act, we recognized the need to discuss the TMDL process and identify priorities for monitoring, assessing and listing impaired waters to ensure a focused and organized approach. To do so, an interagency group began meeting in mid-2006 to discuss the TMDL process and prioritization needs, including how to approach assessment and listing of wetlands and ditches. Doug Thomas and Shannon Lotthammer will summarize the interagency process and outcomes, and update the Board on the status of MPCA implementation of the agreed-upon approach for considering wetlands and ditches in the 2008 impaired waters listing cycle. ***INFORMATION ITEM***

5. **BWSR Committee Meeting Schedule** – see attached. ***INFORMATION ITEM***

6. **Legislative Update** – John Jaschke will provide an update. ***INFORMATION ITEM***

If you have any questions regarding the agenda, please feel free to give me a call at 651-296-0878. The meeting will adjourn about 12:30 p.m. I look forward to seeing you on April 25th!

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BOARD OF WATER AND SOIL RESOURCES
520 LAFAYETTE ROAD NORTH
2nd FLOOR CONFERENCE ROOM
ST. PAUL, MINNESOTA 55155
WEDNESDAY, APRIL 25, 2007

PRELIMINARY AGENDA

9:00 AM CALL MEETING TO ORDER

PLEDGE OF ALLEGIANCE

ADOPTION OF AGENDA

MINUTES OF MARCH 28, 2007

OPEN MIKE (10-minute agenda time, two-minute limit/person)

REPORTS

- Chair – Randy Kramer
- Executive Director – John Jaschke
- Dispute Resolution Committee – Randy Kramer
- Wetlands Committee – LuAnn Tolliver
- Grants Program & Policy Committee – Louise Smallidge
- Public Relations, Outreach & Strategic Planning Committee – Kay Cook
- Administrative Advisory Committee – Randy Kramer

COMMITTEE RECOMMENDATIONS

Metro Water Planning Committee

1. Ramsey-Washington Metro Watershed District, Watershed Management Plan – Bob Burandt - ***DECISION ITEM***

2. Shingle Creek and West Mississippi Watershed Management Organizations' Major Plan Amendment – Bob Burandt - ***DECISION ITEM***

3. Upper Rum River Watershed Management Organization, Watershed Management Plan – Bob Burandt - ***DECISION ITEM***

Northern Water Planning Committee

1. Wilkin County Priority Concerns Scoping Document – Quentin Fairbanks - ***DECISION ITEM***

Southern Water Planning Committee

1. Middle Fork Crow River Watershed District (MFCRWD) Water Management Plan – Brian Kletscher - ***DECISION ITEM***

NEW BUSINESS

1. Koochiching SWCD Supervisory Boundary Change Request – Ron Shelito - ***DECISION ITEM***

2. Establishment Petition for Cedar River Watershed District – Jim Haertel - ***DECISION ITEM***

3. Reinvest In Minnesota (RIM) Reserve Strategic Plan Update and BWSR Committee Appointment – Kevin Lines - ***INFORMATION ITEM***

4. Update on the MPCA Ditches and Wetland Listing Process– Doug Thomas, BWSR; and Shannon Lotthammer, MPCA – ***INFORMATION ITEM***

5. BWSR Committee Meeting Schedule – John Jaschke - ***INFORMATION ITEM***

6. Legislative Update – John Jaschke – ***INFORMATION ITEM***

AGENCY REPORTS

- Minnesota Extension Service – Jim Anderson
- Minnesota Department of Natural Resources – Mark Holsten
- Minnesota Department of Health – Dan Wilson
- Minnesota Department of Agriculture – Joe Martin
- Minnesota Pollution Control Agency – Brad Moore

ADVISORY COMMENTS

- Association of Minnesota Counties (AMC) – Annalee Garletz
- Minnesota Association of Conservation District Employees (MACDE) – Rick Reimer
- Minnesota Association of Soil and Water Conservation Districts (MASWCD) – LeAnn Buck
- Minnesota Association of Townships (MAT) – Sandy Hooker
- Minnesota Association of Watershed Districts (MAWD) – Ray Bohn
- Natural Resources Conservation Service (NRCS) – Tim Koehler
- Others

UPCOMING MEETINGS

- Next Board Meeting, May 23, 2007, St. Paul

12:30 PM **ADJOURN**

**** The Public Relations, Outreach and Strategic Planning Committee will meet immediately following the Board meeting.**

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BOARD OF WATER AND SOIL RESOURCES
520 LAFAYETTE ROAD NORTH
2ND FLOOR CONFERENCE ROOM
ST. PAUL, MINNESOTA 55155
MARCH 28, 2007

BOARD MEMBERS PRESENT:
Dana Allen, Jim Anderson, MES; Paul Brutlag, Bob Burandt, Kay Cook, Quentin Fairbanks, Mark Holsten, DNR; Randy Kramer, Paul Langseth, Brian Napstad, Louise Smallidge, Lisa Thorvig, MPCA; Gene Tiedemann, LuAnn Tolliver, Dan Wilson, MDH.

BOARD MEMBERS ABSENT:
Brian Kletscher
Joe Martin, MDA

STAFF PRESENT:
MaryJo Anderson, Bill Eisele, Jim Haertel, John Jaschke, Dale Krystosek, Kevin Lines, Les Lemm, Ron Shelito, Dan Steward, Steve Woods, Brad Wozney

OTHERS PRESENT:
Wayne Anderson, PCA
Ray Bohn, MAWD
LeAnn Buck, MASWCD
Wayne Edgerton, DNR
Jack Frost, Met Council
Sandy Hooker, MAT
Tim Koehler, NRCS
Helen McLennan, Morrison SWCD
Doug Norris, DNR

Chair Kramer called the meeting to order at 9:02 a.m.

PLEDGE OF ALLEGIANCE

ADOPTION OF AGENDA - Chair Kramer proposed adding another agenda item
** under New Business, "Metro Water Planning Committee Update". Moved by
07-26 Louise Smallidge, seconded by Brian Napstad, to approve the agenda as amended. Motion passed on a voice vote.

** **MINUTES OF FEBRUARY 28, 2007** - Moved by LuAnn Tolliver, seconded by
07-27 Gene Tiedemann, to approve the minutes of February 28, 2007, as circulated. Motion passed on a voice vote.

REPORTS

Chair's Report – Randy Kramer attended several meetings at the Capitol. Chair Kramer reported that he met with various groups that are happy with BWSR, and heard from those that registered their complaints too.

Executive Director's Report – John Jaschke has been busy attending legislative hearings. John will provide legislative information later today on the agenda.

Dispute Resolution Committee – Chair Kramer reported that the Dispute Resolution Committee did not meet this month. Jim Haertel stated that a new appeal has been received from Blue Earth County regarding County Highway 26.

Wetlands Committee – LuAnn Tolliver reported that the Wetlands Committee did not meet in March; the Wetlands Committee will meet today immediately following the Board meeting.

Public Relations, Outreach & Strategic Planning Committee – Kay Cook reported that the Committee met via e-mail. Kay requested that Board members reply to a survey on the website and respond to Jon Fure.

Administrative Advisory Committee – Chair Kramer reported that the Administrative Advisory Committee met this morning; items will be considered later today on the agenda.

COMMITTEE RECOMMENDATIONSNorthern Region Water Planning Committee Itasca County Local Water Management Plan – Quentin Fairbanks reported that the Northern Region Water Planning Committee met on March 12, 2007, to review the Itasca County Local Water

Management Plan, and recommend approval of approval of the Itasca County
** Local Water Management Plan. Moved by Quentin Fairbanks, seconded by Brian
07-28 Napstad, to approve the Itasca County Local Water Management Plan. Motion passed on a voice vote.

Koochiching County Priority Concerns Scoping Document (PCSD)– Quentin Fairbanks reported that the Northern Water Planning Committee reviewed the Koochiching County Priority Concerns Scoping Document and recommends
** approval. Moved by Quentin Fairbanks, seconded by Brian Napstad, to approve
07-29 the Koochiching County Priority Concerns Scoping Document. Quentin stated that Koochiching County has acknowledged the concerns by agencies and has agreed to complete them as required for updating their Comprehensive Local Water Management Plan by July. Lisa Thorvig stated that Minnesota Statutes require that all counties administer an ISTS ordinance; Koochiching County is the only county that has not adopted such an ordinance. Brian Napstad stated the concern is that Koochiching County is a large geographic county with sparse population, this equates to limited resources to carry out a plan. Brian is confident that the plan will be completed; Koochiching County may need assistance in implementation of the plan. Motion passed on a voice vote.

NEW BUSINESS

Petition for Enlargement, Name Change and Increase in Number of Managers of Carnelian-Marine Watershed District – Jim Haertel explained that the Metro Water Planning Committee presided over a public hearing on February 22, 2007. The hearing record remained open for two weeks and contains strong support for the proposed action and no opposition. The Metro Water Planning Committee met on March 9, 2007 and, based on the record, recommend the petition be approved
** contingent upon the Marine on St. Croix WMO being dissolved. Moved by Louise
07-30 Smallidge, seconded by LuAnn Tolliver, that the Board hereby orders the Carnelian Marine Watershed District be enlarged according to the Petition, that the name be changed to the Carnelian-Marine-St. Croix Watershed District, and that the number of managers be increased from five to seven, contingent upon the dissolution of the Marine on St. Croix Watershed Management Organization occurring within three months from the date of the Order. The Board further orders that the Carnelian-Marine Watershed District Watershed Management Plan be amended within one year of the date of the Order to include the petitioned area. Motion passed on a voice vote.

Update on Army Compatible Use Buffer Program (ACUB) – Dan Steward introduced Helen McClennan, Morrison SWCD Manager; Marty Skoglund, Camp Ripley Environmental Supervisor; Jay Brezinka, Camp Ripley Environmental staff;

and Lieutenant Colonel Scott St. Sauver, Camp Ripley. Lieutenant Colonel St. Sauver presented the Army Compatible Use Buffer (ACUB) Program and explained that BWSR has been working with Camp Ripley and Morrison SWCD to help implement easements through the ACUB Program. Marty Skoglund presented a chronology of events on the buffer program. Helen McClennan explained that BWSR and the local SWCD's have become active partners in the ACUB project, working on easements, funding, and land use planning on ordinances. She thanked BWSR for holding easements to keep Morrison County a rural area and agriculturally protected. ACUB provides an opportunity for agricultural producers to preserve their land. Kevin Lines stated that this is a very positive collaborative effort with BWSR, DNR, and Camp Ripley, an exciting project to be involved in; a win-win effort for the State of Minnesota. Dan Steward clarified that this program has been federally funded to this point. Chair Kramer thanked everyone for the presentation and for coming in today.

Chair Kramer called for a break in the meeting at 10:05 a.m. The meeting reconvened at 10:25 a.m.

2006 DNR Enforcement Wetland Flyovers – DNR Commissioner Mark Holsten introduced Captain Perry Bollum and Lieutenant Julie Olson. Captain Bollum explained that DNR has been working with BWSR on education and training efforts to get the message out to the public about the Wetland Conservation Act (WCA). In 2006, DNR began unprecedented aerial patrol using aircraft detection for possible wetland impacts. The aerial approach to identifying wetland violations has been effective. Lieutenant Olson presented a power-point presentation "Operation Bird's Eye View". The aerial patrol is intended to increase detection of violations; expand on educational efforts; bring public attention to WCA – and it works! 542 possible impacts recorded; 315 were impacts; 148 are violations; 77 are still under investigation. In 2006, statewide, 526 cease and desist orders were issued. Captain Bollum stated that wetland violations are not criminal violations, they are civil violations. DNR and local units of government work with the landowner to assist in the process, tracking violations, a team effort to get the landowner to comply. Ron Shelito stated that our challenge is to work with those that are willing to comply. Paul Brutlag stressed that communicating the positive aspects of wetland protection efforts is also important. Lisa Thorvig commended DNR for their efforts. Brian Napstad suggested potential enhancements to the imagery to help this effort in the future such as a closer partnership with zoning – the zoning person would fly with the Wetland Enforcement Officer (WEO), which could rapidly dismiss many of those violations. Chair Kramer thanked Captain Bollum and Lieutenant Olson for the very informative presentation.

Guidance for Management of Forested Wetland Mitigation Sites – Dale Krystosek introduced Doug Norris and Rick Dahlman, DNR. Dale explained the purpose of the guidance paper is to provide landowners and Local Government Units (LGUs) with guidance for determining allowable long-term vegetative management for forested wetland mitigation sites under the Wetland Conservation Act. Doug Norris clarified that this only applies to lands on mitigation sites. It is recommended that forest management activities for forested wetland mitigation sites be described in the vegetation management plan section of the wetland replacement plan and be considered in the Wetland Replacement Plan or Wetland Banking Plan decision by the LGU. Brian Napstad would like to see similar provisions as are required for forest certification rather than another set of rules. Dale agreed that some compatibility can be achieved. Chair Kramer thanked Dale, Doug and Rick for their presentation.

Legislative Update – John Jaschke presented a legislative summary that was current on March 27, 2007. The House has created an Environment and Natural Resources omnibus finance and policy bill (HF 1651). This has BWSR's bills included. The Senate has begun the same process for their finance bills but has policy bills separate. Negotiations continue on the bills until passage and then via House-Senate conference committees. John gave the current status of the budget, WCA, drainage buffers bill, the oversight bill, BWSR membership bill, RIM bonding, biofuels bill, and dedicated funding. John stated that the information provided will be subject to some change. John distributed the draft "Local Water Management Oversight and Accountability Principles" for board members' information. Chair Kramer commended John and staff for their efforts during this legislative session.

Metro Water Planning Update – Steve Woods reported that the Metro Water Planning Committee met on March 9, 2007, to discuss and explore non-implementation of watershed district plans. Steve distributed a copy of the Committee's meeting minutes for board members' information. Dan Wilson explained the stepped enforcement process. LuAnn Tolliver stated that a standardized format is useful. Quentin Fairbanks suggested having a meeting with county commissioners as they are the ones that make people comply. Chair Kramer stated that this is for information at this time. Staff and board members will continue discussions and move forward to develop programmatic or comprehensive oversight provisions, dependent on legislative direction and funding.

AGENCY REPORTS

Minnesota Extension Service (MES) - Jim Anderson reported that they are close to hiring his co-director position, replacing Deb Swackhamer. Jim reported that two NEMO positions will be filled soon.

Department of Natural Resources (DNR) - Mark Holsten reported that Brad Moore's replacement has been appointed; Larry Kramka, is the new Assistant Commissioner of DNR for field operations. Mark reported that DNR will be making some senior management structure changes. In the southern region, Mark Matuska is the new Regional Director in New Ulm.

Mark announced that the MCEA lawsuit with DNR on lakeshore rules has been dropped. Mark reported that DNR is working with the Department of Natural Resources and the Department of Health regarding tuberculosis (TB) in deer herds. In the northwest, 366 deer were shot in the impacted area; three deer have TB lesions. There has been good landowner participation, the assessment of herds continues. DNR is involved in legislation regarding fencing issues.

Department of Health (MDH) - Dan Wilson briefly commented on legislative bills. Dan reported that the Department of Health has a limited study for water treatments on groundwater contaminates. The MDH is primarily looking at technologies on PFCs in Washington County.

Minnesota Pollution Control Agency (MPCA) - Lisa Thorvig announced that MPCA received approval from EPA on mercury TMDLs. Lisa reported that MPCA is revising rules for septic systems, which will impact county requirements. Lisa stated that MPCA is soliciting grant proposals for the burn barrel reduction campaign. Lisa briefly commented on the controversial issue of Individual Sewage Treatment Systems (ISTS) and the new Subsurface Sewage Treatment Systems (SSTS). Lisa reported that MPCA held the first Clean Water Council meeting this month. Lisa stated that MPCA has been working with BWSR, DNR, and MDA, discussing impaired wetlands on the impaired waters list. Guidance is being put together for wetlands that are hydrologically connected to lakes, rivers, streams. Lisa suggested this topic as a future BWSR meeting agenda item.

ADVISORY COMMENTS

Minnesota Association of Soil and Water Conservation Districts (MASWCD) - LeAnn Buck thanked BWSR for DNR's presentation on aerial patrol; this is a huge workload with good partnerships. LeAnn encouraged BWSR to be strategic on WCA funding allocations.

Minnesota Association of Watershed Districts (MAWD) – Kay Cook briefly commented on MAWD's good legislative day a few weeks ago. The "Minnesota Watershed District Guidebook" was distributed for board members' information.

Natural Resources and Conservation Services (NRCS) - Tim Koehler gave a brief update on legislative issues. He thanked BWSR for the funding for RIM tied to CREP and WRP. Tim will be working with Kevin Lines on allocations for quality projects when the funding becomes available. Tim thanked BWSR for assistance on WRP sites, wetland restoration, wildlife habitat, as areas with cooperative agreements between NRCS and BWSR. Tim reported that as of today $1.5M has been allocated to the State for drought assistance. NRCS would like to help with cost-share feedlot assistance. Chair Kramer thanked Tim for his report.

UPCOMING MEETINGS

- Next Board Meeting, April 25, 2007, in St. Paul

LuAnn Tolliver announced that the Wetland Committee will meet at 1:00 p.m. today.

** 07-31 Moved by Louise Smallidge, seconded by Dana Allen, to adjourn the meeting at 12:45 p.m. Motion passed on a voice vote.

Respectfully submitted,

Mary Jo Anderson
Recorder

Dispute Resolution Report
April 12, 2007
by: Jim Haertel

There are presently 23 appeals pending. All of the appeals involve WCA except File 05-24. There have been three new appeals filed since the last report dated March 15, 2007.

File 07-9. This is a new appeal of an exemption decision in Stearns County. The appeal concerns the denial of the request that the wetlands are "incidental". No decision has been made on the appeal.

File 07-8. This is a new appeal of a restoration order in Stearns County. The appeal regards the draining of wetland on agricultural land. No decision has been made on the appeal.

File 07-7. This is a new appeal of a replacement plan in Blue Earth County. The appeal regards the approval of a wetland replacement plan involving the realignment of a county road. No decision has been made on the appeal.

File 07-3. This is an appeal of a replacement plan decision in Traverse County. The appeal concerns the approval of a wetland replacement plan application. No decision has been made on the appeal.

File 06-43. This is an appeal of a restoration order in Morrison County. The appeal involves the placement of fill in wetland near a lake. The appeal has been placed in abeyance and the restoration order has been stayed pending field review by the Technical Evaluation Panel this spring.

File 06-28. This is an appeal of a restoration order in St. Louis County. The appeal regards the placement of fill in Type 7 wetland associated with construction of a road. The appeal has been remanded for TEP review of a wetland delineation and measurement of the wetland fill areas.

File 06-27. This is an appeal of a replacement plan decision in Otter Tail County. A permanent road was constructed in Type 6/7 wetland with a portion of it in the shoreland zone. A Restoration Order was issued and a replacement plan application was submitted to retain the road. An LGU staff individual denied the replacement plan. The appeal has been remanded for a public hearing at the local level.

File 06-26. This is an appeal of a wetland exemption determination in Cass County. The LGU approved the wetland exemption. The TEP recommended the exemption not be approved. The activity involves the placement of drain tile in a Type 2 wetland that was previously hayed and is now a sod farm. The appeal has been accepted, a pre-hearing

conference was held, a hearing before the DRC was scheduled but has been canceled while settlement discussions take place.

File 06-23. This is an appeal of a replacement plan decision in Kanabec County. The LGU denied the wetland replacement plan application. A previous denial of the same replacement plan application had been appealed, the appeal was remanded for a hearing, and now the current denial has been appealed. The appeal has been placed in abeyance pending the outcome of a lawsuit between the landowner and the county. The lawsuit concerns the county's possible noncompliance with the 60-day rule. The county prevailed in district court, however the decision has been appealed to the Court of Appeals.

File 06-17. This is an appeal of a replacement plan decision in the City of Montgomery in LeSueur County. The LGU denied an after-the-fact wetland replacement plan application based on a lack of sufficient reasons why the restoration could not be completed. The appeal has been remanded for further processing at the local level.

File 06-12. This is an appeal of a no-loss decision in Stearns County. It involves the same project and issues as File 06-6. After a restoration order was issued, a no-loss application was submitted by the developer and denied by the LGU. The appeal has been remanded for further technical evaluation.

File 06-6. This is an appeal of a restoration order in Stearns County. At issue are numerous wetlands impacted by filling, sedimentation, reduction of hydrology and lack of Best Management Practices associated with a residential development. The appeal has been denied in part. The Restoration Order has been affirmed in part and has been stayed in part.

File 06-5. This is an appeal of a wetland boundary and type decision in the City of Hermantown in St. Louis County. The appeal concerns the denial of a wetland delineation. There are issues regarding the soils and vegetation in a disturbed area. The area has been disturbed by wetland filling and a cease and desist order has been issued to the developer. The appeal has been remanded for further processing by the LGU.

File 06-4. This is an appeal of a restoration order in Carlton County. At issue is the unauthorized placement of fill in wetland for a roadway. The appeal is in abeyance pending completion of a wetland delineation during the growing season.

File 06-2. This is an appeal of a restoration order in Mille Lacs County. At issue is the unauthorized placement of fill in wetland for construction of a road. Also, unstable steep slopes exist along the edge of the fill in wetland. The appeal is in abeyance pending further technical work during the growing season.

File 06-1. This is an appeal of a replacement plan approval in Itasca County. The appeal contends that sequencing was not followed. The TEP recommended denial on a 3:1 vote. The SWCD approval was on a 3:2 vote. The application sought wetland filling for three

outbuildings and lake access. The appeal has been accepted and is in abeyance pending settlement discussions.

File 05-26. This is an appeal of a replacement plan decision in Crow Wing County. The appeal concerns the denial of a wetland replacement plan application. The application was denied because there was no hardship to support approval. Upon inspection it appears a decision was made to deny a variance, however it is likely no WCA decision was made. The appeal has been accepted and is in abeyance pending settlement discussions.

File 05-24. This is an appeal, actually three appeals, of the Bois de Sioux Watershed District compensation to landowners related to a project. The appeal has been held in abeyance pending settlement discussions, was starting to be move forward for a hearing before the DRC, and now is in settlement discussions.

File 05-20. This is an appeal of a replacement plan decision in Cokato, Wright County. The decision approved the filling of a 0.2 acre Type 2 wetland on a residential lot for construction of a residence. There is a question about the alternatives proposed for sequencing. Also, no TEP was held. The appeal has been remanded for a TEP to be held and sequencing to be addressed.

File 05-17. This is an appeal of a replacement plan decision in the City of Holdingford in Stearns County. At issue is the denial of a replacement plan application relating to a residential development. Wetland impacts of 0.7 acres were proposed for construction of a road and multi-use trail. The TEP recommended approval of the application. The LGU denied the application on finding the development could proceed without wetland impacts. The Corps issued a permit for the project. The appeal has been accepted and is in abeyance pending settlement discussions.

File 05-1. This is an appeal of a replacement plan decision by the Rice Creek Watershed District. The District previously made a decision that was appealed which resulted in a remand for an expanded TEP. Now there is an appeal of the decision made under remand since the decision differed from the TEP report. At issue is a wetland delineation and the Comprehensive Wetland Protection and Management Plan that BWSR approved. After a hearing before the DRC, the board remanded the matter for a new wetland delineation and for submission on an updated, complete replacement plan application.
File 04-26. This is an appeal of a restoration order in Spring Lake Township, Scott County. At issue is the placement of 4,300 feet of fill in a wetland for a driveway. The approved plat showed access to the lot without wetland impacts. The appeal is in abeyance pending a decision on a replacement plan application.

File 04-23. This is an appeal of a forestry exemption decision in Kittson County. Unpermitted fill was placed in a Type 7 wetland for a road. A Cease and Desist Order was issued. Additional filling has recently occurred in violation of the CDO. Corps and DNR violations also exist. The appeal has been accepted and is in abeyance pending completion of a wetland delineation and submittal of a replacement plan application.

File 04-15. This is an appeal of a wetland boundary and type decision in Anoka County. At issue is the decision by the Rice Creek Watershed District to classify a site as effectively drained. Previously a wetland delineation report identified most of the site as wetland. The appeal has been remanded for a technical evaluation panel to meet onsite. The appeal remains in abeyance under the remand.

COMMITTEE RECOMMENDATIONS

Metro Water Planning Committee

1. Ramsey-Washington Metro Watershed District, Watershed Management Plan – Bob Burandt - ***DECISION ITEM***

2. Shingle Creek and West Mississippi Watershed Management Organizations' Major Plan Amendment – Bob Burandt - ***DECISION ITEM***

3. Upper Rum River Watershed Management Organization, Watershed Management Plan – Bob Burandt - ***DECISION ITEM***

Northern Water Planning Committee

1. Wilkin County Priority Concerns Scoping Document – Quentin Fairbanks - ***DECISION ITEM***

Southern Water Planning Committee

1. Middle Fork Crow River Watershed District (MFCRWD) Water Management Plan – Brian Kletscher - ***DECISION ITEM***

Ramsey-Washington-Metro Watershed District Plan 2006 – 2016

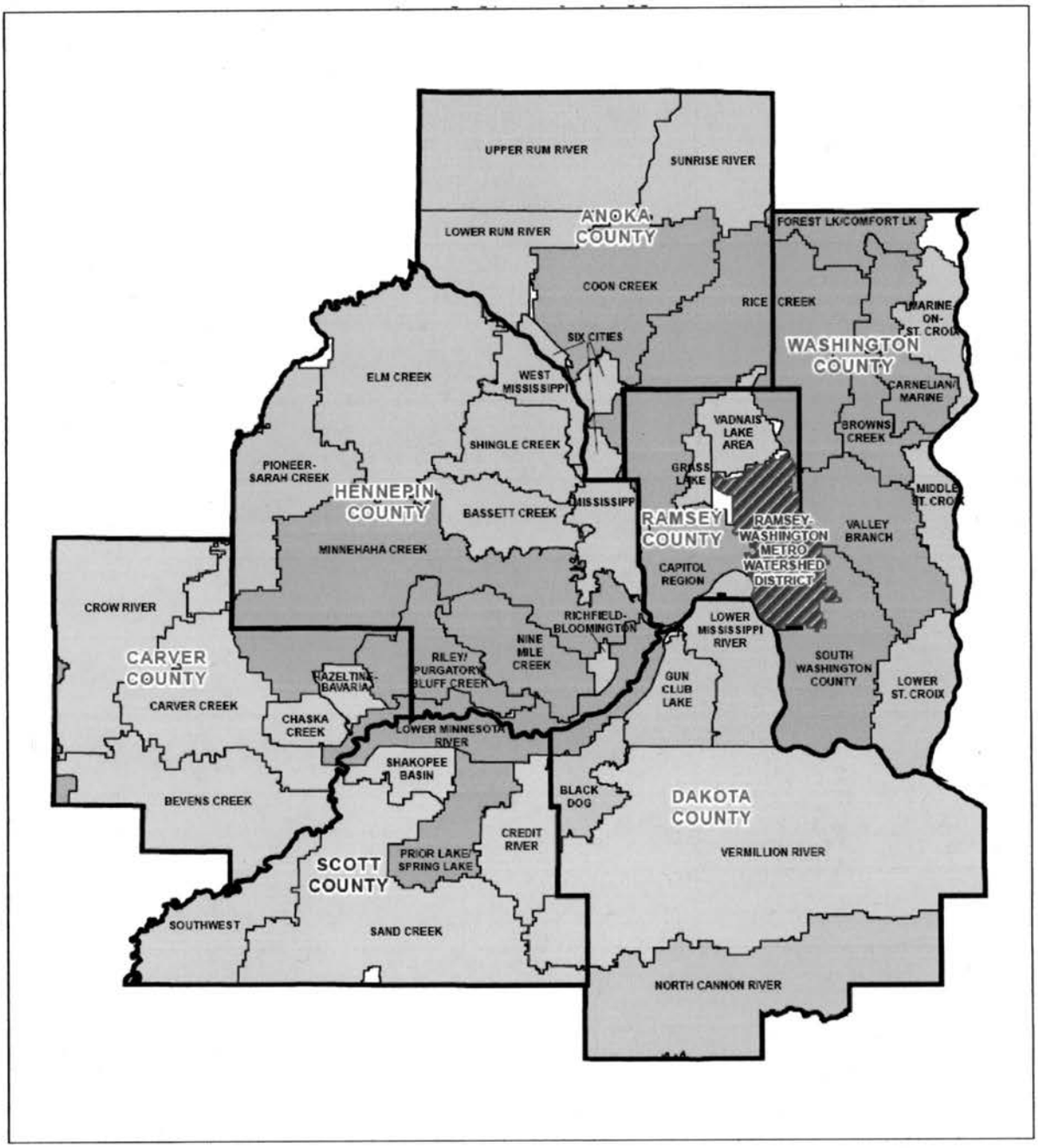


Figure I.A-1

LOCATION OF
RAMSEY-WASHINGTON METRO
WATERSHED DISTRICT

Fiscal Context and Implementation

The table below provides context, and reveals a relatively stable trend with regards to expenditures of RWMWD over the past several years of available data, with variations due mainly to expenditures for capital projects. RWMWD expenditures are projected to total $49,450,000 over the life of the plan. Approximately 95 percent of the RWMWD's funds for implementing capital projects, programs, and other operations are raised through an ad valorem property tax levy. The current District financing approach is to pay for District capital improvements in the year they are constructed, if possible. Projects in excess of approximately $1 million may be financed in multiple years. Grants and loans make up a small percentage of the RWMWD's funding sources. As a guiding principle, the RWMWD intends to restrict its annual levy to be in a range from approximately $3 to $4 million. This will maintain a relatively level property tax rate of approximately 2.5% or about $25 per $100,000 of property value. Based on 2005 property values, a tax rate of 2.5% would raise approximately $4 million. This tax rate will allow the RWMWD's levy to grow at approximately the same rate as the increase in property values. This self-imposed tax limit requires that the RWMWD establish spending priorities to assist the Board in decision-making when there is a high demand for the District's programs.

Watershed District	Taxes Payable 2004 (TMV)	Area (sq mi)	Expenditures				
			2001	2002	2003	2004	2005
Ramsey-Washington Metro	**9,197,769,100**	**53**	**3,048,986**	**3,329,310**	**3,370,862**	**2,350,399**	**1,945,645**
Browns Creek	1,118,882,500	28	1,035,814	536,531	403,906	320,385	503,935
Capitol Region	12,180,656,400	37	397,354	386,503	577,504	1,327,715	924,848
Carnelian-Marine	517,571,600	43	404,561	447,838	491,103	420,888	-
Comfort Lake Forest Lake	1,289,010,500	49	77,716	301,143	206,157	287,058	243,511
Coon Creek	6,763,641,200	96	467,285	601,544	660,523	640,591	498,240
Lower Minnesota River	5,748,966,600	64	427,058	292,621	204,346	318,216	456,166
Minnehaha Creek	28,338,875,675	184	6,086,030	5,270,636	3,343,963	2,436,635	3,212,548
Nine Mile Creek	13,293,860,700	50	1,021,981	950,905	1,015,845	1,484,029	2,413,557
Prior Lake-Spring Lake	1,882,034,700	42	410,171	610,534	732,799	655,410	756,044
Rice Creek	13,893,021,700	201	1,319,055	1,692,567	2,589,521	3,041,834	2,810,074
Riley-Purgatory-Bluff Creek	9,434,538,700	47	480,471	772,593	2,366,737	2,245,286	1,819,722
South Washington	6,070,592,700	53	2,356,478	2,323,327	5,771,911	1,921,135	1,252,877
Valley Branch	2,681,731,600	64	443,537	526,532	730,992	772,065	211,104

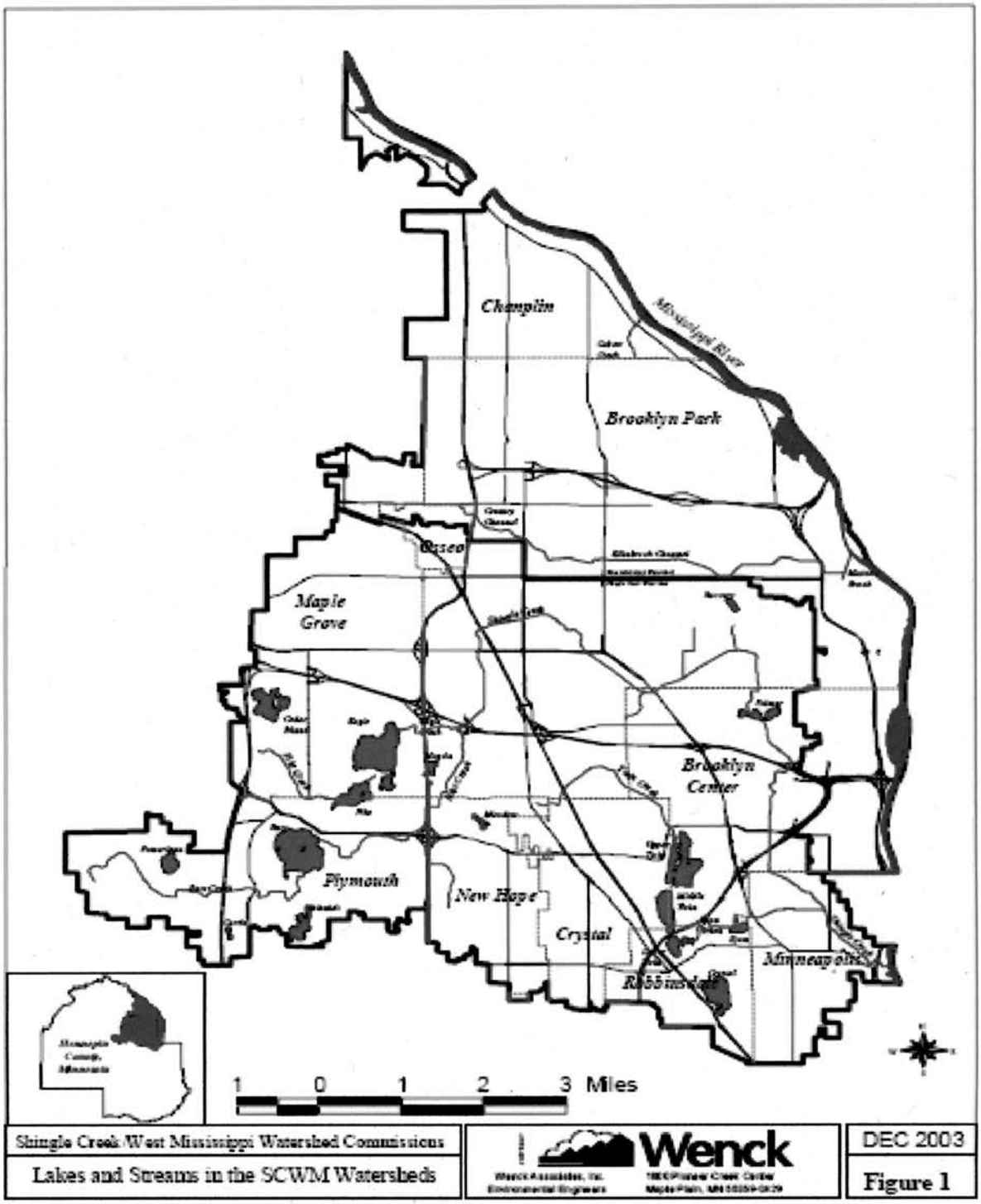
Recommendation

BWSR Board Conservationist Les Lemm recommends approval of the Ramsey-Washington Metro Watershed District 2006-2016 Watershed Management Plan.

Minnesota Board of Water and Soil Resources
April 2007 Metro Water Planning Committee Meeting

OVERVIEW

Shingle Creek / West Mississippi Watershed Management Organizations (SC-WMWMC) Major Plan Amendment 2007-2012



Shingle Creek/West Mississippi Watershed Commissions

Lakes and Streams in the SCWM Watersheds

Wenck

DEC 2003

Figure 1

1. **SC-WMWMC Establishment.** Joint Powers Agreements established the Shingle Creek and West Mississippi Watershed Management Commissions (SC-WMWMC) in 1984. Each Commission is comprised of one member appointed from each community by their respective city council. The first Watershed Management Plan was published in April 1990. The second generation watershed management plan was approved by BWSR in April 2004.

2. **Requirement to Plan.** The Metropolitan Surface Water Management Act requires the preparation of a watershed management plan for the subject watershed area which meets the requirements of Minnesota Statutes Sections 103B.201 to 103B.251.

3. **Nature of the Watershed.** The Shingle Creek and West Mississippi Watershed Management Commissions are located exclusively in Hennepin County in the northwest portion of the Minneapolis – St. Paul seven county metropolitan area. They are bound by the Mississippi River to the north and east, on the southeast by the Mississippi WMO, on the south by Bassett Creek WMO, and on the west by the Elm Creek WMO. Both watersheds encompass all or part of the following ten municipalities: Brooklyn Center, Brooklyn Park, Champlin, Crystal, Maple Grove, Minneapolis, New Hope, Osseo, Plymouth, and Robbinsdale. The Shingle Creek and West Mississippi watersheds cover 44.5 square miles and 23 square miles respectively. There are fourteen lakes in the Shingle Creek watershed, and none in West Mississippi. Combined the watersheds have approximately 20.5 miles of stream. Predominantly both watersheds are fully developed, with the remaining land being currently developed.

4. **Plan Development and Review.** The draft Amendment was submitted to BWSR, other state agencies, and local governments for the required 60-day review on September 23, 2006. The main components of the Amendment include: **1) Addition of a Water Quality Plan that includes specific water quality goals for the lakes, streams, and wetlands, and a specific set of management actions to manage and improve those resources, 2) Revised Capital Improvement Program and amendment procedure language, 3) Revised Cost-Share Policy that provides that 25% of the cost of qualifying capital projects would be funded by the county ad valorem tax levy across all watershed-wide properties, with the balance of the project costs paid for by the cities.** The SC-WMWMC received 60-day review comment letters from BWSR, DNR, Hennepin County Department of Environmental Services, MNDOT, Met Council, and the Cities of Brooklyn Center and Plymouth. SC-WMWMC held a public hearing on December 20, 2006. No new suggested changes were offered during the meeting. On December 22, 2006, all review agencies had received the revised draft Amendment for the required 45-day review period. The Commissioners received comment letters from the BWSR, DNR, MPCA, and Met Council. The final draft Amendment was submitted to BWSR on February 23, 2007.

5. **Local Review.** The SC-WMWMC circulated a copy of the draft Amendment to local units of government for their review pursuant to Minnesota Statutes Section 103B.231, Subd. 7.

   City of Brooklyn Center had concerns regarding the anticipated increase in the city assessment dues above the assessment cap dictated in the JPA. In addition, the city commented that capital projects should not be funded where TMDLs have not been completed. SC-WMWMC stated that an adjustment to the cap might be warranted to accomplish the goals set forth in the Water Quality Plan and grants will continue to be solicited to offset project costs. SC-WMWMC responded that there are several good reasons for pursuing projects not related to TMDLs such

as WMO statutory responsibilities, the length of time it takes agencies to approve TMDLs and their associated implementation plans, and taking advantage of timely opportunities.

City of Plymouth suggested a few minor changes related to various lakes and water quality data.

6. **Metropolitan Council Review.** Met Council was supportive of the amendment with the recognition that TMDL implementation plans should be part of this amendment.

7. **Department of Agriculture Review.** MDA did not provide comments on the SC-WMWMC Amendment.

8. **Department of Health Review.** MDH did not provide comments on the SC-WMWMC Amendment.

9. **Department of Natural Resources Review.** The DNR had concerns related to runoff volume control, protection of unimpaired waterbodies, and one component of the water resource prioritization criteria. These items were adequately addressed in the Commissions' responses.

10. **Pollution Control Agency Review.** MPCA offered their support of the Amendment, looking forward to partnering on TMDL development and implementation.

11. **Department of Transportation Review.** DOT requested clarification on TMDL intentions, lake classifications, and wetland function and value assessments.

12. **Hennepin County.** Hennepin County strongly recommended that all capital projects in the Capital Improvement Plan where the SC-WMWMC contribution exceeds $250,000 be submitted as minor plan amendments for approval by the County Board, even if costs are within the 125% cost estimate threshold.

13. **Board Review.** Board comments centered around developing a process for incorporating future TMDL implementation plans and other management plans resulting from this Water Quality Plan, the need to involve the WCA Technical Evaluation Panel in every phase of wetland assessment and management planning, and the perceived lack of commitment to implement the Water Quality Plan. The Commissions sufficiently revised the implementation plan to address the commitment issue by creating four categories of activities: 1) Activities already undertaken and which they commit to continuation, 2) Activities to be undertaken starting in 2007 which are currently funded by member city assessments above the assessment cap, 3) Activities the Commissions have budgeted for in future years but have not yet undertaken, and 4) Activities that are desirable but for which no ongoing funding has yet been identified. The All Commissions' responses were determined satisfactory.

14. **Plan Summary and Highlights.** The main goal of the major plan amendment is the addition of the Water Quality Plan. Other results of the amendment include an updated CIP and revisions of the cost share policy and minor amendment criteria. Highlights include:

    - Prioritization and grouping schemes for scheduling water management activities and targeting limited funding.
    - An aggressive "Interim CIP 2007-2009" for Shingle Creek WMC.

- A major Total Maximum Daily Load (TMDL) role taken on by SCWMC for chloride. TMDLs have also begun for nutrient impairments on 13 lakes.
- Extensive water quality monitoring programs.

15. **Metro Water Planning Committee Meeting**. On April 10, 2007, the Board's Metro Water Planning Committee and staff met with representatives from the SC-WMWMC in St. Paul to review and discuss the Amendment. Those in attendance from the Board's Committee were Robert Burandt, Louise Smallidge, Lisa Thorvig, and LuAnn Tolliver. Board staff in attendance were Metro Region Supervisor Steve Woods and Board Conservationists Brad Wozney and Les Lemm. The representative from SC-WMWMC was Consultant Diane Spector and Ed Matthiesen from Wenck Associates. Board staff recommended approval of the Amendment. [After discussion, the subcommittee (unanimously?) voted to recommend _____ of the Shingle Creek – West Mississippi Watershed Management Commissions' Watershed Management Plan Amendment to the full Board.]

Fiscal Context and Implementation

The table below reveals a stable trend with regards to annual expenditures of the Shingle Creek WMC and an upward trend for West Mississippi WMC. The Commissions appear to be in the middle bracket of expenditures per area in comparison with adjacent WMOs. Shingle Creek WMC's proposed annual budget for the Water Quality Plan within this amendment ranges $425,000 - $608,375 for years 2007-2009. West Mississippi WMC has a proposed annual budget ranging $39,700 - $45,500 from 2007 until 2012. It is highly likely that the Water Quality Plan, which includes the proposed TMDL implementation plans, stream assessments, and lake management plans will generate a significant number of new projects thereby requiring incorporation by amendment. Another amendment to the Water Quality Plan will be needed prior to 2009 to fill in the Water Quality Plan budget gaps. Additionally, the overall CIP will be reviewed and updated annually, a management strategy that BWSR fully supports.

The table below reveals financial information for adjacent WMOs. A map of the metro WMOs can be found at http://www.bwsr.state.mn.us/watermgmt/metro_imap-2005.htm

WMO	Area (sq mi)	Year 02	03	04	05	Exp/Area
Shingle Creek WMO	**44**	**$353,581**	**$374,809**	**$349,990**	**$305,402**	**$7,862**
West Mississippi WMO	**24**	**$67,834**	**$83,385**	**$125,104**	**$103,729**	**$3,959**
Mississippi WMO	31	$239,658	$487,438	$722,226	$1,284,437	$11,688
Bassett Creek WMO	40	$390,653	$318,823	$1,176,382	$270,230	$13,476
Six Cities WMO	21	$9,810	$6,317	-	$13,764	$474
Lower Rum WMO	56	-	-	$50,353	$48,222	$880
Elm Creek WMO	127	$156,370	$121,562	$140,500	$93,203	$1,007
Nine Mile Creek WD	50	$950,905	$1,015,845	$1,484,029	$2,413,557	$29,322
Minnehaha Creek WD	184	$5,270,636	$3,343,963	$2,436,635	$3,212,548	$19,380
Rice Creek WD	201	$1,692,567	$2,589,521	$3,041,834	$2,810,074	$12,604

" – " indicates incomplete data.

STAFF RECOMMENDATION:

With the state agencies' concerns sufficiently addressed in the amendment, BWSR Board Conservationist Brad Wozney recommends approval of the Shingle Creek – West Mississippi Watershed Management Commissions' Major Plan Amendment 2007-2012.

Minnesota Board of Water and Soil Resources
520 Lafayette Road North
St. Paul, Minnesota 55155

In the Matter of the review of the Watershed Management Plan for the **Ramsey-Washington Metro Watershed District** pursuant to Minnesota Statues Section 103B.231, Subdivision 9

ORDER APPROVING WATERSHED MANAGEMENT PLAN

Whereas, the Board of Managers of the Ramsey-Washington Metro Watershed District (RWMWD) submitted a Watershed Management Plan (Plan) to the Minnesota Board of Water and Soil Resources (Board) pursuant to M.S. Section 103B.231, Subd. 9, and;

Whereas, the Board has completed its review of the Plan;

Now Therefore, the Board hereby makes the following Findings of Fact, Conclusions and Order:

FINDINGS OF FACT

1. RWMWD Establishment

The Ramsey-Washington Metro Watershed District (RWMWD) was established on February 24, 1975, by the Minnesota Water Resources Board, now the Minnesota Board of Water and Soil Resources (BWSR) pursuant to the Minnesota Watershed Act, to effect the protection and provident use of water resources. This Plan is the fourth watershed management plan for RWMWD. The previous RWMWD Plans were:

1977 – *Overall Plan – Ramsey-Washington Metro Watershed District*
1986 – *Stormwater Runoff and Water Quality Management Plan*
1997 – *Ramsey-Washington Metro Watershed District Watershed Management Plan*

In general, the RWMWD is responsible for addressing water resource management issues that affect more than one city or issues defined by the RWMWD to be of District-wide significance. This usually means the watershed of the affected water resource spans more than one city. Specifically, the RWMWD is responsible for managing water level and water quality issues for certain water resources. These "District-managed" resources include the following 14 lakes and five streams:

Lakes:

Battle Creek Lake	Beaver Lake	Carver Lake
Eagle Lake	Gervais Lake	Keller Lake
Kohlman Lake	Lake Phalen	Round Lake (Maplewood)
Round Lake (Little Canada)	Tanners Lake	Twin Lake
Wakefield Lake	Willow Lake	

Streams:

Battle Creek	Fish Creek	Gervais Creek
Kohlman Creek	Willow Creek	

2. Requirement to Plan

The Metropolitan Surface Water Management Act requires the preparation of a watershed management plan for the subject watershed area which meets the requirements of Minnesota Statutes Sections 103B.201 to 103B.251.

3. Watershed Description

The RWMWD is located in eastern Ramsey County and western Washington County. The District is generally bounded on the west by downtown St. Paul and Interstate 35E, on the north by County Road E in White Bear Lake, on the east by I-694/I-494, and on the south by the Mississippi River. A small part of the District extends southeast of I-494 in the city of Woodbury. The RWMWD spans a 56.5-square-mile area and includes all or part of 10 communities, including White Bear Lake, Vadnais Heights, Gem Lake, Little Canada, Maplewood, Landfall, North St. Paul, St. Paul, Oakdale, and Woodbury. Approximately 44.9 square miles of the area lie within Ramsey County; the remaining 11.6 are within Washington County.

The RWMWD is adjacent to the following watershed districts and joint powers watershed management organizations:

- Capitol Region Watershed District, along west boundary of RWMWD
- Grass Lake Watershed Management Organization, along northwest boundary of RWMWD
- Vadnais Lake Area Watershed Management Organization, along north boundary of RWMWD
- Rice Creek Watershed District, along northeast boundary of RWMWD
- Valley Branch Watershed District, along east boundary of RWMWD
- South Washington Watershed District, along southeast boundary of RWMWD
- Lower Mississippi River Watershed Management Organization, across the Mississippi River from RWMWD along the southwest boundary of RWMWD

Topography within the District varies from steep river bluffs along the east side of the Mississippi River Valley and southeastern St. Paul, to moderately rolling land in Oakdale, Maplewood and eastern St. Paul, to gently rolling land in White Bear Lake, North St. Paul and Little Canada.

According to the 2000 Metropolitan Council land use data for the RWMWD, the watershed is largely fully developed. According to the Metropolitan Council future land use projections for 2020 for the RWMWD, some additional development is likely to occur but much of the expected overall change in land use will be from redevelopment. Based on the University of Minnesota's color-infrared Landsat photography (2002), the RWMWD analyzed the amount of impervious surface areas within each watershed and found the impervious surface areas of the RWMWD subwatersheds ranged from 21.3% to 43.1%, and the average was 34.0%.

4. **Plan Development and Review**

In assembling its fourth generation Watershed Management Plan (Plan), the RWMWD solicited input from review agencies and stakeholders through several meetings of a Planning Advisory Group (PAG), who guided the development and content of the Plan. Prior to submitting its updated Plan for formal review, the RWMWD solicited additional up-front comments by submitting a preliminary version of the draft Plan to review agencies and local governments. This resulted in additions and revisions to the draft Plan, as well as a meeting between RWMWD and BWSR staff to discuss the District's approach to addressing BWSR requirements. The draft Plan was submitted to BWSR, other state agencies, and local governments for the required 60-day review on July 6, 2006. A public hearing was held on November 1, 2006 and few comments were received. On November 27, 2006 the revised draft plan was sent to the review agencies for the 45-day review period. Formal comments were relatively limited due to the early involvement of agency staff in the Plan development process. The final draft Plan was submitted to BWSR on March 20, 2007.

5. **Local Review**

The BCWD circulated a copy of the draft Plan to local units of government for their review pursuant to Minnesota Statutes Section 103B.231, Subd. 7.

Washington County: The County commended the RWMWD for developing an excellent planning framework to provide direction for managing water resources in the watershed, and found the Plan generally consistent with County activities. The County encouraged RWMWD to consider groundwater protection in the rule development process. The County also recommended referencing the Washington County Groundwater Plan and listing the implementation actions that watershed districts are responsible for implementing. The County also recommended adding additional groundwater information to certain sections of the Plan, and to encourage local governments to develop land use regulations to protect groundwater resources. The RWMWD responded by including much of the requested information in the Plan. The RWMWD also responded that they have reviewed the County's draft proposed groundwater rules and determined that they were not appropriate for the Watershed, but that they would reassess this issue as new data become available.

Ramsey County: The County commented that, overall, the Plan reflects the maturity of the District and provides a thorough discussion of proposed water management strategies

and activities. The County provided sources for the historic water quality data collected by the County and recommended it be included in the Plan. The RWMWD replied that it would check the identified sources and update the Plan as appropriate. The County also provided updated information regarding the West Vadnais outlet and recommended the Plan include a breakdown of capital, operation, and maintenance costs for the alum treatment systems and innovative BMPs. The RWMWD responded that it will complete the suggested evaluations and include this information in the Plan.

Washington Conservation District: The WCD commented that it supports the RWMWD Plan.

City of Vadnais Heights: The City, through several comments, requested clarification on how specific Plan requirements would apply to the member cities. The RWMWD responded by providing clarifications and stating that the new Rules will apply district-wide while other implementation items will be the responsibility of the District.

City of Woodbury: The City provided numerous corrections and recommendations to improve information in the Plan and make it easier to read, resulting in several Plan changes by RWMWD. The City also suggested a closer review of Carver Lake water quality data, questioning the reported correlation between phosphorous concentration and Secchi disc values, which the RWMWD agreed to check for accuracy. The City commented that the completed Carver Ravine project was damaged by the October 2005 storm event and in need of repair. The RWMWD responded that because the Carver Ravine and its tributary watershed are located entirely within the City of Woodbury, the City's increased flows to the ravine (caused by the City's change to the drainage system) likely exacerbated the recent damages, and the slope failure at the upstream end was a main contributor to damage, that the repairs are the City's responsibility.

The City also commented that RWMWD does not have zoning authority and cities are not required to obtain watershed district approvals for zoning changes. The RWMWD agreed and clarified that the District's intent is to review proposed zoning changes to determine if the changes would impact the District's modeling, and that any comments are advisory to the City.

The City suggested removing the street sweeping requirement from the stormwater management system maintenance requirements, indicating they are analyzing whether a fall sweeping is cost-effective. The RWMWD responded that they would be interested in seeing the results of this analysis, but that the District's extensive street sweeping study presents strong evidence that two sweepings per year is a bare minimum and up to 9 sweepings per year is supported.

The City noted the statutory requirement for watershed district plans to describe conflicts with existing plans of local government units and stated that the RWMWD Plan does not adequately address this requirement. The RWMWD responded that past such evaluations performed by the District were not specific enough to be helpful in the development of local water management plans, and that this information would be more useful if performed when the cities are ready to start their local planning process. The RWMWD

offered to assist the cities in defining District requirements and inconsistencies with local ordinances at this time.

City of St. Paul: The City asked how the Plan's buffer and pretreatment requirements would apply to certain City storm ponds. The RWMWD responded that the City will be required to develop a plan to minimize buffer disturbance during maintenance activities. The City also had a similar comment as the City of Woodbury regarding zoning authority (see above), and requested a couple clarifications.

6. **Metropolitan Council Review**

Council staff felt that the Technical Advisory Committee that was appointed early in the planning process provided valuable input and feedback on the plan as it was being developed and provided an opportunity for stakeholder involvement. The Council found the Plan to be consistent with the Council's 2030 Water Resources Management Policy Plan and recommended that BWSR approve the RWMWD Plan update.

7. **Department of Agriculture Review**

MDA did not provide comments on the RWMWD Plan.

8. **Department of Health Review**

MDH did not provide comments on the RWWD Plan.

9. **Department of Natural Resources Review**

For the 60-day review, the DNR noted that Division of Waters staff were involved with the development of the Plan through the Planning Advisory Group. The DNR specifically recommended revising a table within the plan to list the MPCA's water quality criteria for those basins identified on the impaired waters list. The DNR also clarified information regarding public water lake identification numbers, contacts for MLCCS data, and administration of the DNR's aquatic plant management control program.The DNR also provided specific recommendations regarding individual subwatershed plans, including specific recommendations for improving public access and recreational activities, removal and limiting movements of carp, controlling excessive aquatic vegetation, monitoring of highway reconstruction, establishing native vegetation and restoring shorelines, and provide additional improvements to water quality.

In the DNR's 45-day comment letter, the agency indicated that the RWMWD had sufficiently and completely considered and responded to the comments previously submitted.

10. **Pollution Control Agency Review**

The PCA found the Plan to be well written and comprehensive. The PCA recommended that, for the lakes where RWMWD water quality goals are less stringent than the water

quality criteria of the PCA, that the Plan could describe the study methods, techniques, and goals, giving due consideration to the PCA criteria. The PCA requested additional assurance that the wetland protection afforded by the Plan meet or exceed WCA, DNR, and PCA requirements, and provided suggested language to add to the Plan. The PCA also recommended that the stormwater requirements include a provision for maintenance. RWMWD responded by making the applicable changes to the Plan.

11. **Department of Transportation Review**

DOT found the Plan to be very well organized and very detailed. The DOT, however, felt that the draft Plan should have been circulated prior to development of the District's Rules. Many of the DOT's comments were similar to those on the draft Rules. The DOT provided several comments to clarify the Department's responsibilities and authorities, and requested clarification to how many of the RWMWD's requirements would apply in road situations, instances with limited right-of-way, etc. The DOT also questioned the RWMWD's one-inch volume control standard, stating that these standards need to take into consideration the type of soil and should be phased in on a subwatershed basis. The DOT also expressed a preference that NPDES permitting remain with the PCA. The RWMWD responded by revising the plan, providing requested information, and recognizing that linear road projects can present additional challenges so variances for these projects could be considered on a case-by-case basis.

12. **Board Review**

Board staff noted that they had previously provided comments on a preliminary version of the Plan, which were fully incorporated, and commented that the RWMWD's early coordination, combined with early involvement of the PAG, had resulted in a quality Plan and few comments at the end of the process. The Board fully supported the steps RWMWD had taken to complete a self-assessment, noting that it was important for the District to continue to improve its effectiveness in reaching its goals. The Board recommended a periodic self-evaluation of the effectiveness of the District's actions over the duration of this Plan. Board staff indicated that the Plan meets or exceeds the requirements of Minnesota Rule 8410.

13. **Plan Summary and Highlights**

The RWMWD Plan includes goals, actions, and measures in six primary areas—surface water quality, ecosystems, flood control, groundwater, citizen education and involvement, and organizational management. The Plan is comprised of two main parts. The Strategic Overview is designed to reach a broad audience and provide them with an understanding of the District's past, present, and future approach to effective watershed management. The Resource and Organizational Assessment provides more specific details of the RWMWD resources (district-wide and watershed-based) and organizational management (e.g., District operations, such as regulatory programs, local water management plans, and the RWMWD standards). The watershed-based resource assessment section is comprised of individual subwatershed plans that present detailed information for each of the17 subwatersheds within the RWMWD.

The RWMWD's vision is as follows: "Water resources and related ecosystems are managed to sustain their long-term health and integrity and to enable them to contribute to the well-being of the citizens within the watershed. Watershed citizens understand the importance of water resources and support the Ramsey-Washington Metro Watershed District's science-based and citizen input-based management decisions."

The RWMWD will adhere to the following core set of principles that will guide their efforts to achieve the above identified vision. The RWMWD will be:

- A leader and innovator in the field of watershed management
- Focused on excellence in the delivery of services
- Focused on results and performance
- A trusted and accountable spender of public money
- A provider of reliable information to citizens, businesses, and the general public
- A collaborator with other public and private organizations
- An organization that bases its decisions on reliable information and science
- An organization that uses past experiences to guide future decision making

According to the RWMWD, "Accomplishing the vision requires a focus on common goals that, when realized, will place the use and management of RWMWD water resources closer to the District's vision." The RWMWD will pursue the following goals as a way of proceeding toward the vision:

- Promote quality surface water—The quality of surface waters is maintained or improved to meet or exceed the water quality necessary to support RWMWD designated beneficial uses.

- Achieve healthy ecosystems—Ecosystems associated with watershed projects and programs are managed to achieve the characteristics of healthy urban ecosystems.

- Provide for flood control—The public is protected from flooding through measures that ensure public safety and prevent inundation of occupied structures.

- Sustain quality groundwater—The RWMWD considers groundwater protection in management decisions and collaborates with other governing entities responsible for groundwater management and protection.

- Educate and involve citizens—Citizens of all ages are educated about water resources (including their use, protection, and management); are involved in resource management programs and decisions; and interact with water resources and healthy ecosystems.

- Manage organization effectively—RWMWD is well organized and administered, and water resource management is coordinated among clientele, especially various government jurisdictions.

Highlights of the Plan include:

- The Plan contains individual watershed management plans with specific hydrologic data and water quality goals for the 17 sub-watersheds within RWMWD.

- The Plan's Strategic Overview provides an excellent summary of RWMWD goals, accomplishments, activities, and implementation program to effectively and efficiently convey a large amount of information to the general public.

- With much of the District fully developed, the RWMWD will administer a $5,000,000 Best Management Practices Cost Sharing Grant Program over the life of the Plan, soliciting the involvement and action of property owners, including residents, businesses, and builders/developers.

- With many of the large regional water quality improvement projects identified in previous studies completed, RWMWD's priorities have increasingly shifted from flood control toward water quality improvement and natural resources protection.

- To assist in determining the responsibility for the increasing number of smaller scale projects, the RWMWD developed funding guidelines, which place various types of projects and programs into one of three tiers to identify who should fund the project.

- RWMWD is seeking ways to assist the cities in meeting their NPDES Phase II MS4 obligations. This collaborative program is designed to assist the cities in meeting some of their obligations under the MS4 program, identify areas for collaboration and efficiency, and refine and improve all MS4 SWPPPs.

- The Plan outlines a Biennial Work Program & Budget Process, which will develop a two-year work plan and budget (with annual review) that incorporates an evaluation of District programs, tracking of changes to the original plan content and projections, and determining if plan amendments are required.

14. **Metro Water Planning Committee Meeting**

On April 10, 2007, the Board's Metro Water Planning Committee and staff met with representatives from the RWMWD in St. Paul to review and discuss the Plan. Those in attendance from the Board's Committee were Robert Burandt, Louise Smallidge, LuAnn Toliver, and Lisa Thorvig. Board staff in attendance were Metro Region Supervisor Steve Woods, Board Conservationist Les Lemm, and Board Conservationist Brad Wozney. Representatives from the RWMWD were Administrator Cliff Aichinger, District Consulting Engineer Karen Chandler, and Manager Jack Frost. Board staff recommended approval of the Plan. After discussion, the subcommittee unanimously voted to recommend approval of the Ramsey-Washington Metro Watershed District 2006 - 2016 Watershed Management Plan to the full Board.

CONCLUSIONS

1. All relevant substantive and procedural requirements of law and rule have been fulfilled.

2. The Board has proper jurisdiction in the matter of approving a Watershed Management Plan for the Ramsey-Washington Metro Watershed District pursuant to Minnesota Statutes Sections 103B.231, Subd. 9.

3. The Ramsey-Washington Metro Watershed District Watershed Management Plan attached to this Order defines water and water-related problems within the RWMWD boundaries, possible solutions thereto, and an implementation program.

4. The attached Plan is in conformance with the requirements of Minnesota Statutes Sections 103B.201 to 103B.251.

ORDER

The Board hereby approves the attached Plan dated February 2007 as the Watershed Management Plan for the Ramsey-Washington Metro Watershed District.

Dated at Saint Paul, Minnesota this 25th day of April 2007.

MINNESOTA BOARD OF WATER AND SOIL RESOURCES

_____

BY: Randy Kramer, Chair

Minnesota Board of Water and Soil Resources
520 Lafayette Road North
St. Paul, Minnesota 55155

In the Matter of the review of the Watershed Management Plan Amendment for the **Shingle Creek and West Mississippi Watershed Management Organizations** pursuant to Minnesota Statues Section 103B.231, Subdivision 9

ORDER APPROVING WATERSHED MANAGEMENT PLAN AMENDMENT

Whereas, the Board of Commissioners of the Shingle Creek and West Mississippi Watershed Management Commissions (SC-WMWMC) submitted a Watershed Management Plan Amendment (Amendment) to the Minnesota Board of Water and Soil Resources (Board) pursuant to M.S. Section 103B.231, Subd. 9, and;

Whereas, the Board has completed its review of the Amendment;

Now Therefore, the Board hereby makes the following Findings of Fact, Conclusions and Order:

FINDINGS OF FACT

1. **SC-WMWMC Establishment.** Joint Powers Agreements established the Shingle Creek and West Mississippi Watershed Management Commissions (SC-WMWMC) in 1984. Each Commission is comprised of one member appointed from each community by their respective city council. The first Watershed Management Plan was published in April 1990. The second generation watershed management plan was approved by BWSR in April 2004. The During the development process of the Second Generation Plan, both Commissions agreed upon merging the plan preparation, operating policies, and administration for efficiency purposes, but will remain separate, politically distinct Watershed Management Organizations. Four out of the five member cities of West Mississippi Water Management Commission are also members of Shingle Creek WMC; Champlin is a member of West Mississippi only. The attached amendment will therefore be incorporated into the joint Watershed Management Plan once approved and adopted.

2. **Requirement to Plan.** The Metropolitan Surface Water Management Act requires the preparation of a watershed management plan for the subject watershed area which meets the requirements of Minnesota Statutes Sections 103B.201 to 103B.251.

3. **Nature of the Watershed.** The Shingle Creek and West Mississippi Watershed Management Commissions are located exclusively in Hennepin County in the northwest portion of the Minneapolis – St. Paul seven county metropolitan area. They are bound by

the Mississippi River to the north and east, on the southeast by the Mississippi WMO, on the south by Bassett Creek WMO, and on the west by the Elm Creek WMO. Both watersheds encompass all or part of the following ten municipalities: Brooklyn Center, Brooklyn Park, Champlin, Crystal, Maple Grove, Minneapolis, New Hope, Osseo, Plymouth, and Robbinsdale. The Shingle Creek and West Mississippi watersheds cover 44.5 square miles and 23 square miles respectively. There are fourteen lakes in the Shingle Creek watershed, and none in West Mississippi. Combined the watersheds have approximately 20.5 miles of stream. Predominantly both watersheds are fully developed, with the remaining land being currently developed.

4. **Plan Development and Review.** The draft Amendment was submitted to BWSR, other state agencies, and local governments for the required 60-day review on September 23, 2006. The main components of the Amendment include: **1) Addition of a Water Quality Plan that includes specific water quality goals for the lakes, streams, and wetlands, and a specific set of management actions to manage and improve those resources, 2) Revised Capital Improvement Program and amendment procedure language, 3) Revised Cost-Share Policy that provides that 25% of the cost of qualifying capital projects would be funded by the county ad valorem tax levy across all watershed-wide properties, with the balance of the project costs paid for by the cities.** The SC-WMWMC received 60-day review comment letters from BWSR, DNR, Hennepin County Department of Environmental Services, MNDOT, Met Council, and the Cities of Brooklyn Center and Plymouth. SC-WMWMC held a public hearing on December 20, 2006. No new suggested changes were offered during the meeting. On December 22, 2006, all review agencies had received the revised draft Amendment for the required 45-day review period. The Commissioners received comment letters from the BWSR, DNR, MPCA, and Met Council. The final draft Amendment was submitted to BWSR on February 23, 2007.

5. **Local Review.** The SC-WMWMC circulated a copy of the draft Amendment to local units of government for their review pursuant to Minnesota Statutes Section 103B.231, Subd. 7.

   City of Brooklyn Center had concerns regarding the anticipated increase in the city assessment dues above the assessment cap dictated in the JPA. In addition, the city commented that capital projects should not be funded where TMDLs have not been completed. SC-WMWMC stated that an adjustment to the cap might be warranted to accomplish the goals set forth in the Water Quality Plan and grants will continue to be solicited to offset project costs. SC-WMWMC responded that there are several good reasons for pursuing projects not related to TMDLs such as WMO statutory responsibilities, the length of time it takes agencies to approve TMDLs and their associated implementation plans, and taking advantage of timely opportunities.

   City of Plymouth suggested a few minor changes related to various lakes and water quality data.

6. **Metropolitan Council Review.** Met Council was supportive of the amendment with the recognition that TMDL implementation plans should be part of this amendment.

7. **Department of Agriculture Review.** MDA did not provide comments on the SC-WMWMC Amendment.

8. **Department of Health Review.** MDH did not provide comments on the SC-WMWMC Amendment.

9. **Department of Natural Resources Review.** The DNR had concerns related to runoff volume control, protection of unimpaired waterbodies, and one component of the water resource prioritization criteria. These items were adequately addressed in the Commissions' responses.

10. **Pollution Control Agency Review.** MPCA offered their support of the Amendment, looking forward to partnering on TMDL development and implementation.

11. **Department of Transportation Review.** DOT requested clarification on TMDL intentions, lake classifications, and wetland function and value assessments.

12. **Hennepin County.** Hennepin County strongly recommended that all capital projects in the Capital Improvement Plan where the SC-WMWMC contribution exceeds $250,000 be submitted as minor plan amendments for approval by the County Board, even if costs are within the 125% cost estimate threshold.

13. **Board Review.** Board comments centered around developing a process for incorporating future TMDL implementation plans and other management plans resulting from this Water Quality Plan, the need to involve the WCA Technical Evaluation Panel in every phase of wetland assessment and management planning, and the perceived lack of commitment to implement the Water Quality Plan. The Commissions sufficiently revised the implementation plan to address the commitment issue by creating four categories of activities: 1) Activities already undertaken and which they commit to continuation, 2) Activities to be undertaken starting in 2007 which are currently funded by member city assessments above the assessment cap, 3) Activities the Commissions have budgeted for in future years but have not yet undertaken, and 4) Activities that are desirable but for which no ongoing funding has yet been identified. The All Commissions' responses were determined satisfactory.

14. **Plan Summary and Highlights.** The main goal of the major plan amendment is the addition of the Water Quality Plan. Other results of the amendment include an updated CIP and revisions of the cost share policy and minor amendment criteria. Highlights include:

- Waterbody prioritization and grouping schemes for scheduling water management activities and targeting of limited funds.
- An aggressive "Interim CIP 2007-2009" for Shingle Creek WMC's portion of the Water Quality Plan. The Commissions will conduct annual CIP reviews and updates.
- A major Total Maximum Daily Load (TMDL) role taken on by SCWMC for chloride. TMDLs have also begun for nutrient impairments on 13 lakes.
- Extensive water quality monitoring programs.

15. **Metro Water Planning Committee Meeting**. On April 10, 2007, the Board's Metro Water Planning Committee and staff met with representatives from the SC-WMWMC in St. Paul to review and discuss the Amendment. Those in attendance from the Board's Committee were Robert Burandt, Louise Smallidge, Lisa Thorvig, and LuAnn Tolliver. Board staff in attendance were Metro Region Supervisor Steve Woods and Board Conservationists Brad Wozney and Les Lemm. The representative from SC-WMWMC was Consultant Diane Spector and Engineer Ed Matthiesen from Wenck and Associates. Board staff recommended approval of the Amendment. After discussion, the subcommittee unanimously voted to recommend approval of the Shingle Creek – West Mississippi Watershed Management Organizations' Watershed Management Plan Amendment to the full Board.

CONCLUSIONS

1. All relevant substantive and procedural requirements of law and rule have been fulfilled.

2. The Board has proper jurisdiction in the matter of approving a Watershed Management Plan Amendment for the Shingle Creek and West Mississippi Watershed Management Organizations pursuant to Minnesota Statutes Sections 103B.231, Subd. 9.

3. The Shingle Creek and West Mississippi Watershed Management Organizations' Watershed Management Plan Amendment attached to this Order defines the need and purpose of the program changes, their relation to the WMO's goals, and the methods of financing.

4. The attached Plan Amendment is in conformance with the requirements of Minnesota Statutes Sections 103B.201 to 103B.251.

ORDER

The Board hereby approves the attached Plan Amendment dated February 2007, to the Watershed Management Plan for the Shingle Creek and West Mississippi Watershed Management Organizations.

Dated at Saint Paul, Minnesota this 25th day of April 2007.

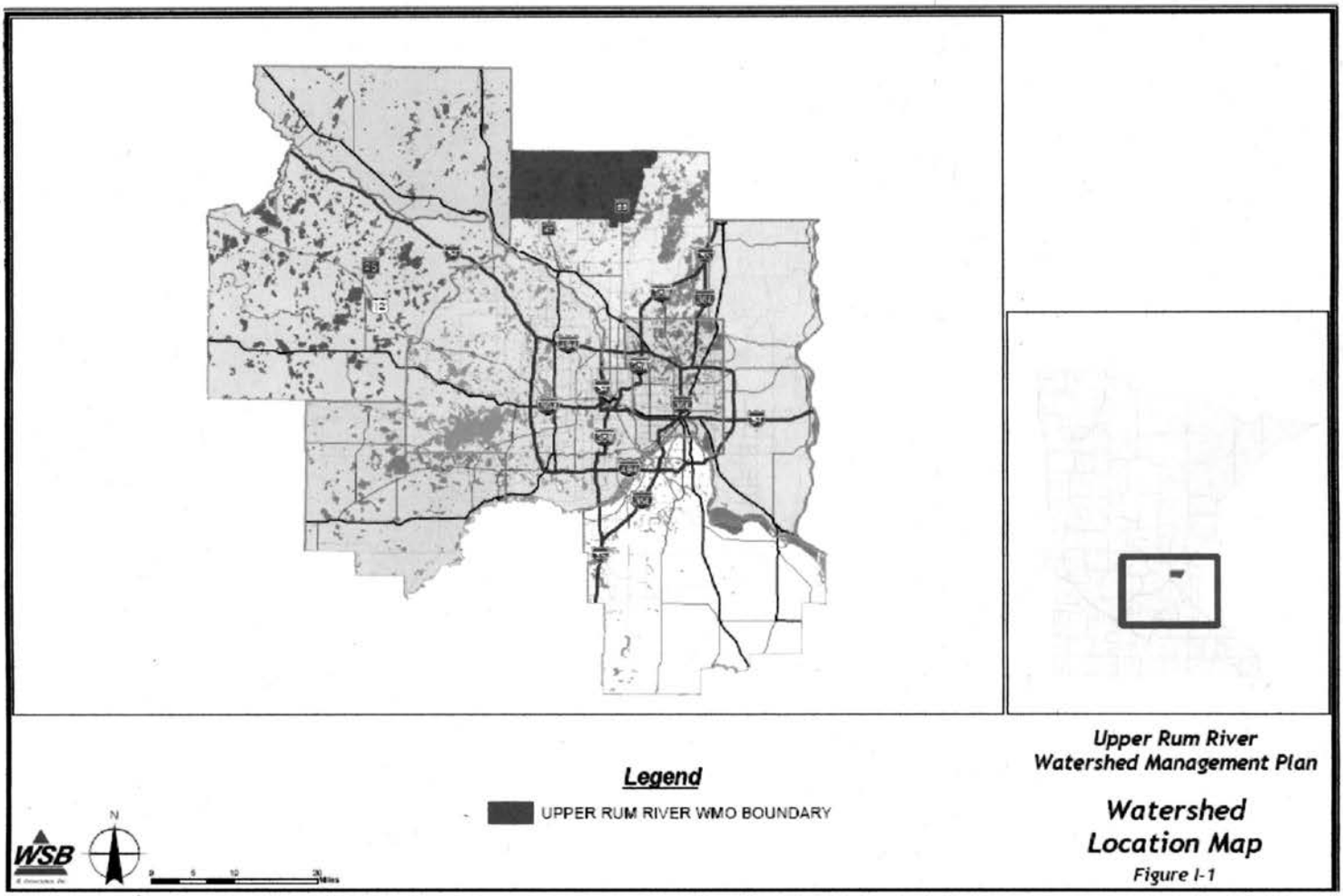
MINNESOTA BOARD OF WATER AND SOIL RESOURCES

BY: Randy Kramer, Chair

Minnesota Board of Water and Soil Resources
April 2007 Board Meeting

Upper Rum River Watershed Management Organization Plan 2007 – 2017

Location and Fiscal Context



Fiscal Context and Implementation

The table below reveals a stable trend with regards to expenditures of the Upper Rum River WMO over the past several years of available data, with the exception of additional planning expenses in 2005. The last several years of WMO expenditures, however, are the lowest of all Watershed Management Organizations in the state. Projected WMO expenditures for management programs and studies vary from $3,500 in 2007 to $45,500 in 2010, with 2012-2017 annual expenditures averaging $10,250. No capital improvements are planned.

Water Management Organizations	Counties	Area (sq mi)	Expenditures					2005 Exp./Area
			2001	2002	2003	2004	2005	
Upper Rum River	**Anoka**	**127**	**2,212**	**2,233**	**2,273**	**2,417**	**20,482**	**161**
Bassett Creek	Hennepin	40	433,208	390,653	318,823	1,176,382	317,647	7,941
Black Dog	Dakota	26	124,711	181,628	159,941	114,637	82,685	3,180
Carver County	Carver	280	76,722	69,447	104,573	138,255		494
Elm Creek	Hennepin	127	160,360	156,370	121,562	140,500	93,203	734
Grass Lake	Ramsey	9			18,594	5,969		663
Gun Club Lake	Dakota	33	42,900	28,125	18,451	32,237	22,958	696
Lower Mississippi River	Dakota, Ramsey	56	43,324	50,727	57,383	85,842	56,709	1,013
Lower Rum River	Anoka	56	31,007			50,353	48,222	861
Lower St. Croix	Washington	46					52,472	1,141
Marine on St. Croix	Washington	37			43,059	32,177	32,460	877
Mississippi River	Hennepin	30		239,658	487,438	722,226	1,284,437	42,815
Middle St. Croix	Washington	19	14,044	11,257	32,918	42,659	61,124	3,217
North Cannon River	Dakota	150	20,500	33,915	11,628	2,500	23,307	155
Pioneer-Sarah Creek	Hennepin	72	91,150	103,625	75,501	60,472	58,104	807
Scott County	Scott	323			194,985	440,661	475,208	1,471
Shingle Creek	Hennepin	44	238,813	353,581	374,809	349,990	305,402	6,941
Six Cities	Anoka	21	9,954	9,810	6,317		13,764	655
Sunrise River	Anoka	71	28,913	14,893	19,327	9,960	10,863	153
Vadnais Lake Area	Ramsey, Anoka	24	63,192	66,409	78,431	625,126	302,081	12,587
Vermillion River	Dakota, Scott	335			154,447	303,967		907
West Mississippi	Hennepin	24	83,385	125,104	149,051	115,215	103,729	4,322

* Gray cells indicate incomplete data.

Minnesota Board of Water and Soil Resources
520 Lafayette Road North
St. Paul, Minnesota 55155

In the Matter of the review of the Watershed Management Plan for the **Upper Rum River Watershed Management Organization** pursuant to Minnesota Statues Section 103B.231, Subdivision 9	**ORDER APPROVING WATERSHED MANAGEMENT PLAN**

Whereas, the Board of Managers of the Upper Rum River Watershed Management Organization (URRWMO) submitted a Watershed Management Plan (Plan) to the Minnesota Board of Water and Soil Resources (Board) pursuant to M.S. Section 103B.231, Subd. 9, and;

Whereas, the Board has completed its review of the Plan;

Now Therefore, the Board hereby makes the following Findings of Fact, Conclusions and Order:

FINDINGS OF FACT

1. **URRWMO Establishment.** The URRWMO was formed on June 18, 1991 through a Joint Powers Agreement by Burns, Bethel, East Bethel, Ham Lake, St. Francis and Oak Grove under the authority conferred to the member parties in 1992 through Minnesota Statues Sections 103B.201 to 103B.251. The agreement was amended and bylaws adopted in 1997. The Organization's purpose is to coordinate watershed-wide efforts to efficiently manage surface and groundwater resources. Management is aimed to improve water quality, minimize flooding, enhance wildlife values, and ensure sustainability. The WMO's first Watershed Management Plan was approved in 1997.

   A Board of Commissioners was established as the governing body of the WMO. The 11 member Board of Commissioners is comprised of appointed members from each of the member communities. Many of the appointed members are council members or town board members of the member community. One member represents the City of Bethel, two members represent the town of Burns, two members represent the City of East Bethel, one member represents the City of Ham Lake, two members represent the City of Oak Grove, and one member represents the City of St. Francis.

2. **Requirement to Plan.** The Metropolitan Surface Water Management Act requires the preparation of a watershed management plan for the subject watershed area which meets the requirements of Minnesota Statutes Sections 103B.201 to 103B.251.

3. **Watershed Description.** The URRWMO lies wholly within the northwestern corner of Anoka County, Minnesota. It is bordered by the Lower Rum River WMO on the southwest, the Coon Creek Watershed District on the southeast, and the Sunrise River

WMO to the east. To the north is Isanti County and to the west is Sherburne County, both outside of the seven county metropolitan area. The watershed covers 126.5 square miles.

Nearly 25% of the watershed's land use is residential development. Agriculture production is another common land use, particularly in Burns Township. Following settlement of the area farming of row crops and hay was common. Sod and tree farming also supply the areas growing landscape needs. Parkland and public land make up 8% of the watershed with Cedar Creek Natural History Area making up nearly half of the public open space.

The two major changes in land use since European settlement are the initial clearing of land for agriculture production, and now the conversion of those agricultural lands and additional clearing for roads, houses, businesses and other facilities to support a growing population. Development within the URRWMO boundary generally has consisted of land use conversion from agricultural to rural residential.

4. **Plan Development and Review.** The WMO's second generation Watershed Management Plan (Plan) has undergone an extensive review process, which included a substantial number of comments during the formal review periods. On February 1, 2005, BWSR staff met with the WMO Board to discuss the requirements of the second generation watershed planning process. The draft plan was submitted to BWSR, other state agencies, and local governments for the required 60-day review on February 23, 2006. A public hearing was held on January 3, 2006 and a second public hearing was held on June 6, 2006. A meeting with the member communities and review agencies was held on June 5, 2006. On August 7, 2006 the revised draft plan was sent to the review agencies for the 45-day review period. Both review periods resulted in a considerable number of significant comments and concerns from local and state reviewers. On November 16, 2006, BWSR received revised text from the draft Plan for additional review. This review resulted in additional comments and a March 5, 2007 meeting between BWSR staff and representatives from the WMO. The multiple comments from the review agencies and additional comments from BWSR staff resulted in significant changes to the plan after the 45-day review period to better address those comments. The final draft Plan was submitted to BWSR on March 21, 2007.

5. **Local Review.** Anoka Conservation District. For the 60-day review, ACD recommended the WMO reduce the uses of phrases such encourage, promote, whenever feasible, shall attempt to, etc. and replace with terms that are more concrete, include more specificity on how the WMO intends to accomplish its priorities, and to reduce the number of policies by converting some to action statements in the implementation schedule. The WMO responded by making some changes while wanting to maintain "flexibility" in others. ACD also identified several issues and additional information that should be included in the current Plan, including analyzing existing programs regulating groundwater, addressing invasive species, detection of illicit discharges, and more specifics on water control structure maintenance concerns. The WMO generally responded that these items would not be addressed in the Plan, but rather in the implementation program by member communities.

ACD commented that the entire implementation program was too vague to be useful, and that details were needed for each item. The WMO indicated that the Plan was revised for added clarity. ACD also noted that the principal funding source for management studies is listed as grants, which generally require a dollar-for-dollar match, making it unreasonable for the WMO to expect that its priority projects will occur without financial contributions from the WMO. ACD pointed out that the table outlining the member community regulatory programs is substantially incomplete, and should be completed to assist the WMO in its planning efforts. The WMO responded that the information has not been provided by all member communities, but can be addressed through the local stormwater management plan process.

ACD commented that the deferral of completing proposed studies to member communities, the vague description of the studies, the lack of financial commitment by the WMO, and the lack of target completion dates seems to indicate that the WMO has not considered whether the work is needed and does not have a commitment to completing it. The WMO responded by clarifying the implementation plan and the roles of member communities. ACD also questioned whether public input was obtained during plan development. The WMO responded that public input was solicited at two public meetings and through WMO Board members.

For the 45-day review, ACD recommended better communication between the WMO and member communities. ACD also indicated that they would like to see the WMO play a larger role in developing water quality goals. The WMO responded that it would develop water quality goals for high public use water bodies with assistance from member communities in 2008. The WMO also added a MOU with ACD for assistance in implementing the 2007 plan of work. ACD strongly urged the WMO to develop hydrologic models on a watershed basis, rather than the member communities developing them on a municipal boundary basis. The WMO responded that it will continue to require hydrologic studies be completed at the local level, showing the location of discharge points at municipal boundaries.

ACD noted that the Plan gives member communities the option to adopt the WMO Plan as their local plan. Since the Plan delegates much of the regulatory and implementation responsibilities to the municipalities, ACD felt this should not be allowed. The WMO responded that the provisions for the WMO, through its Technical Advisory Committee (TAC), will set clear and measurable standards for water quality and volume control, which will establish a formal process for WMO oversight of member communities' annual resource activities.

ACD recommended including a ten-year water quality monitoring plan in the implementation section of the Plan. ACD provided the general plan it currently follows, and recommended some additions. The WMO responded that it will work with ACD to develop a more detailed monitoring program in 2008, and included an MOU between the WMO and ACD in the plan to document the 2007 plans for monitoring. ACD also recommended increasing the amount budgeted for grant matching from $1,000 to 2,000 annually. ACD also recommended adding two implementation items to the Plan; cost-share for water quality improvement projects at $1,000 per year, and lakeshore erosion

mapping and education for a one-time cost of $2,325. ACD indicated that both were discussed by the WMO board and were favorably received. The WMO responded that, given the considerable changes to the implementation section, the WMO would assess these additional projects during the annual review process.

City of Ham Lake. For the 60-day review, the City recommended the WMO work with CCWD to correct the boundary between the two organizations. The City pointed out several corrections in Plan contents and provided updated information, which resulted in revisions by the WMO. The City commented that the WMO requirement for NURP ponds conflicts with the City's SWPPP/LSWMP which does not require ponds for all discharges, to which the WMO responded that stormwater needs to be treated prior to discharge to any water body and that Ham Lake may need to update their policies. The City also pointed out that the WMO requirement for low floor elevations to be two feet above unsuitable soils conflicts with the City's requirement of one foot, to which the WMO again responded that the City would need to update its policies to be in conformance with the WMO.

For the 45-day review, the City again pointed out that the WMO requirement for low floor elevations conflicts with the City requirement. The City stated that they would not revise their low floor requirement. The WMO responded by revising their low floor requirement from two feet to one foot in order to be consistent with the City. The City also expressed concerns with proposal for member communities to implement wetland buffer standards since placing buffers over existing wetlands could significantly reduce development potential. The WMO responded that they would work with the TAC, which will include membership from the member communities, to develop reasonable standards consistent with City goals and expectations.

City of Oak Grove. The City commented that many of the Plan's policies appear to provide the WMO with a substantial increase in authority without modification of the joint powers agreement between the communities. The City felt that the local communities have worked quite well together with the limited authority used by the WMO in the past. The WMO responded that many of the referenced policies were in the previous plan, and that the WMO is required by State Statute and Rule to develop policies, which, in this case, will be implemented locally with WMO involvement only when issues transcend municipal boundaries. The City had many additional questions and comments of a similar nature, requesting the WMO cite the authority under which they may assess and collect payments and regulate water quality and quantity standards, and expressed concerns about the WMO's policies.

The City also expressed objections to what they considered additional layers of regulation and review in areas such as wetlands, groundwater, recreation, and development review. The City feels there are few problems in the watershed and that the WMO proposed standards for stormwater, rate control, erosion control, etc. are unnecessary. Additionally, the City commented the proposed management programs and studies are unnecessary, the City does not need any support from the WMO, and the WMO does not need to review the City's ordinances or require new plans. The WMO responded to multiple such comments by stating that they have the authority to set policy, develop programs, identify projects, review local plans, collect fees from member

communities, and require conformance to the Plan via MN Statute 103B, MN Rules 8410, and the Joint Powers Agreement. The WMO also was clear that it was their intent for the member communities to implement those requirements.

City of St. Francis. The City expressed concerns that WMO policy would require discharge rates to be less than existing, to which the WMO replied that discharge rates could be the same as existing, but could not exceed existing. The City questioned whether the WMO policy on phosphorous removal would place an unreasonable financial burden on a member community. The WMO responded that this was the policy of the last plan, that local communities should require development to reduce phosphorous loading through BMPs, and that it is up to the member communities to implement this policy as part of their development review. The City asked if the requirement for a local shoreland ordinance would apply if there were no shoreland areas within the local community and if other ordinances can be modified to meet the intent of the shoreland ordinance. The WMO responded that an ordinance would not be needed if a community did not have any shoreland areas, but that there are two DNR wetlands with a Natural Environment designation within St. Francis. The City asked if the intent of the Erosion and Sediment Control Ordinance can be met through MPCA permitting. The WMO replied that the intent of the policy is for member communities to adopt an ordinance, of which model ordinances are available online. The City asked if the WMO had the regulatory authority over the member communities that certain policies suggest. The WMO responded that the policies were in the old plan and that they are based on Minnesota Statutes and Rules. The City also had several questions requesting clarification of the WMO's intent, the meaning of proposed policies, compliance with those policies, and the accuracy of certain plan data.

6. **Metropolitan Council Review.** For the 60-day review, the Council found the Plan to have serious deficiencies and not adequately address the issues in the watershed or the requirements in statute for watershed plans. Council staff encouraged the WMO to work with the Board and other review agencies to address Plan shortcomings and urged the Board to hold approval of the Plan until all plan requirements have been met. Given the WMO's general philosophy to keep regulation at the local level, a major concern of the Council was the ability of the WMO to establish criteria and provide effective oversight to ensure the criteria are followed. In a related comment, the Council noted that all of the proposed projects in the Plan are unfunded, pending resources becoming available. The Council felt that the Plan did not include adequate structural and nonstructural solutions to the problems and issues in the watershed, and that the proposed annual budget would not provide adequate funding in order to effectively implement a proactive plan and address watershed issues.

The Council noted the Rule requirement for the Plan to contain specific goals and policies to control soil erosion, and commented that the WMO should take an active role in encouraging the local governments to adopt local erosion control and stormwater management ordinances that can be implemented through their local water plans. If communities fail to adopt local water plans or applicable ordinances, the Council recommended the WMO seriously consider a permitting program to ensue equitable standards are being enforced watershed-wide. The WMO responded that stormwater management will be implemented via the policies in local plans and that local

communities are better suited to implement the permitting program. The Council also noted that several communities in the WMO have not sent local water plans to the Council in the past, and stated that the Plan needs to be amended to include information about this requirement. The Council also felt it was crucial that the Plan provide guidance to the member communities for developing local water plans. The WMO added the Council's review requirement and revised portions of the Plan to indicate member community responsibilities, but indicated that the specific local requirements could be found in Minnesota Rule 8410.

The Council noted that the Plan did not include information on the storm sewer drainage systems, stormwater management, and resulting discharge rates for the entire watershed, making it important and necessary for the WMO to work closely with the communities to ensure that all local water plans include this information. The Council provided information that must be included in local plans and asked questions concerning how the WMO will ensure compliance. The WMO responded that they would require annual reporting by the member communities to review compliance and implementation of the Plan. The Council also stated that the WMO's minimum requirements for a local stormwater management maintenance plan are inadequate, that most of the model ordinances contained in the Plan are old, and that the new State Stormwater Manual as a source for model maintenance plans and ordinances. The WMO responded by referencing the State Stormwater Manual as a source for model ordinances.

The Council commented that, with over 100 policies, the Plan contained too many policies which were too generic and non-committal rather than clear statements of WMO beliefs that support the overall goals. In addition, the Council felt the Plan was missing detail on how the policies will be implemented. The WMO responded that the Plan will be revised to more clearly identify the goals and policies of the WMO, that the WMO's focus will be to get involved in issues that transcend municipal boundaries, and that implementation of the policies will primarily be at the local level.

The Council noted the Rule requirement for watershed plans to outline specific water quality goals for natural surface water storage and retention systems and strongly encouraged the WMO to establish numerical standards and quantifiable goals for each of the 36 lakes in the watershed as soon as possible. The WMO responded that member communities would be responsible for developing water quality goals. The Council also noted several impaired waters within the watershed and indicated that it was important for the WMO to work with the MPCA to determine TMDLs for the impaired water bodies, to continue water quality monitoring and develop a detailed monitoring plan, and to put in place a strategy to improve the water quality so they can be removed from the impaired waters list. The WMO responded that they have deferred to the member communities to work with the MPCA to develop TMDLs, and that ACD would develop a monitoring plan for the WMO.

The Council felt it was important to complete a wetland function and value assessment watershed-wide and prior to proposals that may impact wetlands to allow for a rational basis for protection and preservation of wetlands, utilization of wetlands for stormwater treatment, and the enhancement or restoration of wetlands. The WMO anticipated that this would be the responsibility of the member communities.

For the 45-day review, the Council commented that the Plan still had serious deficiencies and Council staff had strong reservations about the WMO's approach and the member communities' abilities to meet the requirements. The Council reiterated many of the comments and concerns from the 60-day review, indicating that they were not adequately addressed by the WMO. The WMO ultimately made extensive revisions to the Plan, with the WMO taking a more active approach to developing standards with measurable timelines for water resource management. The revised final plan contains a provision for the WMO Technical Advisory Committee (TAC) to assist in setting clear and measurable standards for water quality, volume control, and local wetland management plans within two years. The TAC will be made up of member communities and review agencies, and will be provided regular ability to evaluate stormwater management via the policies in local plans. The WMO also stated that in 2007 it will undertake a review of the member communities' regulatory programs as part of the local water plan review for conformance with WMO policies, and through an annual report to the WMO by member communities.

Additional Council comments for the 45-day review indicated that local water plans must contain detailed subwatershed hydrologic modeling and a map of the stormwater system. The WMO responded that the Plan would require member communities to develop a hydrologic/hydraulic model as part of the development of their local water plans.

7. **Department of Agriculture Review.** MDA did not provide comments on the URRWMO Plan.

8. **Department of Health Review.** MDH did not provide comments on the URRWMO Plan.

9. **Department of Natural Resources Review.** For the 60-day review, the DNR indicated that they have a number of important concerns about the approaches being taken in various parts of the Plan and about the direction or tenor or the language in the Plan. The direction of the Plan tends to focus on encouraging or considering something rather than committing to proactively pursuing aspects to attain an identified goal, policy, or implementation action. The DNR recommended that the WMO take a strong lead in the planning and implementation of goals, policies, and projects. The WMO responded by revising portions of the Plan to provide more clarity, but stated that they have limited resources and rely on member communities for implementation. The WMO said they would continue to monitor water quality and focus on issues that transcend municipal boundaries.

The DNR emphasized that, for the Plan to ensure that water resources are not impacted by development, that the public capital expenditures to control excessive runoff volumes are minimized, and that fish and wildlife habitat are protected, the Plan should include specific descriptions and discussions about water conservation, volume control, natural vegetated buffers adjacent to all water resources, and responsible erosion control. Relying on encouraging runoff rate control is not sufficient. The WMO responded by clarifying portions of the plan, but that developing wetland management plans, buffer standards, and volume control are deferred to the member communities. The WMO also

contended that the change in land use in the watershed from agricultural to rural residential has reduced the volume of stormwater runoff and provided for improved water quality.

The DNR pointed out that the Plan does not contain an identification, description, or discussion of groundwater quantity, and recommended the Plan be revised to include additional information on the aquifers, groundwater level trends, monitoring efforts, and water supply issues relating to groundwater quantity in and/or affecting the watershed. The DNR also noted that the Plan identifies a potential for groundwater supplies to not meet future demands and recommended that the Plan include some specific requirements to address this issue. The WMO responded that groundwater quality and quantity is a priority, that developing the requested information has been more clearly added to the Plan, and that an implementation component related to developing infiltration and volume control requirements has been added.

The DNR pointed out that, within the watershed, there is limited public access to the Rum River and recommended the WMO seek opportunities to provide public access points along the river. The WMO expressed support for this recommendation, but stated that it is not a priority and would not be pursued. The DNR also noted that the Plan includes specific information from the DNR about the rare features found in the watershed, but that it is important the Plan be expanded to include goals and strategies to address how these rare species and significant native plant communities will be protected. The WMO responded that they would defer this to the local communities.

Regarding the draft Plan goal to "maintain or improve the water flow of all existing natural and artificial watercourses…," the DNR expressed concerns. They stated that the Plan for the watershed should move further than this in promoting and enhancing water resources. The DNR also stated that the goal is contrary to the notion of reducing connectivity in relation to modern stormwater management and is inconsistent with other identified goals within the Plan. The DNR recommended the WMO explore disconnecting at least some of the artificial connections between basins and promote more stormwater storage nearer the source and higher in the watershed. The WMO responded by removing the goal from the Plan, but did not add the recommended item to explore disconnecting artificial connections.

The DNR recommended that the Plan be revised to address runoff volume as part of the effort to protect stream and ditch channels. The DNR specifically recommended a policy clearly stating that increased stormwater runoff rate and volume is not allowed for a developing site as an excellent way to limit public expenditures due to development and to protect water quality. They also pointed out that the Plan states that the WMO "encourages the development of enhanced infiltration practices…" but does not identify how the WMO is or will accomplish it, and that the Plan should be revised as such. The WMO responded that they have deferred to the member communities the responsibility to develop infiltration and volume related guidelines.

The DNR indicated that existing controls are <u>not</u> adequate to protect wetlands or public waters, and that the WMO should go further than just encouraging buffer standards and require naturally vegetated buffers on all wetlands, watercourses, ditches, and basins

through a local buffer ordinance. The DNR recommended that the WMO promote drought tolerant landscaping that uses less water and to add discussion and specific information regarding how the WMO will be encouraging infiltration or preservation of wetlands. The WMO responded that these issues have been deferred to the member communities. The DNR also recommended that the WMO work with member communities to develop aquatic vegetation management plans for individual lakes. The WMO responded that they could coordinate with member communities and ACD if requested by the member communities.

The DNR recommended that the Plan further describe or explain if a policy of the WMO is to require member communities to maintain all existing ditches, including the extent to which it is in the public interest to maintain all ditches, opportunities for restoration of wetlands, efforts to improve water storage, establishing vegetated buffers, construction of more natural side slopes on ditches, and requiring setbacks from the water resource. The WMO responded by clarifying that all of the Public ditches are maintained by the Anoka County Highway Department, and the member communities would be responsible for maintaining any lateral drainage systems.

For the 45-day review, the DNR commented that, in general, many of the previously submitted comments were addressed, but that the Department still has concerns about some of the approaches being taken in various parts of the Plan. The DNR's 45-day comments were similar to the 60-day comments, recommending that the WMO take a stronger leadership role in the planning and implementation of goals, policies, and projects rather than leaving such discretion to the member communities without significant direction from the WMO. The DNR then reiterated some of the areas and issues that the DNR included in previous comments.

The WMO responded by including several additional actions to address the DNR's comments, including provisions for the WMO's TAC to assist in setting clear and measurable standards for water quality and volume control within two years. The WMO will also establish a formal process for oversight by the WMO of the member communities' annual water resources activities, including an annual reporting requirement. The WMO also committed to a clear process with established timelines to achieve specific outcomes including:

- Resource standards completed with local input by the end of 2008, which will allow local communities to incorporate into their 2009 local water management plans.
- The WMO will develop, with the assistance of ACD, a water quality monitoring program to track trends in water quality over time within the watershed. This plan will include a list of lakes and streams to be monitored, the frequency of monitoring, and the parameters and pollutants to be monitored. This monitoring plan will be developed by 2008 and will be effective through 2012. The WMO will review and alter, if necessary, the monitoring plan annually.
- The WMO will undertake a public input process with its member communities to develop specific standards for water resource management within the next two years.

- The WMO will develop specific standards related to infiltration, water quality goals for water bodies, and wetland buffer standards through this input process with the member communities within the next two years.
- The WMO will develop wetland management plan criteria to be followed by the member communities within the next two years.

10. **Pollution Control Agency Review.** For the 60-day review, the PCA listed the water bodies that have been identified as impaired within the watershed and indicated they will seek to work cooperatively with the WMO, local units of government, an other stakeholders to complete TMDL related activities. The PCA also pointed out that the Lake Pepin TMDL is currently underway, aimed at phosphorous and turbidity as the pollutants of concern. The sources of these parameters within the WMO will need to be assessed and strategies to reduce or maintain these parameters at current levels developed. The WMO responded that they have deferred to the member communities to work with the PCA to develop TMDLs for the impaired waters within the watershed.

The PCA encouraged the WMO to require more scientifically based peak flow rate controls. The WMO requirement of sustaining flows at or near two-year storm levels can be very erosive depending on channel shape. Continuous-stage recording of stream flows and periodic measurement of water-quality parameters would allow the WMO to develop flow and duration curves for all open water channels. The PCA also recommended that physical channel measurements be collected at each of the stream gage sites to make it possible to develop regional curves for various channel sites in the WMO. This would allow the WMO to more accurately assess the condition and threats to stream channels and tailor stormwater requirements to protect those stream channels. As an interim approach, the PCA suggested implementing channel protection controls such as those specified in the MPCA's Stormwater Manual. The WMO responded that a program to track lake and stream levels will be implemented by ACD and they will take the comments into consideration as data is collected. The comments were not incorporated into the Plan.

The PCA encouraged the WMO to conduct a thorough and comprehensive hydrologic and hydraulic evaluation of the watershed, which would be useful for the WMO to address its goals. The WMO responded that development of such a model is deferred to the local communities. The PCA cited the wetland protection requirements of Minnesota Rule 7050, and encouraged the WMO to complete a Comprehensive Wetland Management Plan for the watershed. The WMO responded that the member communities are the LGUs for local wetland protection implementation. The PCA also provided citations from the agency's website for information regarding stormwater management and surface water monitoring.

For the 45-day review, the PCA recommended the clear identification of the roles of the WMO and member communities in developing TMDL studies, developing a hydrologic/hydraulic model, and furthering a watershed-wide approach to wetland protection. The WMO responded that the member communities would be responsible for completing the indicated activities. The PCA also recommended considering

planning for the removal/treatment of fecal coliform in stormwater permitting efforts in anticipation of the Mississippi River TMDL studies.

11. **Department of Transportation Review.** For the 60-day review, the DOT questioned how the WMO would ensure that installed BMPs are maintained after construction. The DOT was particularly concerned with those properties that are adjacent to DOT right of way. The WMO responded that these issues are to be determined at the local level. DOT also requested revisions to stormwater treatment design parameters, which the WMO changed in the Plan. DOT commented that the sample Stormwater Maintenance Plan should also apply to private commercial and industrial properties with structural BMPs., to which the WMO responded that this responsibility would remain with the member communities. The DOT also suggested that the WMO take steps to help member communities identify illegal drainage/stormwater connections. The WMO responded that it is more effective and efficient for the member communities to undertake this effort.

12. **Board Review.** For the 60-day review, the Board commented that the Plan was insufficient, lacked specificity and focus, and would be difficult for member communities to know the WMO's intent. The Board recommended against mixing a large number of existing State requirements and general statements with WMO policy, but rather making WMO policies and action items clearer, more specific as to the desired end result, and outcome based in order to measure the WMO's success in reaching them.

    The Board noted that the Plan's implementation program is severely constrained, identifying several high priority management studies without scheduling any for completion without obtaining outside grants. The Board urged URRWMO to commit to doing at least a small number of high priority projects and/or studies, and focus other efforts on prevention. The Board recommended identifying, funding and completing necessary studies to provide a basis for future planning efforts, and for the WMO to better address the requirements of Minnesota Rule 8410 in the Plan.

    The Board noted that the URRWMO has the authority to adopt a budget to the extent necessary to implement its Plan and the requirements of State Statute and Rule, and identifying problems and needs for additional study but failing to fund a prioritized implementation schedule that addresses them does not meet the intent of statute or rule. The Board felt that achieving the goals of the Plan would undoubtedly require a higher level of funding than currently committed. The Board pointed out that the URRWMO still has the opportunity to avoid future problems and protect its important resources through long-term planning activities, and recommended investing some in planning and prevention now to avoid having to fix problems after the fact.

    Board staff indicated that, because of the very modest, non-committal implementation plan and lack of specificity in the WMO policy statements, staff would not recommend approval of a plan with this level of uncertainty. The Board felt that the 60-day version of the draft Plan did not meet the requirements of Minnesota Statute 103B and Rule 8410, and indicated that significant revisions would be necessary to correct deficiencies and address review agency comments. The Board also recommended the Plan provide an assessment of how well the organization did in implementing the last plan, including a

discussion of the implementation barriers of the last plan and how they will be overcome to implement the new Plan.

Specific Board comments expressed concerns about the approach the Plan was taking towards landlocked basins, review and approval of local plans, the proposed wetland management policies, stormwater management, water body classification, enforcement of Plan requirements, TMDLs, runoff volume control, effective use of WMO authorities, clarity of WMO intent, and utilization of more up-to-date technical manuals.

For the 45-day review, the Board commented that the format of the Plan was improved over the 60-day version, but the Plan content remained ambiguous as to what the WMO and member communities are expected to accomplish in several key areas. The Board acknowledged the WMO's intent for the member communities to implement programs and Plan requirements, actually requiring them to undertake planning and development of goals and policies. The Board noted, however, that this intent is contradictory to the policy of allowing member communities the option of adopting the WMO Plan instead of developing their own. The Board also pointed out that Minnesota Rule 8410.0080 requires the WMO to develop the detailed goals and policies, which the member communities can exceed if they wish. The Rules requires the WMO Plan to contain minimum standards and establish maximum permissible runoff rates, etc. The Board explained that merely passing on the development of standards and implementation items to the member communities circumvents the citizen and agency involvement process set up by State Statute. The Board also felt that the WMO's approach conflicts with the intent of Minnesota Statute 103B, which includes a stated purpose to "establish more uniform local policies and official controls for surface and groundwater management." In short, the member communities can implement the policies and standards, but they must be developed by the WMO. Board staff indicated that they were again unable to recommend approval of the 45-day version of the Plan, and proposed that the WMO re-assess the direction of the Plan.

The URRWMO responded by making additional changes to the Plan and submitting it to the Board for a final review, resulting in additional comments. Board staff indicated that review agency comments had not been satisfactorily addressed. Board comments summarized several previous comments regarding Plan clarity and structure, responding to agency comments, organizational accountability, water quality monitoring, wetland management, water quality goals and standards, the Plan's impact on member communities, and plan amendments. For each of these areas, Board comments cited the related State Statute and Rule requirements, summarized Plan contents, and provided guidance on the actions necessary to bring the Plan into compliance. These comments resulted in a meeting between Board staff and representatives from the URRWMO to further discuss needed steps to bring the Plan into compliance with Minnesota Rules. These comments and discussions resulted in significant revisions to the Plan to better address agency comments and meet the minimum requirements of Minnesota Rule 8410 (see responses to other review agency comments above, particularly Met Council and DNR). In the opinion of Board staff, these revisions have resulted in the Plan now being compliant with minimum Rule requirements.

13. **Plan Summary and Highlights.** The URRWMO Watershed Management Plan outlines strategies to target four main audiences in order to meet the goals of the Plan and the requirements of Minnesota Statute 103B.201. Policies were then developed based on the target audience and strategy. The target audiences and strategies are as follows:

AUDIENCE	STRATEGY
Public – Residents and Business Owners	Education, Regulation
City Staff and City Council	Cooperation, Education, Regulation, Operation
Developers	Education, Regulation
Review Agencies	Cooperation

The Plan contains an assessment of existing and potential water resource related problems and the corrective actions the WMO intends to pursue to address them and achieve the organization's goals. An implementation program has been developed, based partially on the availability of grants.

Highlights of the Plan include:

- The WMO realizes it currently has limited capabilities and resources, and thus relies on its member communities for much of the Plan implementation.

- The WMO intends to utilize a Technical Advisory Committee to assist in developing wetland management plan and buffer standards, infiltration and volume reduction standards, and water quality goals for high public use water bodies. These will need to be approved as an amendment to the Plan, and member communities will be required to adopt these standards.

- The WMO intends to complete a groundwater capacity study to determine the population that can be supported by private wells, and to partner with other agencies to develop and implement a plan to track groundwater levels, trends, and quality.

14. **Metro Water Planning Committee Meeting.** On April 10, 2007, the Board's Metro Water Planning Committee and staff met with representatives from the URRWMO in St. Paul to review and discuss the Plan. Those in attendance from the Board's Committee were Robert Burandt, Louise Smallidge, LuAnn Tolliver, and Lisa Thorvig. Board staff in attendance were Metro Region Supervisor Steve Woods, Board Conservationist Les Lemm, and Board Conservationist Brad Wozney. Representatives from the URRWMO were Board Chair Randy Bettinger and Consultants Todd Hubmer and Phil Belfiori of WSB. Board staff recommended approval of the Plan. After much discussion, the subcommittee unanimously voted to recommend approval of the Upper Rum River Watershed Management Organization 2007 - 2017 Watershed Management Plan to the full Board.

CONCLUSIONS

1. All relevant substantive and procedural requirements of law and rule have been fulfilled.

2. The Board has proper jurisdiction in the matter of approving a Watershed Management Plan for the Upper Rum River Watershed Management Organization pursuant to Minnesota Statutes Sections 103B.231, Subd. 9.

3. The Upper Rum River Watershed Management Organization Watershed Management Plan attached to this Order defines water and water-related problems within the URRWMO boundaries, possible solutions thereto, and an implementation program.

4. The attached Plan is in conformance with the requirements of Minnesota Statutes Sections 103B.201 to 103B.251.

ORDER

The Board hereby approves the attached Plan dated February 2007 as the Watershed Management Plan for the Upper Rum River Watershed Management Organization.

Dated at Saint Paul, Minnesota this 25th day of April 2007.

MINNESOTA BOARD OF WATER AND SOIL RESOURCES

BY: Randy Kramer, Chair

Minnesota Board of Water & Soil Resources

April 25, 2007

Stephanie Miranowski, Chairperson
Wilkin County Commissioners
1552 270th Street
Breckenridge, MN 56520-9711

RE: Official Comments pertaining to the State Review of the Wilkin County Priority Concerns Scoping Document.

Dear County Commissioner Miranowski:

Pursuant to M.S. section 103B.313, subdivision 5, this letter communicates the State's official comments pertaining to the priority concerns Wilkin County has chosen to address in the update of their Local Water Management Plan. The Board of Water and Soil Resources, along with the state review agencies, received Wilkin County's Priority Concerns Scoping Document (PCSD) on February 20, 2007.

The Wilkin County Local Water Management Advisory Committee reviewed concerns raised during the data collection process and selected the following priority concerns for the water plan update:

Water Quality Concerns – Including, but not limited to: impaired waters (TMDLs), groundwater pollution, nonpoint pollution, etc.
Erosion Concerns – Including, but not limited to: soil erosion (wind and water), streambank erosion, sedimentation of streams and rivers, etc.
Flood Damage Reduction - Including, but not limited to: flooding, effects of tiling, drainage, etc.
Natural Resource Protection Concerns – Including, but not limited to: trout stream protection, stream/river restoration and connectivity, native prairie conservation, wetland and grassland restoration and protection, etc.
Water Quantity – Including but not limited to: groundwater recharge areas, wellhead protection, surface water supply, etc.

Agency responses, as of April 9, 2007, to the PCSD were:

- The Minnesota Pollution Control Agency (MPCA) concurs with the identified priority concerns. The County, while completing the plan update, is encouraged to use the MPCA's monitoring data for assessments. MPCA commended Wilkin County and Wilkin SWCD efforts in the Lower Ottertail TMDL Study and Implementation

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Plan; the Comstock Coulee Project (in cooperation with Clay SWCD & BRRWD); and implementation of BMPs in the Whiskey Creek Watershed. MPCA congratulates the County and SWCD in obtaining Clean Water Legacy funds which will deal extensively with sedimentation issues and looks forward to reviewing the forthcoming Plan.

- The Minnesota Department of Health (MDH) concurs with the identified priority concerns. MDH offers the following comments for consideration when drafting the plan: mention drinking water protection under Water Quality Priority Concerns and acknowledge that downstream users of Wilkin County rivers and ditch waters (Fargo and Moorhead) are constantly providing expensive treatment to make the waters potable and any upstream improvements of water quality will increase the likelihood that those treatment plants are able to function properly.
- The Minnesota Department of Agriculture concurs with the priority concerns identified.

The Northern Water Planning Committee (hereinafter referred to as the Committee) met on April 16, 2007, to discuss the state review agencies comments, the content of the PCSD and recommendations for the content of the final plan.

The Committee commends the County for the process used to select the priority concerns. The priority concerns to be addressed in the plan were deemed to be appropriate. The Committee does not recommend or require any changes to the PCSD as presented. The Committee suggests the final plan utilize and encompass information from the Lower Otter Tail River Turbidity Total Maximum Daily Load Report and the Implementation Plan; and the Comstock Coulee Assessment of Current Issues and Potential Activities.

Sincerely,

Randy Kramer, Chair
Board of Water and Soil Resources

C: Lyle Hovland, Wilkin County Commissioner & Chair of LWM Advisory Committee
Bruce Poppel, Environmental Officer, Wilkin County
Ron Shelito & Pete Waller, BWSR
John Fax & Mike Carrol, DNR
Art Persons, MDH
Becky Balk, MDA
Lisa Thorvig, MPCA
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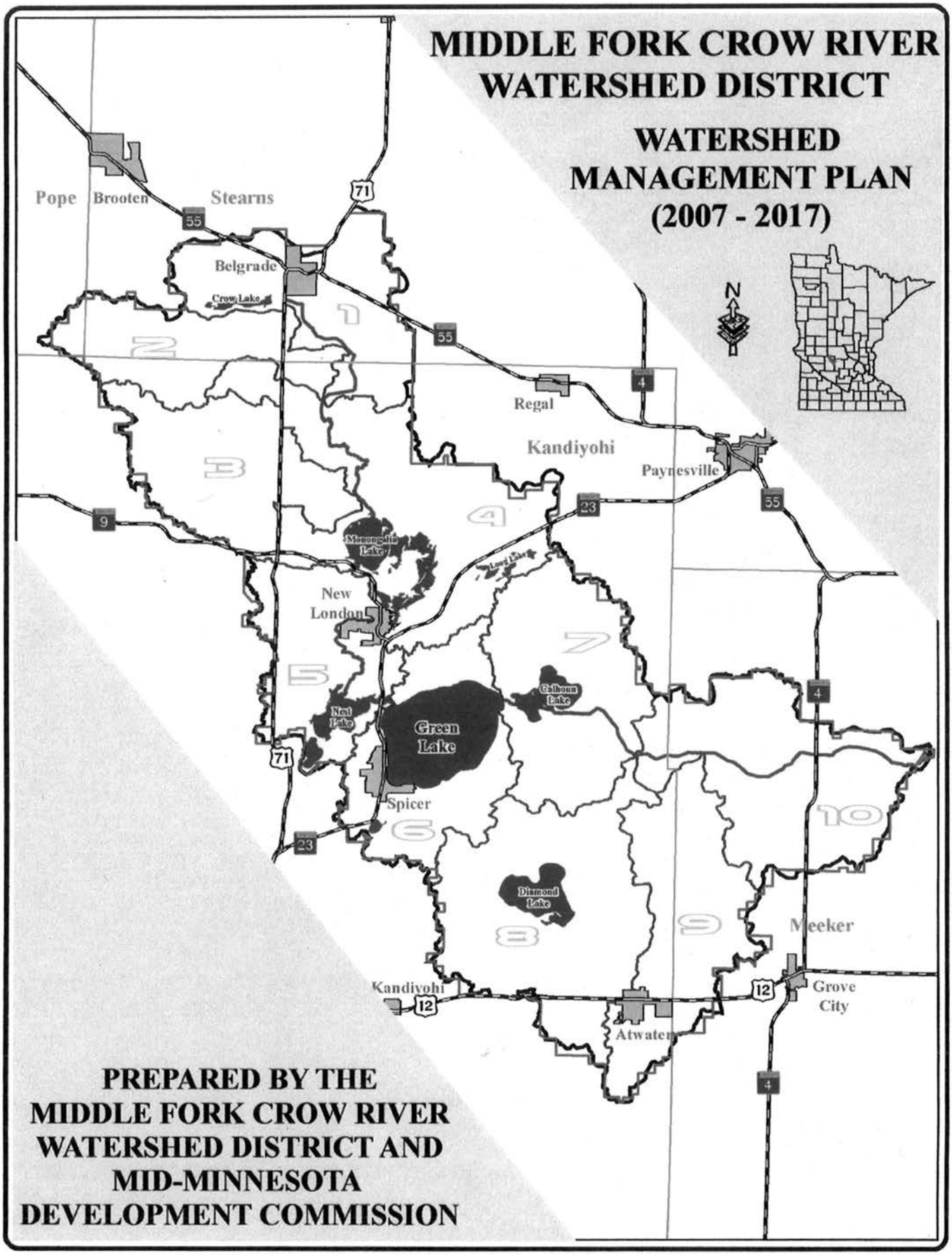
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MIDDLE FORK CROW RIVER
WATERSHED DISTRICT
WATERSHED
MANAGEMENT PLAN
(2007 - 2017)
Pope
Brooten
Stearns
Belgrade
Crow Lake
Regal
Kandiyohi
Paynesville
Monongalia Lake
New London
Green Lake
Nest Lake
Calhoun Lake
Spicer
Diamond Lake
Meeker
Kandiyohi
Grove City
Atwater
N
1
2
3
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PREPARED BY THE
MIDDLE FORK CROW RIVER
WATERSHED DISTRICT AND
MID-MINNESOTA
DEVELOPMENT COMMISSION

Chapter Five:
Administration

Chapter Five provides detailed information on Plan administration with sections on plan schedule, plan coordination, plan implementation, definition of a basic water management project, establishment of water management districts, available funding mechanisms, types of projects, project initiation, recommendations to agency programs, intergovernmental conflict resolution, plan evaluation, plan amendment procedure, and references to statutes and rules.

A. Plan Schedule

Implementation of this Plan will commence with its adoption by the Board of Managers and final approval from the BWSR. The Plan will remain in effect for a ten-year period, which is specified as April 2007 to April 2017.

B. Plan Coordination

Water resource management in the District involves many stakeholders. To effectively achieve the goals and objectives set forth in this Plan, a well-coordinated effort will be needed. The District will ensure coordination of this Plan through its Board of Managers and Advisory Committee. An annual Work Plan will be developed and approved by the Board of Managers that identifies the initiatives targeted for implementation on an annual basis.

C. Plan Implementation

An evaluation of the estimated costs associated with the implementation of this Plan is provided in Table 5A. According to the Table, to fully implement the 106 initiatives contained in the Plan would cost an estimated $2,193,200 over the next ten years. While the District generates $250,000 per year through its General Fund tax levy, not all of this money can be dedicated to projects; a portion will be used for staffing and other administrative costs. As a result, the District understands that it will need to seek outside sources of revenue (i.e. grants) and partnerships with other local units of government and State and Federal agencies to effectively implement this Plan.

Table 5A
Estimated Plan Implementation Costs

Goal	# Initiatives	Total Estimated Cost
Goal 1: Protect and improve surface water quality.	26	$974,250
Goal 2: Protect groundwater quality.	3	$40,000
Goal 3: Maintain an adequate supply of surface and groundwater for all users.	3	$7,500
Goal 4: Protect and restore critical areas.	7	$133,600
Goal 5: Promote Wise Land Use Management.	9	$30,250
Goal 6: Expand our knowledge and understanding of the watershed.	22	$601,500
Goal 7: Engage residents in water resource management.	12	$84,500
Goal 8: Provide for efficient and effective administration.	24	$321,600
Total	106	$2,193,200

EXECUTIVE SUMMARY

The Middle Fork Crow River Watershed District (MFCRWD) was formed by order of the Minnesota Board of Water and Soil Resources (BWSR) on April 27, 2005, in accordance with Minnesota Statutes Chapter 103D (Watershed Law). The action concluded a process that began with an establishment petition that was signed by more than 350 concerned citizens. The petition stated that the formation of the District was necessary because of the degradation of water resources in recent decades and the need to address issues including erosion, sedimentation, and best management practices.

The organizational structure of the District consists of a Board of Managers and an Advisory Committee. The Board, which is comprised of five members, is responsible for the oversight of all District-related business. Board representation is based upon the relative area of each county within the District; three managers represent Kandiyohi County, while Meeker and Stearns County each have one manager. The Advisory Committee assists the Board of Managers on matters affecting the interests of the District. The Committee consists of 31 Board-appointed members, most of which are residents of the District.

Pursuant to M.S. 103D.401, the District is required to prepare and adopt a watershed management plan for the purposes for which it was established. The intent of this Plan is to fulfill this requirement and provide a "vision" for water resource management for the next ten years (April 2007-April 2017). The Plan consists of an introduction and five chapters. A description of each of these components is provided below.

- **Introduction** - This section includes background information on the Watershed Law, formation of the District, organizational structure, and a description of the planning process. Also included in the introduction is a profile of key stakeholders and recently completed water resource studies.

- **Chapter One: Inventory of Resources** - Chapter One provides a general overview of the District. It inventories the physical, social, and economic characteristics that are important to understanding the unique nature of the District. The Chapter is divided into four sections: District Setting, Environmental Context, Water Resources, and Land Resources.

- **Chapter Two: Assessment of Resources** - Chapter Two provides a detailed analysis of the District's important water and land resources. Included in this Chapter are sections on water quality and quantity, invasive aquatic species, soils, and land use.

- **Chapter Three: Priority Issues** - Chapter Three presents the priority issues of the District, as determined by input from the public informational meeting, Watershed Management Plan Taskforce (WMPT), and Advisory Committee. Included in this Chapter is a description on how priority issues were identified, along with profiles of each of the District's ten subwatersheds.

- **Chapter Four: Implementation** - Chapter Four contains the District's Implementation Plan. This Plan identifies the goals, objectives, and initiatives that will guide the District in water resource management over the next ten years.

- **Chapter Five: Administration** - Chapter Five provides detailed information on Plan administration with sections on plan schedule, plan coordination, plan implementation, definition of a basic water management project, establishment of water management districts, available funding mechanisms, types of projects, project initiation, recommendations to agency programs, intergovernmental conflict resolution, plan evaluation, plan amendment procedure, and references to statutes and rules.

A multi-step planning process was utilized in the development of this Plan, with special emphasis placed on involving residents, other local governmental units, and State and Federal agencies. The initial phase of the process involved a Public Informational Meeting, which was held on March 30, 2006, to identify issues facing the District; minutes from this meeting are included as Appendix B. Issues identified at this meeting were then used to focus the scope of the Plan.

The second phase of the planning process involved the appointment of a Watershed Management Plan Taskforce (WMPT), consisting of representatives from the public, other local governmental units, and State and Federal agencies. The WMPT met three times during the planning process to identify the priority issues that are specific to each of the District's subwatersheds, as well as formulate recommendations on how the District should address each issue. Minutes from each of the WMPT meetings are included in Appendix C. The findings of the Taskforce were then submitted to the Advisory Committee for their comments. Comments submitted by Committee members are included in Appendix D. The most prominent issues of the District are presented below in alphabetical order:

- Agricultural Drainage
- Erosion and Sediment Control
- Feedlot Management
- Groundwater Contamination
- Invasive Aquatic Species Control
- Lake Management
- Shoreland Management
- Stormwater Management
- Wellhead Protection
- Wetland Preservation/Restoration

Input from the WMPT was used to formulate the Implementation Plan, which consists of the eight goals listed below. The initiatives contained within the Plan were prioritized for implementation based upon input gathered from an Open House, which was held on November 16, 2006 and was attended by approximately 70 residents and other stakeholders. A detailed transcript of the input gathered from the Open House is contained in Appendix E.

- Goal 1: Protect and improve surface water quality.
- Goal 2: Protect groundwater quality.
- Goal 3: Maintain an adequate supply of surface and groundwater for all users.
- Goal 4: Protect and restore critical areas.
- Goal 5: Promote wise land use management.
- Goal 6: Expand our knowledge and understanding of the watershed.
- Goal 7: Engage residents in water resource management.
- Goal 8: Provide for efficient and effective administration.

Implementation of this Plan will commence with the final approval from the BWSR. The District will ensure coordination and implementation of this Plan through its Board of Managers and Advisory Committee, both of which will regularly review progress and identify emerging issues and opportunities. An annual Work Plan will be developed and approved by the Board of Managers that identifies the initiatives targeted for implementation on an annual basis. The District will utilize all available funding sources to finance the implementation of this Plan, including, but not limited to the following: Ad valorem tax levies, assessment levies, bond sales, and grants.

The Board of Managers and Advisory Committee shall regularly review the Plan in order to ensure that the District's goals and objectives remain both accurate and constructive. The Plan can be amended through the procedures outlined in M.S. Chapter 103D.411. A complete revision of the Plan is scheduled to occur prior to its expiration in April 2017.

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Minnesota Board of Water and Soil Resources
520 Lafayette Road North
St. Paul, Minnesota 55155

In the Matter of prescribing the Watershed Management Plan for the **Middle Fork Crow River Watershed District** Pursuant to Minnesota Statutes Section 103D.401

ORDER PRESCRIBING WATERSHED MANAGEMENT PLAN

Whereas, the Board of Managers of the Middle Fork Crow River Watershed District (District) submitted a Watershed Management Plan (Plan) dated December 2006 to the Minnesota Board of Water and Soil Resources (Board) pursuant to M.S. Section 103D.401, and;

Whereas, the Board has completed its review of the Plan;

Now Therefore, the Board hereby makes the following Findings of Fact, Conclusions, and Order.

FINDINGS OF FACT

1. **District Establishment.** The District was established by the Minnesota Board of Water and Soil Resources (BWSR) on April 27, 2005, under the authority of Minnesota Statutes Chapter 103D. Establishment was in response to a citizens' petition to BWSR to address water resource issues.

2. **Requirement to Plan.** Minnesota Statutes Chapter 103D.401 states that a board of watershed district managers adopt a Plan for any or all of the purposes for which the watershed district may be established. The intent of the District Plan is to fulfill this requirement and provide a vision for water resource management for the next ten years (April 2007-April 2017).

3. **Nature of the Watershed.** The District is located in central Minnesota, approximately 75 miles west of the Minneapolis-St. Paul metropolitan area. It is located within portions of Kandiyohi, Meeker, Pope, and Stearns counties and encompasses 270.7 square miles (173,220 acres). The Middle Fork Crow River begins in the northwestern portion of the District and flows approximately 48.8 miles southeasterly through the District and outlets to the North Fork Crow River, which eventually outlets to the Mississippi River. The drop in elevation across this area is 319 feet. The overwhelming majority of the District is located within Kandiyohi County (72.1%) with lesser amounts in Meeker County (16.2%), Stearns County (11.3%), and Pope County (0.5%). There are approximately 11,546 residents occupying 4,633 households in the District. Spicer (1,174) is the most populated city followed by New London (1,105), Atwater (1,089), and Belgrade (739). The vast majority of residents live in Kandiyohi County (9,930) with lesser amounts in Stearns County (1,021), Meeker County (589), and Pope County (6). There are eight major lakes within the District (Calhoun, Diamond, Elkhorn, George, Green, Long, Monongalia, and Nest) with a majority of them found in the New London-Spicer area. There are fifteen public drainage ditches totaling a combined length of approximately 137 miles. Land use within the District is 51.4% agriculture, 13.5% forest, 13.0% wetland, 8.4% urban/development, 8.0% water, 5.3% grassland, and 0.4% shrub land.

4. **Plan Development and Review.** The District engaged a multi-step planning process. A Public Information Meeting was held on March 30, 2006. A watershed Management Plan Taskforce was appointed that met three times to identify the priority issues. An Open House was held on November 16, 2006 to gather input from the approximately 70 residents and stakeholders that attended. The final draft Plan was then developed utilizing all input received at that point. On December 7, 2006, pursuant to Minnesota Statutes Chapter 103D.401, the Plan was distributed to specific local government units and state agencies for their review. Comments were to be returned to the District

before the end of the 60-day review period—February 5, 2007. Comments received from reviewing entities were addressed—incorporated in part or wholly into the Plan, pointed out where already found within the Plan, or responded why comment was not considered for including. A summary of comments received and the responses made are included within the Plan as Appendix F.

5. **Local Review.** Roseville Town Board. The Roseville Town Board stated they are committed to the North Fork Crow River Watershed District, cannot serve in two capacities, please remove our name from your mailing list, and the small portion of Long Lake in the township is being covered by the Long Lake Association. No written response needed.

6. **Local Review.** Stearns Soil and Water Conservation District. Only one comment submitted via e-mail questioning the littoral area information in Table 1E of two lakes. No written response made; no change in information in final Plan.

7. **Local Review.** Advisory Committee member. A summary of comments received and the responses made are included within the Plan as Appendix F. Comments were incorporated into the Plan, identified where already found within the Plan, or addressed why not in the Plan.

8. **Minnesota Pollution Control Agency Review.** Numerous comments provided by two different agency staff, some grammatical, others technical. A summary of comments received and the responses made are included within the Plan as Appendix F. Comments were incorporated into the Plan, identified where already found within the Plan, or addressed why not in the Plan.

9. **Department of Natural Resources Review.** The DNR thanked the District for the opportunity to provide input and stated that overall the Plan is well thought out, very comprehensive and ambitious. The DNR provided specific comments and recommendations, some grammatical, others technical. A summary of comments received and the responses made are included within the Plan as Appendix F. Comments were incorporated into the Plan, identified where already found within the Plan, or addressed why not in the Plan.

10. **Minnesota Department of Health Review.** The MDH provided comments via e-mail, some grammatical, others technical. A summary of comments received and the responses made are included within the Plan as Appendix F. Comments were incorporated into the Plan, identified where already found within the Plan, or addressed why not in the Plan.

11. **Minnesota Department of Agriculture.** The MDA thanked the District for the opportunity to review and recommended some additional initiatives to add. A summary of comments received and the responses made are included within the Plan as Appendix F. Comments were incorporated into the Plan, identified where already found within the Plan, or addressed why not in the Plan.

12. **Board Review.** Following the establishment of the District in April 2005, Board staff attended a vast majority of the monthly board of managers meetings offering guidance, recommendations and assistance as needed as they began their organizational structure and worked toward initiating the development of their Plan. In 2006, the District contracted with a consultant to facilitate the development of its Plan. Board staff met early in the process with the managers of the District and its consultant to have discussions on the planning process. Board staff attending the Public Information Meeting, most of the task force meetings, and the Open House. Board staff also provided periodic review and comment of draft materials during the planning process. In a letter dated February 2, 2007, Board staff submitted numerous written comments including content recommendations, grammatical changes, formatting changes/additions, requested including budget information, etc. for consideration. A summary of comments received and the responses made are included within the Plan as Appendix F. Comments were incorporated into the Plan, identified where already found within the Plan, or addressed why not in the Plan.

13. **Highlights of the Plan.** Critical elements in the Plan include:
    a. Opportunity for and input received from citizens and local and state agency partners in bringing forth issues and concerns of the watershed.
    b. Opportunity for and participation received from citizens and local and state agency partners on the task force committee to prioritize issues and concerns and provide input in the development of the Plan.
    c. Each of the ten sub-watersheds within the District were profiled containing information on area, minor surface water resources, local government units, land use characteristics, and priority issues.
    d. Identification of the most prominent issues of the District: agricultural drainage; erosion and sediment control; feedlot management; groundwater contamination; invasive aquatic species control; lake management; shoreland management; stormwater management; wellhead protection; and wetland preservation/restoration.
    e. Development of goals, objectives, and initiatives to guide the District in water resource management over the ten-year period of 2007-2017.
    f. An implementation section of the Plan that contains 106 specific actions to address the following eight identified goals of the District:
        Goal 1 Protect and Improve Surface Water Quality.
        Goal 2 Protect Groundwater Quality.
        Goal 3 Maintain An Adequate Supply of Surface and Groundwater For All Users.
        Goal 4 Protect and Restore Critical Areas.
        Goal 5 Promote Wise Land Use Management.
        Goal 6 Expand Our Knowledge and Understanding of the Watershed.
        Goal 7 Engage Residents in Water Resource Management.
        Goal 8 Provide for Effective and Efficient Administration.

14. **Publish Notice of Filing.** The Board provided for legal notice of filing for the District Plan. Notices were published in "The Observer" on February 21, 2007; "West Central Tribune" on February 22, 2007; "Lakes Area Review" on February 19, 2007; "Bonanza Valley Voice" on February 22, 2007; and the "Independent Review" on February 22, 2007. Also, a letter containing the Legal Notice of Filing was sent from Board staff Jim Haertel dated February 15, 2007, to several addresses, including the affected county board of commissioners, county auditors, county water planners, county soil and water conservation districts, cities, and the Minnesota Department of Natural Resources. This notice provided an invitation to submit written comments on the Plan or submit a written request for a hearing if opposed to the Plan. Written comments or requests were to be submitted by March 26, 2007. No written comments or written requests for a hearing were received.

15. **Public Hearing.** No written request for a hearing was received, therefore, no hearing was held.

16. **Board Water Planning Review Committee Meeting.** On April 5, 2007, the Board's Southern Region Water Planning Review Committee (Committee) and staff met with representatives from the District at the Dethlef Senior Center in Spicer, Minnesota, to review and discuss the Plan. Those in attendance from the Board's Committee were Dana Allen, Dan Wilson, Becky Balk, Randy Kramer and Paul Langseth. Board staff in attendance were Southern Region Supervisor Jeff Nielsen and Board Conservationist Tom Fischer. In attendance representing the District were managers Robert Hodapp, Robert Zenner, Gordan Behm, and Joe Flanders; District Administrator Julie Klocker; and Michael Sharp of Mid-Minnesota Development Commission (Plan consultant). Also attending were District Citizen Advisory Committee members Bill and Ann Latham, and Harlan Meints, and Kandiyohi SWCD Program Director Rick Reimer. Board staff recommended approval of the Plan. After discussion, the Committee voted 5-0 to recommend approval of the Middle Fork Crow River Watershed District 2007 – 2017 Watershed Management Plan to the full Board.

CONCLUSIONS

1. All relevant, substantive, and procedural requirements of law and rule have been fulfilled.

2. The Board has proper jurisdiction in the matter of approving a Watershed Management Plan for the Middle Fork Crow River Watershed District pursuant to Minnesota Statutes Chapter 103D.401.

3. The Middle Fork Crow River Watershed District 2007 – 2017 Watershed Management Plan attached to this Order defines water and water-related problems within the District boundaries, possible solutions thereto, and an implementation program.

4. The attached Plan is in conformance with the requirements of Minnesota Statutes Chapter 103D, BWSR guidelines for Watershed District Plan content, and is consistent with the affected counties' comprehensive water plans.

ORDER

The Board hereby prescribes the attached Plan as the 2007 – 2017 Watershed Management Plan for the Middle Fork Crow River Watershed District.

Dated at Saint Paul, Minnesota this 25th day of April 2007.

MINNESOTA BOARD OF WATER AND SOIL RESOURCES

_____

BY: Randy Kramer, Chair

April 3, 2007

RECEIVED
APR 05 2007
BD OF WATER & SOIL
RESOURCES-BEMIDJI

Board of Water and Soil Resources
520 Lafayette Road North
Saint Paul MN 55155

Dear Board Members:

At their April 2, 2007 regular board meeting, the Koochiching Soil and Water Conservation District Board of Supervisors voted to change the boundaries of supervisor nomination Districts III and V (as outlined on the attached resolution and supporting map) after considering the following:

- The district wishes to effectively increase the number of eligible supervisor candidates in District V without unseating any current supervisor;
- District supervisors are elected "at large" so registered voter numbers within any supervisor area does not affect the election of the supervisor, only the size of their work area or jurisdiction.

Koochiching County is the second largest county in Minnesota with 2 million acres or 3102 square miles, about the size of the 9-county metro area of Anoka, Washington, Ramsey, Dakota, Hennepin, Carver, and Wright. Yet that is where the similarities end. With a total population of just under 14,000, Koochiching County has approximately 4 people per square mile. International Falls alone contains 77% of the county population.

During the 2006 election, no one filed for the office of District V supervisor. Although District supervisors are elected at-large, eligible candidates must live within the district they represent. Of the 38 total registered voters eligible to serve as District V supervisor, one resident was elected county-wide with a total of 4 write-in votes. After deliberating since January 2007, he has since decided to decline the position.

Feeling strongly that this boundary change is the correct course of action, the Koochiching Soil & Water Conservation District Board of Supervisors respectfully requests your support and approval.

Sincerely

Bernie Uran (Bernard Uran)

Bernie Uran
Secretary
Koochiching SWCD

2007-1 NOMINATION DISTRICTS RESOLUTION

REVISED

Be it resolved by the **Koochiching** Soil and Water Conservation District Supervisors
that pursuant to M.S. 103C.311, the district be divided into five areas for nominating candidates for the positions of Soil and Water Conservation District Supervisors to be elected at-large as follows:

District	Description of Boundaries
I	
II	
III	**See Attachment**
IV	
V	

I, **Bernie Uran,** Secretary of the **Koochiching** Soil and Water Conservation District, do hereby certify that the above resolution relating to the division of the **Koochiching** Soil and Water Conservation District into five (5) nominating areas was adopted by the said District Supervisors at a regular meeting held on **April 2, 2007** , that I have compared the above copy with the original resolution as set forth in the minutes of said meeting, and it is a true and correct copy of and transcript from said original and the whole thereof. I further certify that said meeting of the Board was duly called and held, that a quorum of members of said Board was present thereat, and that said resolution was duly adopted thereat by a vote of **two (2) Ayes** to **one (1) Nay** of the members present.

Signed: Bernie Uran (Bernard Uran)
Secretary
Koochiching Soil and Water Conservation District

Be it resolved by the Board of Water and Soil Resources that the division of the
Koochiching Soil and Water Conservation District into five nominating areas as set forth in the above resolution adopted by the supervisors of said district on **April 2, 2007**, is hereby approved.

I, **John Jaschke**, Executive Director of the Board of Water and Soil Resources, do hereby certify that I have compared the above copy of resolution relating to the division of the **Koochiching** Soil and Water Conservation District into five (5) nominating areas adopted by said Board at a regular meeting held on _____, **2007,** with the original as set forth in the minutes of said meeting, and that said copy is a true and correct copy of and transcript from said original and the whole thereof. I further certify that said meeting of said Board was duly called and held, that a quorum of members of said Board was present thereat, and that said resolution was duly adopted thereat by a vote of to of _____to _____of the members present.

Signed:_____
Executive Director
Board of Water and Soil Resources

Filed _____day of _____, 2007.

Signed:_____
County Auditor
Koochiching County

Nomination Districts for Koochiching Soil and Water Conservation District
Koochiching County

REVISED 4-2-2007

DISTRICT I

From a point located at the NW corner of Sec.7 – T 160 N – R 29W, thence South along a line on the Western boundary of Koochiching County to a point located at the SW corner of Sec. 31 – T 156 N – R 29W, thence East along a line to a point located at the SE corner of Sec. 36 – T 156 N – R 25W, thence North to a point located at the NE corner of Sec. 13 – T 158 N – R 25 W, at its junction with Rainy River, thence West along the United States border to the point of beginning.

DISTRICT II

From a point located at the NW corner, Sec. 13 – T 158 N – R 25 W, thence South along a line to a point located at the SW corner of Sec. 35 – T 66 N – R 27 W, thence East along a line to a point located at the SE corner of Sec. 36 – T 66N – R 25 W, thence North along a line to a point located at the NE corner of Sec. 24 – T 70 N – R 25 W, at its junction with Rainy River, thence West along the United States border to the point of beginning.

DISTRICT III

From a point located at the NE corner of Sec. 24 – T 70 N – R 25 W, thence South along a line to a point located at the SW corner of Sec. 31 – T 70 N – R 24 W, thence East along a line to a point located at the SE corner of Sec. 36 – T 70 N – R 22W, thence North along a line following the Eastern boundary of Koochiching County to its junction with the United States border, thence West along the United States border to the point of beginning.

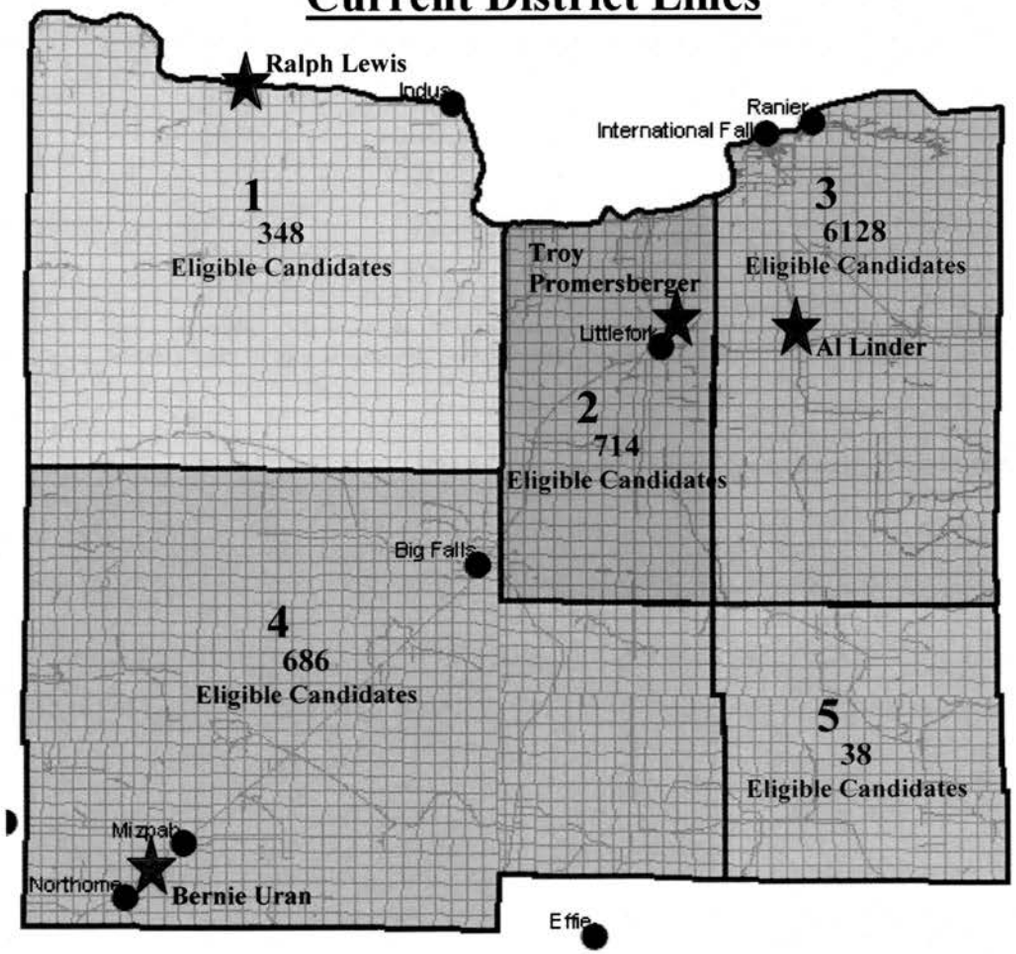
DISTRICT IV

From a point located at the NW corner of Sec. 6 – T 155 N – R 29 W, thence along a line South, following the West boundary of Koochiching County to a point located at the SW corner of Sec. 31 – T 151 N – R 29 W, thence East along the Southern boundary of Koochiching County to a point located at the SE corner of Sec. 36 – T 63 N – R 25 W, thence North along the Eastern boundary of Townships on R 25 W to a point located at the NE corner of Sec. 1 – T 65 N – R 25 W, thence West along a line to a point located at the SW corner of Sec. 35 – T 66 N – R 27 W, thence North along a line to a point located at the NE corner of Sec. 1 – T 155 N – R 25 W, thence West along a line to the point of beginning.

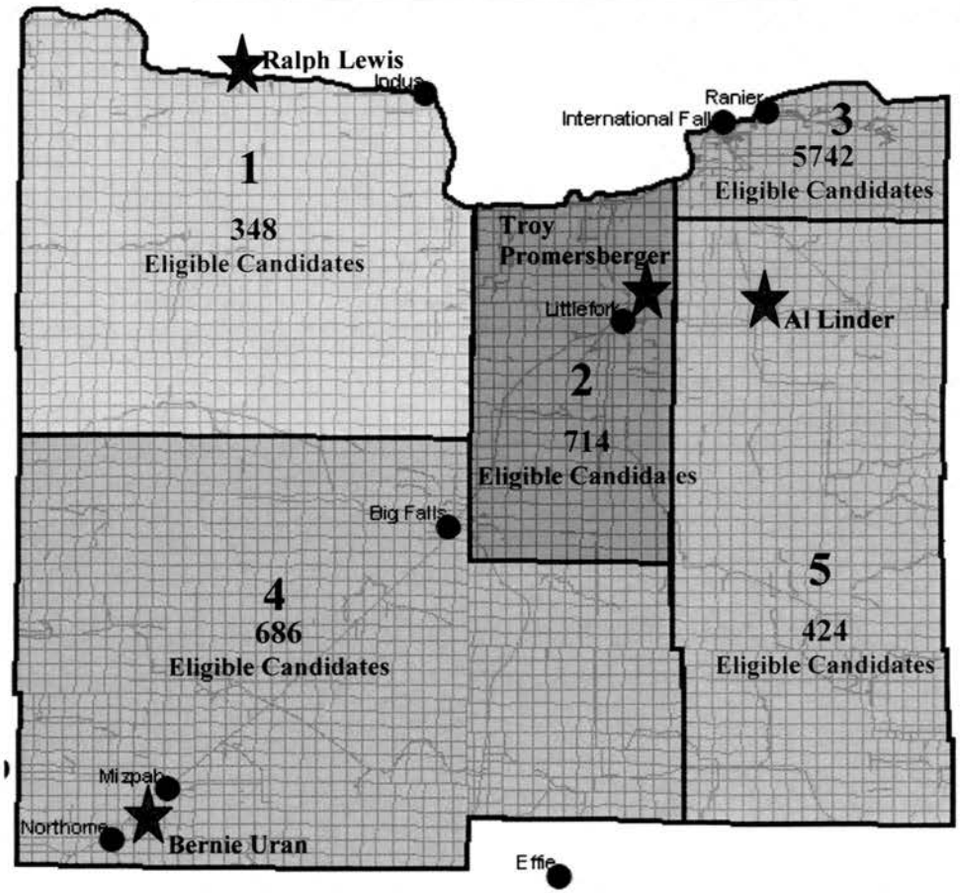
DISTRICT V

From a point located at the NW corner of Sec. 6 – T 69 N – R 24 W, thence along a line South to a point located at the SW corner of Sec. 31 – T 63 N – R 24 W, which follows the Western boundary of Townships on R 24W, thence East along the Southern boundary of Koochiching County to a point located at the SE corner of Sec. 36 – T 63 N – R 22 W, thence North along the Eastern boundary of Koochiching County to a point located at the NE corner of Sec. 1 – T 69 N – R 22 W, thence West along a line to the point of beginning.

Current District Lines



Proposed NEW District Lines



Supervisor Name and Location

City Name and Location

Minnesota Board of Water and Soil Resources
520 Lafayette Road North
Saint Paul, Minnesota 55155

In the Matter of the Establishment Petition for the Cedar River Watershed District in Dodge, Freeborn, Mower and Steele Counties pursuant to Minnesota Statutes Sections 103D.205 to 103D.225.

ORDER TO ESTABLISH CEDAR RIVER WATERSHED DISTRICT

Whereas, Mower County in the proposed Cedar River Watershed District in Dodge, Freeborn, Mower and Steele Counties filed a Petition dated November 7, 2006, with the Board of Water and Soil Resources (Board) on November 30, 2006, to establish a watershed district pursuant to Minn. Stat. § 103D.205, and;

Whereas, the Board has completed its review of the Petition;

Now Therefore, the Board hereby makes the following Findings of Fact, Conclusions, and Order.

FINDINGS OF FACT

1. **Establishment Petition.** The establishment Petition dated November 7, 2006, was filed with the Board on November 30, 2006 by Mower County. Mower County contains more than 50 percent of the area in the proposed watershed district. Minn. Stat. § 103D.205, Subd. 3, item 3 allows an establishment petition to be signed by counties having 50 percent or more of the area within the proposed watershed district. The proposed watershed district lies within Dodge, Freeborn, Mower and Steele Counties. Filed with the Petition were the required proofs of service on the Dodge, Freeborn, Mower and Steele County Auditors, the Commissioner of the Department of Natural Resources, and the Director of the Division of Waters of the Department of Natural Resources.

2. **Property Description.** The territory to be included in the proposed watershed district is depicted in Exhibit A of the Petition and is an area in the Cedar River Watershed that is in Dodge, Freeborn, Mower and Steele Counties, approximately 435 square miles in several communities, which includes land in the Cities of Austin, Blooming Prairie, Brownsdale, Dexter, Elkton, Hayfield, Lyle, Rose Creek, Sargeant, Waltham, and the Towns of Adams,

Ashland, Austin, Blooming Prairie, Clayton, Dexter, Grand Meadow, Hayfield, Hayward, Lansing, London, Lyle, Marshall, Moscow, Nevada, Newry, Oakland, Redrock, Ripley, Sargeant, Shellrock, Udolpho, Vernon, Waltham, Westfield and Windom.

3. **District Name.** The Petition states the name of the proposed district shall be the Cedar River Watershed District.

4. **Number of Managers.** The Petition specifies the proposed number of managers as seven (7).

5. **Necessity for Watershed District.** The Petition states the establishment of a watershed district is necessary due to an increase in damaging floods over the last 30 years and to improve water quality on the impaired Cedar River. Significant damaging floods have occurred in 2004, 2000, 1993 and twice in 1978. The 2004 flood resulted in the loss of two lives and over $17 million in property losses. The Cedar River exceeds state health standards for fecal coliform and total suspended solids.

6. **Contemplated Improvements.** The Petition states: "Through the contemplated improvements listed … that include protection of public infrastructure, improvement of water quality and the reduction of peak flows, the formation of a watershed district would be conducive to public health and welfare and would accomplish the purposes of Minnesota Statutes Chapter 103D". The Petition lists contemplated improvements, as follows:

   a. Significant flood and peak flow reduction of 20 percent in the Cedar River and Dobbins Creek areas.

   b. Prevention of structural damages in the watershed area during a 100-year 24 hour rainfall event.

   c. Reduction of sediment loading in the watershed streams as a result of reduced flows and corresponding reduction in erosion of farmland and riverbanks. This will be accomplished by wetland restorations, installation of buffers and erosion control practices.

   d. Reduction of nutrient loads to all streams in the watershed.

e. Protection and improvement of Township, County, City and State infrastructure resulting from reduced levels of flooding.

f. Protection of the Minnesota Department of Transportation Highway System including 218 and Interstate 90.

7. **Hearing Order.** At its regular meeting on December 20, 2006, the Board determined the Petition met the requirements of Minn. Stat. § 103D.221, Subd. 1, and consequently ordered a public hearing to be held on the Petition.

8. **Hearing Notice.** Legal notice of the public hearing on the proposed watershed district establishment, pursuant to Minn. Stat. § 103D.221, Subd. 2, was published in the Blooming Prairie Times on December 26, 2006, the Austin Daily Herald on December 27, 2006, the Albert Lea Tribune on December 27, 2006 and the Hayfield Herald on December 27, 2006. Further, a copy of the hearing notice and map were mailed to approximately 50 addressees including the affected county Boards of Commissioners, County Auditors, County Water Planners, all of the cities in the proposed watershed district, all of the towns in the proposed watershed district, the affected soil and water conservation districts, neighboring watershed districts and the DNR.

9. **Director's Report.** The Director of the Division of Waters of the Department of Natural Resources (DNR) filed a written report pursuant to Minn. Stat. §103D.215 dated January 3, 2007 recommending establishment of a larger watershed district than proposed in the Petition that would include the Turtle Creek Watershed District and the Cedar River subwatersheds that flow into the Cedar River in Iowa.

10. **Public Hearing.** A public hearing was held on the establishment of the Cedar River Watershed District on January 10, 2007, at the Ellis Middle School Auditorium located at 1700 Fourth Avenue Southeast in Austin, Minnesota. The proceedings were tape recorded. The hearing panel consisted of Board members Dana Allen, Robert Burandt, Brian Kletscher, Gene Tiedemann and Randy Kramer as chair. After all people present at the public hearing were given an opportunity to speak and enter exhibits, the hearing record was left open for three weeks until 4:30 PM on January 31, 2007, for receipt of written comments.

The following list of exhibits comprise the hearing record. Jim Haertel, Board staff, entered Exhibits 1 through 12 into the hearing record by reading a brief description of each exhibit.

Exhibit 1. Letter dated November 29, 2006, from Craig Oscarson, Mower County Coordinator, with attached (a) Petition for the Establishment of the Cedar River Watershed District dated November 7, 2006, signed by Dave Hillier, Chairman, Mower County Board of Commissioners, and (b) Map of Proposed Cedar River Watershed District, dated July 25, 2006.

Exhibit 2. Proofs of Service of the Petition on the Auditors of: (a) Dodge, (b) Freeborn, (c) Mower and (d) Steele Counties, and (e) the Department of Natural Resources Commissioner and Director of the Division of Waters.

Exhibit 3. Order of the Board of Water and Soil Resources dated December 20, 2006, setting the date, time and location of the public hearing on the Petition.

Exhibit 4. Letter dated December 21, 2006, from Jim Haertel, Board of Water and Soil Resources, to several addressees providing notification of the public hearing with attached (a) Legal Notice, (b) map, (c) list of addressees and (d) Affidavit of Mailing.

Exhibit 5. Affidavit of Publication of Legal Notice in the Blooming Prairie Times on December 26, 2006.

Exhibit 6. Affidavit of Publication of Legal Notice in the Austin Daily Herald on December 27, 2006.

Exhibit 7. Affidavit of Publication of Legal Notice in the Albert Lea Tribune on December 27, 2006.

Exhibit 8. Affidavit of Publication of Legal Notice in the Hayfield Herald on December 27, 2006.

Exhibit 9. Letter dated December 29, 2006 from Daryl Franklin, Mower County Environmental Services Director, with attached (a) Water Quality Study on the Cedar River, dated summer of 2001, by Carol Mostrom.

Exhibit 10. Letter dated January 3, 2007 from Kent Lokkesmoe, DNR-Division of Waters Director, recommending establishment of a larger watershed district than proposed in the Petition that would include the Turtle Creek Watershed District and the Cedar River subwatersheds that flow into the Cedar River in Iowa, with attached (a) map.

Exhibit 11. Letter dated January 3, 2007 from Tom Butler, Turtle Creek Watershed District Chairman, supporting the Petition.

Exhibit 12. Letter dated January 10, 2007 from Dave Peterson, Board of Water and Soil Resources, recommending establishment of a larger district than proposed in the Petition that would include the Cedar River subwatersheds that flow into the Cedar River in Iowa.

Exhibit 13. Hardcopy of the power point presentation given for the petitioners by David Hillier, Mower County Commissioner.

Exhibit 14. Water Quality Study on the Cedar River, dated spring/summer of 2000 and 2001, by Carol Mostrom.

Exhibit 15. Request from Dan Belshan, Freeborn County Commissioner, requesting a public hearing be held in Freeborn County.

Exhibit 16. Watershed support from the City of Austin with information on floods.

Exhibit 17. Resolution No. 13128 dated January 2, 2007 from the Austin City Council in support of the Petition.

Exhibit 18. Letter dated January 10, 2007 from Jim Gebhardt, Mower Soil and Water Conservation District Chairman, stating the Board of Supervisors passed a resolution in support of the Petition.

Exhibit 19. Position statement dated January 10, 2007 from Dave Cole, Izaak Walton League Austin Chapter 10 President, in support of the Petition.

Exhibit 20. Position statement from Arlen Schamber, Hormel Foods Corporation, in support of the Petition.

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After all people present at the public hearing were given an opportunity to speak, the hearing record was left open for three weeks until 4:30 PM on January 31, 2007, for receipt of written comments. The following exhibits were received while the record was open.

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Exhibit 21. Letter received on January 18, 2007 from Peggy Ratigan in opposition to the Petition.

Exhibit 22. Letter dated January 14, 2007 from Carol Leuer in support of the Petition.

Exhibit 23. Letter dated January 23, 2007 from Steven Crull, Drainage Design and Survey, in opposition to the Petition.

Exhibit 24. Letter received on January 26, 2007 from Lynn Schmeling in opposition to the Petition.

Exhibit 25. Letter dated January 25, 2007 from Roger and Georgia Schramm in opposition to the Petition.

Exhibit 26. Letter dated January 25, 2007 from Jams Hurm, City of Austin Administrator, in support of the Petition.

Exhibit 27. Letter dated January 29, 2007 from Jon Erichson, City of Austin Engineer, in support of the Petition.

Exhibit 28. Letter dated January 29, 2007 from Harold Buck, Hayfield Town Board Supervisor, in opposition to the Petition.

Exhibit 29. Letter received on January 31, 2007 from Paul Fiebiger in opposition to the Petition.

Exhibit 30. Letter dated January 28, 2007 from Phyllis Helgeson in opposition to the Petition.

11. **Board Hearing Panel.** On February 28, 2007, the hearing panel of the Board convened. Hearing panel members in attendance were Dana Allen, Robert Burandt, Brian Kletscher, Gene Tiedemann and Randy Kramer, Chair. Based on the entire record in the matter and after due consideration, the panel with a voice vote decided to recommend to the full Board the watershed district be established according to the Petition because the establishment would benefit the public welfare and public interest, and would advance the purpose of Minnesota Statutes Chapter 103D. The watershed district boundary should be established according to the Petition and the name should be the "Cedar River Watershed District" as proposed in the Petition. Also, the panel decided with a voice vote to recommend the watershed district board of managers consist of seven managers with the distribution being four managers from Mower County, one manager from Dodge County, one manager from Freeborn County and one manager from Steele County. The panel further decided with a voice vote to recommend the terms of office for the first board of managers appointed by the respective county Boards of Commissioners be set as follows:

Dodge County Manager

One manager position – three year term

Freeborn County Manager

One manager position – three year term

Mower County Managers

One manager position – one year term
One manager position – one year term
One manager position – two year term
One manager position – three year term

Steele County Manager

One manager position – two year term

Lastly, the panel decided with a voice vote to recommend seven manager nominees from the Petition as the first board of managers of the watershed district. Criminal background checks were to be completed.

After the February 28, 2007 meeting, the manager nominee selected from Dodge County became unavailable to serve as a manager. On April 5 and 6, a majority of the panel members gave their approval of an alternate manager nominee from Dodge County. Background checks of the seven manager nominees being recommended were completed and indicated no criminal history according the Bureau of Criminal Apprehension Criminal Justice Information System. The panel recommends the first board of managers consist of the following individuals:

Alfred Kording – Dodge County

Steven Kraushaar – Freeborn County

James Gebhardt – Mower County

Albert Layman – Mower County

Harlen Peck – Mower County

Daniel Regner – Mower County

Michael Jones – Steele County

CONCLUSIONS

1. The Petition for establishment of the Cedar River Watershed District is valid in accordance with Minn. Stat. § 103D.205.

2. Proper notice of hearing was given and the public hearing was held in accordance with applicable laws.

3. The establishment of the Cedar River Watershed District would benefit the public welfare and public interest, and would advance the purpose of Minnesota Statutes Chapter 103D.

4. The boundary of the Cedar River Watershed District should be as set forth in the Petition.

5. All relevant substantive and procedural requirements of law and rule have been fulfilled.

6. The Board has proper jurisdiction in the matter of ordering a watershed district establishment.

ORDER

The Board hereby orders the following:

1. The proposed watershed district is hereby established and is named the "Cedar River Watershed District" by which name it shall hereafter be known, and it shall have all the power, authority, and duties provided by law.

2. The principal place of business of the Cedar River Watershed District is the Mower Soil and Water Conservation District Office, 1408 – 21st Avenue NW, Suite 2, Austin, MN 55912.

3. The territory to be included in the Cedar River Watershed District encompasses a total area of approximately 435 square miles in Dodge, Freeborn, Mower and Steele Counties in several communities, which includes land in the Cities of Austin, Blooming Prairie, Brownsdale, Dexter, Elkton, Hayfield, Lyle, Rose Creek, Sargeant, Waltham, and the Towns of Adams, Ashland, Austin, Blooming Prairie, Clayton, Dexter, Grand Meadow, Hayfield, Hayward, Lansing, London, Lyle, Marshall, Moscow, Nevada, Newry, Oakland, Redrock, Ripley, Sargeant, Shellrock, Udolpho, Vernon, Waltham, Westfield and Windom.

4. The boundary of the Cedar River Watershed District shall be as set forth in "Exhibit A" of the Petition, a map which shows the watershed district boundary attached herewith to this Order and fully incorporated herein, together with the data set "Exhibit A" was produced from.

5. The Board of Managers for the Cedar River Watershed District shall consist of seven (7) managers with one manager from Dodge County, one manager from Freeborn County, four managers from Mower County, and one manager from Steele County.

6. The first board of managers of voting residents within the Cedar River Watershed District shall be as follows:

Alfred Kording – Dodge County

Steven Kraushaar – Freeborn County

James Gebhardt – Mower County

Albert Layman – Mower County

Harlen Peck – Mower County

Daniel Regner – Mower County

Michael Jones – Steele County

7. The term for the first Board of Managers appointed by the Board of Water and Soil Resources is one year and until the successors can be appointed and qualified, and the terms of office for the first board of managers appointed by the respective county Boards of Commissioners are as follows:

Dodge County Manager

One manager position – three year term

Freeborn County Manager

One manager position – three year term

Mower County Managers

One manager position – one year term
One manager position – one year term
One manager position – two year term
One manager position – three year term

Steele County Manager

One manager position – two year term

Thereafter, upon completion of the terms for the first board of managers appointed by the county Boards of Commissioners, manager terms are three years and until the successors can be appointed and qualified.

Dated at Saint Paul, Minnesota this 25th day of April, 2007.

MINNESOTA BOARD OF WATER AND SOIL RESOURCES

By: _____
Randy Kramer, Chair

What: Reinvest in Minnesota (RIM) Reserve Strategic Plan
Purpose: Update RIM Reserve Strategic Plan
Timeline: April – June, 2007
Who: Staff Lead: Kevin Lines, Conservation Easement Section Manager
Agency Staff: Tim Fredbo, Conservation Easement Specialist
Tabor Hoek, Board Conservationist
Pete Waller, Board Conservationist
Greg Larson, Technical Services Manager

RIM Reserve Committee: Board members appointed by BWSR Chair Kramer at April 25, 2007 BWSR Board Meeting

Stakeholders: The following stakeholders will be invited to participate: agriculture, environmental, conservation, local government, state government, and federal government

Process for Updating Minnesota Reinvest in Minnesota (RIM) Strategic Plan

Goal – Update Minnesota's RIM Reserve Program Strategic Plan

Review the accomplishments of the first twenty years of the RIM Reserve Program, and identify future opportunities for continued success. For the first twenty years the following goals have guided the RIM Reserve program:

- Protect and improve water quality
- Reduce soil erosion
- Enhance fish and wildlife habitat

Although we believe these goals are still pertinent we are seeking input from the Board and stakeholders in updating our RIM Reserve Strategic Plan. This updated RIM Reserve Strategic Plan will guide agency requests for future appropriations, leveraging opportunities with partners, and new conservation initiatives such as biofuels.

Process

BWSR through its RIM Reserve committee will update the agency's RIM Reserve Strategic Plan. The RIM Reserve committee will meet approximately three times during May and June 2007 to achieve this goal. The RIM Reserve committee will be seeking significant stakeholders participation. Stakeholders representing the following organizations and agencies will be invited to participate: agriculture, environmental, conservation, local government, state government, and federal government.

Timeline:

April 25, 2007	BWSR Chair Kramer will appoint a RIM Reserve committee at the April 25, 2007 Board Meeting.
May 2007	Three meeting dates will be determined after appointment of committee members. Kick-off meeting will include stakeholders to provide input into updating RIM Reserve Strategic Plan.
June 2007	Date, Time, and Location to be determined by RIM Reserve Committee.
June 27, 2007	Present updated RIM Reserve Strategic Plan for BWSR Board Approval.

Prepared by Kevin J. Lines
Conservation Easement Section Manager
April 13, 2007

BWSR Committee Schedule (tentative agenda items)

April 16, 2007

April 18, 2007

- Northern Water Planning Committee

April 24, 2007 (5:00 – 8:00 p.m.)

- Wetlands Committee
  1. Policy - Sale of Wetland Mitigation Credits to Public Transportation Authorities
  2. Plan for Soliciting Wetland Restoration Projects for the Local Road Wetland Replacement Program
  3. Wetland Mitigation Memorandum of Understanding
  4. Legislative Update

RIM Strategic Planning Committee – to be named at April 25th Board meeting

April 25, 2007 Board Meeting

- Public Relations, Outreach and Strategic Planning Committee (immediately following Board meeting)

April ???

- Metro Water Planning Committee
  - SWCD Petition for Dakota/Ramsey Counties

May 9, 2007

- Northern Water Planning Committee

May 23, 2007 Board Meeting

- Grants Program and Policy Committee (immediately following Board Meeting)
  - '08 SWCD Grants Allocations
    - Easement Services
    - General Services
    - State Cost-Share Program
      - Base Grants Allocation
      - Feedlot Water Quality Management Grant Allocation
  - '08 NRBG Authorization
    - LWM
    - WCA
    - Shoreland
    - Feedlot
    - SSTS
    - NPEA
  - LCCMR Challenge Grants

May ???

- RIM Strategic Planning Committee

June 13, 2007

- Northern Water Planning Committee

June ???

- RIM Strategic Planning Committee
- Dispute Resolution Committee (possibly)
- Wetlands Committee (rulemaking)
  1. WCA Rulemaking
  2. Policy - Sale of Wetland Mitigation Credits to Public Transportation Authorities
  3. WCA LGU Reporting
  4. WCA Exemption Study

June 27, 2007 Board Meeting – no Committee meetings scheduled as this will be a long Board meeting

July 25, 2007 (no Board Meeting)

- Grants Committee
- Wetlands Committee
  1. Wetland Banking Fee Policy-Update Average Agricultural Land Values
  2. Sale of Wetland Credits to Public Transportation Authorities - Cost of Credits
  3. WCA Rules – Update on Exempt Rules, and Plans for Permanent

August 22-23, 2007 (tour/meeting) – Koochiching & Lake of the Woods Counties

FOR YOUR INFORMATION

April 25, 2007

- Updated Board Member Listing
- *Draft* Governor's Conservation Legacy Council (CLC) Meeting Notes, April 12, 2007

MINNESOTA BOARD OF WATER AND SOIL RESOURCES
520 LAFAYETTE ROAD NORTH
ST. PAUL, MINNESOTA 55155
Phone: 651-296-3767 Fax: 651-297-5615

Appointed Members	*Appointment Designation*	*Term Expires*	*Telephone/Fax*	
Randy Kramer, Chair 42808 County Road 11, Bird Island, MN 55310 rlkramer@westtechwb.com	**Citizen**	01-01-07	320-365-3094 320-365-4784	*Home* *Office*
Dana Allen 11304 19th Street, SE, Eyota, MN 55934 dm.allen@myclearwave.net	**Citizen**	01-05-09	507-545-3969 507-951-5597	*Home* *Office*
Paul Brutlag 27113 County Road 11, Wendell, MN 56590 brutlagp@runestone.net	**Citizen**	01-07-08	218-458-2113 320-589-4151	*Home* *Office*
Quentin Fairbanks 16374 Stoner Memorial Dr., NE, Hines, MN 55647 quentin@paulbunyan.net	**Co. Commissioner**	01-01-07	218-835-4184 218-679-3378	*Home* *Fax*
Brian Kletscher 30427 County Hwy. 10, Vesta, MN 56292 bk3376@redred.com	**Co. Commissioner**	01-05-09	507-762-3376 507-828-1429	*Home* *Office*
Brian Napstad 51227 Long Point Place, McGregor, MN 55760 bnapstad@yahoo.com	**Co. Commissioner**	01-04-10	218-426-3008 218-426-4662	*Home* *Office*
Paul Langseth 35505 280th Street, Worthington, MN 56187 pltrees@frontiernet.net	**SWCD**	01-04-10	507-376-5686 507-360-5844	*Home* *Office*
Louise Smallidge 10992 Point Douglas, Hastings, MN 55033 Choregirl2@juno.com	**SWCD**	01-07-08	651-459-5600	*Home*
Robert Burandt 1340 Waconia Pkwy. S., Waconia, MN 55387 robertburandt@aol.com	**SWCD**	01-10-09	952-442-4216	*Home*
Kay Cook 20783 Eastway Court, Richmond, MN 56368 kayc@meltel.net	**Watershed**	01-01-07	320-597-2794	*Home*
Gene Tiedemann 13099 310th Ave., SW, Euclid, MN 56722 gtiedemann@rrv.net	**Watershed**	01-04-10	218-281-6723 218-289-3511	*Home* *Office*
LuAnn Tolliver 14801 Wychewood Road, Minnetonka, MN 55345 mltolly@aol.com	**Watershed**	01-07-08	952-938-6749 952-838-1571	*Home* *Office*

State Agency Members:			
Joe Martin Freeman Office Bldg., 625 Robert St. N., St. Paul, MN 55155 Joe.Martin@state.mn.us	**Department of Agriculture**	651-201-6551 651-297-5522	*Office* *Fax*
Dan Wilson P.O. Box 64975, St. Paul, MN 55164-0975 Daniel.Wilson@health.state.mn.us	**Department of Health**	651-201-4598 651-201-4599	*Office* *Fax*
Mark Holsten 500 Lafayette Road, St. Paul, MN 55155 Mark.Holsten@state.mn.us	**Department of Natural Resources**	651-259-5555 651-296-4799	*Office* *Fax*
Jim Anderson 439 Borlaug Hall, 1991 Upper Buford Circle, St. Paul, MN 55108 Ander045@umn.edu	**U of M/Dept. of Soil, Water & Climate**	612-625-0279 612-625-2208	*Office* *Fax*
Brad Moore 520 Lafayette Road, St. Paul, MN 55155 Brad.Moore@state.mn.us	**Pollution Control Agency**	651-296-7301 651-296-6334	*Office* *Fax*

April 2007

DRAFT

Governor's Conservation Legacy Council (CLC)
April 12, 2007
State Capitol
Room 318
10:00 a.m. – 3:00 p.m.

Meeting Notes

Conservation Legacy Council members
LeAnn Buck, Joe Duggan, Dawn Hegland, Mike Kilgore-Chair, Jane Kingston, Carrie Mellesmoen, Sen. Gen Olson, Sen. Tom Saxhaug, Ron Schara, Kirk Schnitker, Lawrence Sukalski, and David Zentner.

Ryan Church – facilitator, Joshua Gackle – Governor's Office, Gen Swenson – note taker.

Absent: Bruce Hawkinson, Rep. Aaron Peterson, Rep. Tom Hackbarth

Visitors
Jim Loving – Nature Conservancy
Commissioner Holsten – DNR

Welcome and Introductions
Mike Kilgore called the meeting to order and welcomed members. Mike stated that the focus of the meeting would be to discuss the Council's recommendations. He reminded members that in two meetings the CLC must flesh out recommendations. He also encouraged members to think about what the Governor said about presenting bold and provocative recommendations that can be implemented; recommendations that can be adopted by the legislature and the Governor. Finally, he reminded members to work on behalf of the whole group; to build on any and all points of agreement so that the goup can reach consensus – an agreement that we can live with.

Approval of Agenda
Mike Kilgore reviewed the agenda. The agenda was approved.

Approval of Meeting Notes (March 23, 2007)
Mike asked for feedback from Council members regarding the meeting notes from March 23, 2007. The content of the meeting notes was approved.

General Discussion of the Council's Draft Report
Ryan reviewed the meeting objectives: 1) Hear general feedback on the first draft; and 2) Identify and resolve the most critical issues. Ryan asked that members provide any written feedback that they have by the end of the day today. The focus will be to address the report section by section centering our attention on the recommendations.

DRAFT

To begin, Ryan asked the group to rate their reactions to the draft on a 1-5 scale, with one being a poor rating and five being an endorsed rating. He also asked that they identify those aspects of the report that they believe are most important for today.

Flipchart

General Feedback	
Rank (1-5)	**Critical Points**
3	Governance – Commission
3	Planning – Who does it?
4	Funding – alternatives to dedicated
4	Commission details Delivery/state organization (BWSR)
3.5	Conservation plan "create a framework" Strong case for funding
2	Conservation plan Long-term funding Regional delivery Commission of what?
3	Commission – all natural resources BWSR model (State standards/local delivery) Measurable goals – what areas?
3	Nebraska model; non-point source Sale of lands Funding
1	Governance – consolidating agencies; enforcement Funding
4.5	Funding – need resources to drive goals Commission authority/accountability
3	More specific agency structure Details of commission (authority/structure) Alternatives to dedicated funding State/Regional governance

Other general comments about the draft were captured on a separate flip chart. They included suggestions that the report needs to:

1. Balance general and specific observations and recommendations.
2. Include a vision of "what" – for example the vision includes the development of a massive buffer.
3. Include forward that has sizzle factor – be concise – convey URGENCY.
4. "Sell" the Council's recommendations and it should list issues that we haven't yet addressed (example of grants, taxes, and other concerns that the group has heard).
5. Use successes as examples.
6. Add visuals/graphics.

7. Focus on fish, wildlife, forestry, water and soil.
8. Have more ZING!
9. Recognize that the non-point source pollution of water in southern Minnesota is different than the issues in northern Minnesota.
10. Focus on Governance and funding – not focus on strategic plans.
11. Emphasize that funding is number one priority and/or issue and a commission should be able to allocate funds, just as the Governor suggested.
12. Convey URGENCY.
13. Convey need for science-based approaches – away from politics.
14. Emphasize the commission and its need for real authority. Must sort out the roles of the legislature and commission on allocation of money.
15. Clarify the process for the appointment of the commissioner of DNR.
16. Articulate a longer time frame. The five year plan/update is too short.

Ryan asked members if they are comfortable focusing on the draft recommendations or if they would rather start from scratch. The members expressed a clear preference for revising the draft.

Ryan distributed a worksheet that provide the following review questions. He then asked members to review page 13 and asked them to jot down their notes.

1) Which recommendations do you like the most? Why?

2) Which recommendations do you like the least? Why?

3) What recommendations need to be added or restated?

4) What other changes would clarify and strengthen the recommendations?

Once members had gathered their thoughts, Ryan asked for their reactions. The following flip chart notes summarize the group's responses.

Strengths of the Conservation plan:

+ First time a "conservation plan" will be developed supported by dedicated, long-term funding.
+ Has the potential to gets things done.

Aspects of the Conservation Plan that should be changed

1. Longer-term (25-50) with regular updates, continuous assessments.
2. The plan should be the primary responsibility of commission.
3. The plan and the process must involve non-government players.
4. Not sure DNR staff should be the only lead staff. Need to blend state agency involvement.
5. Inlclude a five-year report to the people of Minnesota.
6. Recommend that the plan covers:
   a. Soil

   b. Water
   c. Fish and Wildlife
   d. Forestry
   e. Outdoor recreation
   f. Emerging issues
   g. And specific outcomes for the areas listed above.
7. Emphasize a science-based plan.
8. The plan should be strategic and include benchmarks.
9. Centerpiece is funding composed of three elements (dedicated funding, existing funding, and other financial incentives or disincentives for conservation, such as certain tax policies).
10. The plan must be a "non-silo plan"; a plan that integrates various agency plans.
11. The plan must recognize LCCMR planning and Trust Fund expenditures and should include:
    a. An analysis of all needs and current expenditures; and
    b. A way to address the gaps.
12. The plan should be a vehicle to get conservation practices on the ground.
13. Plan should be led by the citizen board, include citizen participation (in both developing and implementing the plan), and require citizen decision-making about how funding can be allocated to have impact on natural resources.
14. Regional planning – build on local water planning model.
15. Define "region."
16. Specify which agencies/entities would be involved/affected.

Summary of key points about the plan

1. Centerpiece has three elements – the commission, the plan, and the funding. The recommendations must be built on these three elements and be integrated and interdependent.
2. The plan must emphasize science-based approaches and be citizen lead.
3. Vision should highlight the outcome areas identified (water, fish, wildlife, forests, soil, outdoor recreation and emerging issues).
4. Wish to streamline – not create another layer of government.

Ryan said that the group will revisit this section on the 26th of April.

Ron said that the report needs a preamble and the Council's vision should start this publication. The vision is what we have all been functioning from. This is our ideal scenario and this report will hopefully get us there. He said that he felt the report should open with the vision and he recommend that the Council use the revised vision instead of the one that is included on page 36 of the report.

Conservation Commission

Ryan asked members to refer to page 14: "A Focal Point for Conservation – Minnesota Conservation Commission." Ryan asked the group to look at the first 7 points; the commission's primary duties with respect to the conservation plan. He asked members to

identify what they see as the strengths of this section – things they would not want to change, as well as identify those aspects of the section that should be changed.

Strengths of the Commission

+ Like the use of direct verbs which help clarify the commission's authority.

Commission Changes

Members made comments about or suggested changes to the draft. The following flip chart notes summarize the feedback:

1. Clarify statutory authority of the Commission.
2. Define what is meant by regional?
3. Make the case, "What can be better about citizen-based" commission?
4. Deeply "credentialed" citizen-based group (See Jane's response.)
5. The Commission should be a "place to go" vs. telling a state "employee what to do."
6. The commission should address multi-agency issues and multi-interest group concerns.
7. It should be made clear that these are not in any particular order or priority listing.
8. The Commission should not "empower local government." Local government has the power to do the things included in the report.
9. The word "hearings" has the wrong connotation. Consider using something like "listening sessions" or some wording that does not make it sound overly formal and legislative.
10. Delete the reference to the "sale or acquisition of land."
11. Separate statutory duties from other responsibilities/tasks, so that it is very clear which of these responsibilities are to be clearly enumerated in statute.
12. Appoint commissioner. There was a lengthy discussion of the issue of the commission's role in appointing the commissioner of DNR. No consensus was reached but an alternative suggestion was made, as follows:
    a. Commission would recommend to the governor a candidate for DNR.
    b. The Commission could interview and nominate a candidate for the DNR commissioner for appointment by the Governor.
    c. It was also suggested that members consider the process used to select the members of the LCCMR (Minn. Stat. 116.05 Subd.1a.)

State Plan – Regional Components

In discussing the state plan and its regional components, the following points were captured.

- State plan should have regional components.
- Regional components would define resource priorities for the region.
- Use existing DNR and other regional offices to convene local groups (citizens, communities, business, non –profit).
- The commission should take the lead in defining the approach to involve regional stakeholders. It may be necessary to establish advisory panels or build upon other successful models such as the "EQIP" model.
- Intent is NOT to create more (regional) government.

Funding recommendations
Ryan asked members to refer to the section referring to funding, at the bottom of page 15 of the draft. Comments on the section included:

1. Without dedicated funding the remaining recommendations are mute.
2. Strike the italics section of the draft.
3. We need a mix of funding to impact conservation – dedicated funding must supplement not supplant.
4. Need to make the case for funding.
5. Separate paragraphs on dedicated funding;
    a. Need significantly more than 100 million should be appropriated for conservation initiatives.
    b. Need to consider existing funding (fees, bonding, etc.)
    c. Need to consider local property tax and other tax policy implications for conservation efforts.
6. Need long-term/dedicated funding to match long-term needs. Need to move away from short-term, two-year, funding cycle.

Watershed management
Josh said that watershed management is important to the Governor and wants to make sure that this is not lost in the final report. Mike added that the Governor spoke specifically about water management in his their meeting. Mike suggests that the report should recommend that BWSR link to the conservation commission. He added that we currently have a very confusing array of water planning entities and that the long-term goal is to simplify (he noted the Nebraska example). Dave said that BWSR should disappear. He said that the number of employees wouldn't need to change because the work isn't going away, but that they could be assimilated into other agencies.

Larry raised the concern that such a change could disconnect people that are active right now in BWSR. Mike explained that this would not rearrange the SWCD, just take the 17-member citizen board and fold the BWSR responsibilities into the new commission. Larry said that he doesn't want someone telling him how to spend his money. LeAnn said that if we wipe away BWSR board – that is asking the commission to take on a lot. She said she would challenge this because it could eliminate an important connection between state and local government conservation efforts. Ron said that rather than eliminate the board it just needs to be brought under the umbrella of the commission. He said if it is working – and it was his understanding that it did a good job – then why fix it? Mike said he saw is as a way to more closely align the BWSR's work with the responsibilities of the commission. It would not require any changes to the work of the local entities. Dave said that he was concerned that if we create a commission, without saying anything about how existing boards ought to related to it, all we have done is add to the problem of a growing number of board's and councils that further confuse the citizens. LeAnn asked if legislators be asked to endorse the report. Mike said yes, the legislative members of the Council will be asked to sign the final report.

Other organizational changes

There was some additional discussion regarding the groups recommendations, or lack of recommendations, to reorganize state government. Jane said that she felt the Council should have done something to streamline and reduce redundancy in the system. Larry asked Jane: "What can we consolidate?" She said that the question would require more research and that this process did not look at that. LeAnn also asked if we are changing for change sake. Joe said that making specific recommendations on organizational changes was beyond the scope of the Council's time and resources. It was suggested that the group have an extra meeting to talk about the issue. Kirk said he felt that this is a very complicated issue and said he did not think one more meeting – or several more meetings – would prove satisfying. He said he was comfortable with the language in the report. Dave suggested that Mike talk with Josh and the Governor's office to see if they have concerns. Mike said that he would be happy to do so, and that he was quite sure that the Council needs to say something, but that the Council cannot address this issue comprehensively. He said that BWSR is at top of the list. The Auditor's report raises a lot of issues and we ought to at least comment.

Next Steps

Ryan said that he would send an email by end of day Monday, requesting member comments – particularly on the composition of the commission. It was also suggested that members have a brief conference call. A number of members agreed. Dave just asked that members promise to stay focused and respond to the particular questions regarding the recommendations. On April 26th, the group can review the entire final draft. CLC members should send availability time to Ryan in early part of next week. Mike said that we will try to arrange a conference call in the early afternoon of next Wednesday or Thrusday.

Mike mentioned that he has been talking to Josh in regard to the events after the CLC group concludes. There will be a date in early to mid-May for a press conference. Mike asked the members plan to attend, if at all possible.

The Council's final meeting is scheduled for April 25 in the Ladyslipper Room at the Centennial Building.

Adjourn

Facilitated by Management Analysis & Development
Minnesota Department of Administration
Ryan Church, facilitator

These materials are available in Braille, audiotape, or large print
From Renda Rappa at 651-201-2294 or TTY 800-6527-3529

Minnesota Board of Water & Soil Resources

DATE: May 14, 2007

TO: Board of Water and Soil Resources Members, Advisors, and Staff

FROM: John Jaschke, Executive Director

SUBJECT: May 23, 2007, Board Meeting Notice

The Board of Water and Soil Resources (BWSR) will meet on Wednesday, May 23, 2007, beginning at 9:00 a.m. The meeting will be held in the second floor conference room, at 520 Lafayette Road North, in St. Paul. Parking is available in the lot directly in front of the building (use hooded parking areas).

The following information pertains to agenda items:

COMMITTEE RECOMMENDATIONS

Northern Water Planning Committee

1. **Benton County Priority Concerns Scoping Document (PCSD) -** Benton County submitted their Priority Concerns Scoping Document for approval by the Northern Water Planning Committee. The Northern Water Planning Committee, led by Quentin Fairbanks, approved the scoping document, and recommends approval of the Benton County Priority Concerns Scoping Document. ***DECISION ITEM***

2. **Stearns County Priority Concerns Scoping Document (PCSD) -** Stearns County submitted their Priority Concerns Scoping Document for approval by the Northern Water Planning Committee. The Northern Water Planning Committee, led by Quentin Fairbanks, approved the scoping document, and recommends approval of the Stearns County Priority Concerns Scoping Document. ***DECISION ITEM***

3. **Warroad Watershed District Revised Watershed Management Plan -** The Northern Water Planning Committee met on May 9, 2007, in Brainerd to review and discuss the content of the revised Warroad Watershed District Watershed Management Plan. Based on this review and discussion with BWSR staff and representatives of the Warroad Watershed District the Northern Water Planning Committee recommends the Board approve the plan per the attached draft Order. ***DECISION ITEM***

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fax (218) 755-4201

Brainerd
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Duluth
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NEW BUSINESS

1. **Sale of Wetland Mitigation Credits to Public Transportation Authorities -** BWSR has been authorized since 2002 to sell wetland credits to public transportation authorities. Recently, non-road public transportation authorities have inquired about purchasing credits under this statutory authority. The Wetland Committee has reviewed the issue and is forwarding a recommendation for Board consideration. ***DECISION ITEM***

2. **Plan for Soliciting Wetland Restoration Projects for the Local Road Wetland Replacement Program -** Staff have developed a plan for seeking wetland banking projects for the Local Road Wetland Replacement Program. This plan seeks proposals from landowners for high quality wetland restoration projects in priority watersheds and bank service areas. The Wetland Committee has reviewed the proposal and is forwarding a recommendation for Board consideration. ***DECISION ITEM***

3. **Wetland Mitigation Memorandum of Understanding -** BWSR staff have been working on the Wetland Mitigation Memorandum of Understanding (MOU) for approximately four years. The Wetland Committee has reviewed the draft MOU and is forwarding a recommendation for Board consideration. ***DECISION ITEM***

4. **Legislative Update** – John Jaschke – ***INFORMATION ITEM***

If you have any questions regarding the agenda, please feel free to give me a call at 651-296-0878. The meeting will adjourn about 12:30 p.m. I look forward to seeing you on May 23rd!

Please note: The Grants Program and Policy Committee and the RIM Strategic Planning ad hoc Committee will meet immediately following the Board meeting.

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BOARD OF WATER AND SOIL RESOURCES
520 LAFAYETTE ROAD NORTH
2nd FLOOR CONFERENCE ROOM
ST. PAUL, MINNESOTA 55155
WEDNESDAY, MAY 23, 2007

PRELIMINARY AGENDA

9:00 AM CALL MEETING TO ORDER

PLEDGE OF ALLEGIANCE

ADOPTION OF AGENDA

MINUTES OF APRIL 25, 2007

OPEN MIKE (10-minute agenda time, two-minute limit/person)

REPORTS

- Chair – Randy Kramer
- Executive Director – John Jaschke
- Dispute Resolution Committee – Randy Kramer
- Wetlands Committee – LuAnn Tolliver
- Grants Program & Policy Committee – Louise Smallidge
- Public Relations, Outreach & Strategic Planning Committee – Kay Cook
- Administrative Advisory Committee – Randy Kramer

COMMITTEE RECOMMENDATIONS

Northern Water Planning Committee

1. Benton County Priority Concerns Scoping Document (PCSD) – Quentin Fairbanks – ***DECISION ITEM***

2. Stearns County Priority Concerns Scoping Document (PCSD) - Quentin Fairbanks – ***DECISION ITEM***

3. Warroad Watershed District Revised Watershed Management Plan – Quentin Fairbanks – ***DECISION ITEM***

NEW BUSINESS

1. Sale of Wetland Mitigation Credits to Public Transportation Authorities – Dave Weirens – ***DECISION ITEM***

2. Plan for Soliciting Wetland Restoration Projects for the Local Road Wetland Replacement Program - Dave Weirens – ***DECISION ITEM***

3. Wetland Mitigation Memorandum of Understanding - Dave Weirens – ***DECISION ITEM***

4. Legislative Update – John Jaschke – ***INFORMATION ITEM***

AGENCY REPORTS

- Minnesota Extension Service – Jim Anderson
- Minnesota Department of Natural Resources – Mark Holsten
- Minnesota Department of Health – Dan Wilson
- Minnesota Department of Agriculture – Joe Martin
- Minnesota Pollution Control Agency – Brad Moore

ADVISORY COMMENTS

- Association of Minnesota Counties (AMC) – Annalee Garletz
- Minnesota Association of Conservation District Employees (MACDE) – Rick Reimer
- Minnesota Association of Soil and Water Conservation Districts (MASWCD) – LeAnn Buck
- Minnesota Association of Townships (MAT) – Sandy Hooker
- Minnesota Association of Watershed Districts (MAWD) – Ray Bohn
- Natural Resources Conservation Service (NRCS) – Tim Koehler
- Others

UPCOMING MEETINGS

- Next Board Meeting, June 27, 2007, St. Paul
- Board Tour and Meeting, August 22-23, 2007, Koochiching and Lake of the Wood Counties

12:30 PM **ADJOURN**

** **Please Note:** The Grants Program and Policy Committee and the RIM Strategic Planning ad hoc Committee will meet immediately following the Board meeting.

DRAFT DRAFT DRAFT

BOARD OF WATER AND SOIL RESOURCES
520 LAFAYETTE ROAD NORTH
2ND FLOOR CONFERENCE ROOM
ST. PAUL, MINNESOTA 55155
WEDNESDAY, APRIL 25, 2007

BOARD MEMBERS PRESENT:
Dana Allen, Jim Anderson, MES; Paul Brutlag, Bob Burandt, Kay Cook, Quentin Fairbanks, Mark Holsten, DNR; Randy Kramer, Paul Langseth, Joe Martin, MDA; Brian Napstad, Louise Smallidge, Lisa Thorvig, MPCA; Gene Tiedemann, LuAnn Tolliver, Dan Wilson, MDH

BOARD MEMBERS ABSENT:
Brian Kletscher

STAFF PRESENT:
Mary Jo Anderson, Bill Eisele, Jim Haertel, John Jaschke, Dale Krystosek, Kevin Lines, Ron Shelito, Doug Thomas, Dave Weirens, Steve Woods, Brad Wozney

OTHERS PRESENT:
Cliff Aichinger, Ramsey-Washington Metro Watershed District
Jack Frost, Ramsey-Washington Metro Watershed District
Sandy Hooker, Minnesota Association of Townships
Molly Deen, Sierra Club

Chair Kramer called the meeting to order at 9:00 a.m.

PLEDGE OF ALLEGIANCE

** 07-32 **ADOPTION OF AGENDA** – Moved by Louise Smallidge, seconded by Kay Cook, to adopt the agenda as presented. Motion passed on a voice vote.

** 07-33 **MINUTES OF MARCH 28, 2007** – Moved by Paul Langseth, seconded by Brian Napstad, to approve the minutes of March 28, 2007, as circulated. Motion passed on a voice vote.

REPORTS

Chair's Report – Randy Kramer stated that he did not attend the EQB meeting last week; he was farming so Jim Haertel attended on his behalf. Chair Kramer has had many conversations with agricultural groups regarding agricultural exemptions on wetlands. Chair Kramer has also had various discussions regarding other legislative issues.

Executive Director's Report – John Jaschke reported that he attended the Northern Counties Land Use Coordinating Board meeting in Chisholm. The group discussed wetland issues and strategies, ISTS, mining interests, and federal legislation that could redefine the waters of the United States. John attended the Northern Region staff meeting and met with local governments regarding the oversight issue. John has spent much time on legislative issues; he will provide information later today on the agenda. John reported that BWSR's staffing plan is beginning development. Staff will be working with the Administrative Advisory Committee as legislative issues unfold and as a staffing plan is finalized.

Brian Napstad thanked John Jaschke, on behalf of the Northern Counties Land Use Coordinating Board, they expressed gratitude for John's attendance at their meeting.

Dispute Resolution Committee (DRC) – Jim Haertel reported that four new appeals have been received. Stearns County's appeal with MinnCan pipeline; an exemption decision in Stearns County; a restoration order in Redwood County; and a replacement plan denial in Benton County. The DRC members voiced concern for the number of appeals and paper they receive; Jim will e-mail information to the DRC members.

Wetlands Committee – LuAnn Tolliver reported that the Wetlands Committee met on March 28 and again on April 24. The Committee discussed wetland restoration project solicitation and the sale of wetland banking credits to non-road public transportation authorities. These issues will be presented to the full Board in May. LuAnn thanked staff for their diligence in keeping board members informed. She also thanked the Wetland Committee for their time, commitment, and patience in working on the wetland issues.

Grants Program and Policy Committee – Louise Smallidge reported that the Grants Program and Policy Committee will meet following the May Board meeting.

Public Relations, Outreach and Strategic Planning Committee – Kay Cook reported that the Public Relations, Outreach and Strategic Planning Committee will meet today immediately following the Board meeting. Kay thanked Steve Woods and Jon Fure for their efforts in coordinating this meeting.

Administrative Advisory Committee – Randy reported that the Administrative Advisory Committee met this morning; items will be considered later today on the agenda.

COMMITTEE RECOMMENDATIONS

Metro Water Planning Committee

Ramsey-Washington Metro Watershed District, Watershed Management Plan – Bob Burandt reported that the Metro Water Planning Committee met to review the Ramsey-Washington Metro Watershed District Watershed Management Plan, and unanimously recommend the Plan be approved. Moved
** 07-34 by Bob Burandt, seconded by Louise Smallidge, to approve the Ramsey-Washington Metro Watershed District Watershed Management Plan. Bob and LuAnn Tolliver commended the Ramsey-Washington Metro Watershed District for the "mini-plan" that was developed as an informational piece from the Plan, a useful tool for others to review and use as a model. Motion passed on a voice vote.

Shingle Creek and West Mississippi Watershed Management Organizations' Major Plan Amendment – Bob Burandt reported that the Metro Water Planning Committee reviewed the Shingle Creek and West Mississippi Watershed Management Organization's major plan amendment and recommends approval. Moved by Bob Burandt, seconded by LuAnn
** 07-35 Tolliver, to approve the Shingle Creek and West Mississippi Watershed Management Organizations' Major Plan Amendment. Discussion followed.

Lisa Thorvig stated that MPCA supports the Plan amendment. Motion passed on a voice vote.

Upper Rum River Watershed Management Organization, Watershed Management Plan – Bob Burandt reported that the Metro Water Planning Committee reviewed the Upper Rum River Watershed Management Organization, Watershed Management Plan and unanimously recommends the
** Plan approval. Moved by Bob Burandt, seconded by LuAnn Tolliver, to approve
07-36 the Upper Rum River Watershed Management Organization Watershed Management Plan. Discussion followed. Lisa Thorvig asked for an overview from staff regarding the WMO's reliance on state agencies and locals to assist. Steve Woods stated that Anoka Conservation District has pledged to work with the Upper Rum River Watershed Management Organization on the Watershed Management Plan. Motion passed on a voice vote.

Northern Water Planning Committee

Wilkin County Priority Concerns Scoping Document – Quentin Fairbanks reported that the Northern Water Planning Committee reviewed the Wilkin County Priority Concerns Scoping Document and recommends approval.
** Quentin stated that DNR comments were not relevant to the document. Moved
07-37 by Quentin Fairbanks, seconded by Kay Cook, to approve the Wilkin County Priority Concerns Scoping Document. Motion passed on a voice vote.

Southern Water Planning Committee

Middle Fork Crow River Watershed District (MFCRWD) Water Management Plan – Dana Allen reported that the Southern Water Planning Committee met to review the Middle Fork Crow River Watershed District Water Management Plan and unanimously recommend approval of the Plan. Dana reported that this is the MFCRWD's first plan, they hired an experienced administrator; the Committee is
** confident the plan will be implemented. Moved by Dana Allen, seconded by Paul
07-38 Langseth, to approve the Middle Fork Crow River Watershed District Water Management Plan. Motion passed on a voice vote.

NEW BUSINESS

Koochiching SWCD Supervisory Boundary Change Request – Quentin Fairbanks reported that the Northern Water Planning Committee met to consider the Koochiching SWCD supervisor nomination districts proposed boundary
** change, and recommends approval. Moved by Quentin Fairbanks, seconded by
07-39 Kay Cook, to accept and approve the boundary change request for Koochiching SWCD. Discussion followed. It was noted that this is not a change based only on

population, there are other factors including the landscape. The SWCD supervisors are elected on a countywide basis. Motion passed on a voice vote.

Establishment Petition for Cedar River Watershed District – Jim Haertel reported there is a strong consensus from Mower County for the establishment of a watershed district; there is no opposition. Jim reported that the hearing panel recommends establishment of the Cedar River Watershed District per the draft Order. Moved by Louise Smallidge, seconded by Bob Burandt, to approve the establishment petition for the Cedar River Watershed District, with acceptance of the proposed list of managers. Jim Haertel stated that criminal background checks were completed on the board of managers. Discussion followed. Motion passed on a voice vote.

** 07-40

Chair Kramer called for a break in the meeting at 10:05 a.m. The meeting reconvened at 10:20 a.m.

Reinvest in Minnesota (RIM) Reserve Strategic Program Plan Update and BWSR ad hoc Committee Appointment – Kevin Lines explained the need to update the RIM Reserve Program Strategic Plan. The updated Plan will guide agency requests for future appropriations, leveraging opportunities with partners and new conservation initiatives. Chair Kramer named the ad hoc RIM Reserve Committee: Paul Brutlag, chair; Paul Langeth, Bob Burandt, Joe Martin, and Dana Allen. Chair Kramer has contacted the aforementioned board members, and they are willing to serve on the ad hoc committee. Kevin reported that the committee will seek significant stakeholder participation representing agriculture, environment, conservation, federal, state, and local government. The ad hoc committee will meet three times during May and June, and is expected to present the results of the Committee's work to the full Board at the June 27, 2007, meeting. Paul Brutlag stated that the ad hoc committee will meet briefly immediately following the Board meeting today.

Update on the MPCA Ditches and Wetland Listing Process – Doug Thomas explained that as state agencies begin to implement the Clean Water Legacy Act, the need to discuss the TMDL process and identify priorities for monitoring, assessing and listing impaired waters to ensure a focused and organized approach was recognized. An interagency group began meeting in mid-2006 to discuss the TMDL process and prioritization needs, including how to approach assessment and listing of wetlands and ditches. Doug Thomas introduced Shannon Lotthammer, MPCA. Shannon presented an overview of the interagency listing process and outcomes, the status of MPCA implementation of the agreed-upon watershed-based approach for considering wetlands and

ditches in the 2008 impaired waters listing cycle. Discussion followed. Quentin Fairbanks suggested that counties include the classification standards in their water plans. Chair Kramer thanked Doug and Shannon for their informative presentation.

BWSR Committee Meeting Schedule – John Jaschke presented upcoming BWSR committee schedules for board members' information. This committee schedule will be posted on the Board's website and updated as meetings are scheduled.

Legislative Update – John Jaschke presented a legislative summary as of April 24th. John also presented the Senate and House FY08/09 Biennium Budget Comparison. Discussion followed.

John Jaschke briefly commented on the Governor's Conservation Legacy Council (CLC) draft minutes from a meeting on April 12, 2007. John noted that on page six of the draft minutes, regarding watershed management, BWSR is mentioned and a possible link to the conservation commission is discussed. The CLC's final meeting will be held tomorrow, with a final report subsequent to that.

AGENCY REPORTS

Minnesota Extension Service (MES) – Jim Anderson reported that Faye Sleeper has been hired as co-director of the Water Resources Center. Jim announced that John Bilotta, has been hired for the NEMO project; John will be located in Farmington, starting next week.

Minnesota Department of Natural Resources (DNR) – Mark Holsten reported that DNR is spending lots of time monitoring legislative conference committees. DNR is working with the legislature on groundwater and aquifers including another budget proposal for groundwater research, it's been a struggle to get funding over the years. Commissioner Holsten stated that drought conditions still exist in northeastern Minnesota and lakes are low.

Commissioner Holsten stated that DNR prevailed in the lawsuit with MCEA regarding shoreland rules. Senator Chaudhary has an omnibus bill (SF #1312) for DNR implementation of shoreland rules. Commissioner Holsten announced that the DNR southern region is working with Farm Fest on a prairie grass demonstration site.

Commissioner Holsten reported on the status of tuberculosis (TB) in northwestern Minnesota deer herds. DNR has finished the final spring shooting,

harvesting 488 deer in the last couple weeks; six deer are expected to be TB positive, showing early signs of TB centered on the Marshall-Beltrami County line. DNR will continue further monitoring in the fall. A press release regarding this issue will go out within the week.

Minnesota Department of Health (MDH) – Dan Wilson reported that legislation is moving along. MDH is reacting to external environmental health issues, discussions continue on health risks. Dan reported that the well code has been under revision for a long time; this will be sent to the Governor shortly, with dual notice on the rules. The rule is anticipated to be in effect by the end of the calendar year.

Minnesota Department of Agriculture (MDA) - Joe Martin stated that there is lots of uncertainty at the State Capitol right now. Issues of interest include: county waste and pesticide issues, Clean Water Legacy, bioenergy, funding for feasibility studies and research on E85.

Minnesota Pollution Control Agency (MPCA) – Lisa Thorvig reported that another interagency group has been formed with MPCA, BWSR and DNR, to work on ditch maintenance and stormwater requirements, trying to keep the NPDES permitting approach simple. Chair Kramer thanked MPCA for allowing Shannon Lotthammer to present information today.

UPCOMING MEETINGS
- Next Board Meeting, May 23, 2007, in St. Paul.

Kay Cook announced that the Public Relations, Outreach and Strategic Planning Committee meets immediately following the Board meeting today.

** 07-41 Moved by LuAnn Tolliver, seconded by Quentin Fairbanks, to adjourn the meeting at 12:05 p.m. Motion passed on a voice vote.

Respectfully submitted,

Mary Jo Anderson
Recorder

Dispute Resolution Report
May 10, 2007
by: Jim Haertel

There are presently 28 appeals pending. All of the appeals involve WCA except File 05-24. There have been seven new appeals filed since the last report dated April 12, 2007.

File 07-16. This is a new appeal of a replacement plan decision in Aitkin County. The appeal involves the denial of a replacement plan application for a second driveway.

File 07-15. This is a new appeal of an exemption decision in Carver County. The appeal regards the denial of a wetland exemption application on agricultural land. No decision has been made on the appeal.

File 07-14. This is a new appeal of an exemption decision in Carver County. The appeal regards the denial of a wetland exemption application on agricultural land. No decision has been made on the appeal.

File 07-13. This is a new appeal of a replacement plan decision in Benton County. The appeal involves the denial of a replacement plan application that proposed filling 7.8 acres of an approximately 10 acre wetland for commercial development. No decision has been made on the appeal.

File 07-12. This is a new appeal of a restoration order in Redwood County. The appeal regards the filling of Type 3 wetlands. No decision has been made on the appeal.

File 07-11. This is a new appeal of an exemption decision in Stearns County. The appeal involves the MinnCan pipeline project. The appeal has been remanded for a public hearing at the local level.

File 07-10. This is a new appeal of a replacement order in Stearns County. The appeal regards the filling of wetlands associated with road maintenance/improvement. No decision has been made on the appeal.

File 07-7. This is an appeal of a replacement plan decision in Blue Earth County. The appeal regards the approval of a wetland replacement plan involving the realignment of a county road. The appeal has been remanded for a public hearing at the local level.

File 07-3. This is an appeal of a replacement plan decision in Traverse County. The appeal concerns the approval of a wetland replacement plan application. No decision has been made on the appeal.

File 06-43. This is an appeal of a restoration order in Morrison County. The appeal involves the placement of fill in wetland near a lake. The appeal has been placed in abeyance and the restoration order has been stayed pending field review by the Technical Evaluation Panel this spring.

File 06-28. This is an appeal of a restoration order in St. Louis County. The appeal regards the placement of fill in Type 7 wetland associated with construction of a road. The appeal has been remanded for TEP review of a wetland delineation and measurement of the wetland fill areas.

File 06-27. This is an appeal of a replacement plan decision in Otter Tail County. A permanent road was constructed in Type 6/7 wetland with a portion of it in the shoreland zone. A Restoration Order was issued and a replacement plan application was submitted to retain the road. An LGU staff individual denied the replacement plan. The appeal has been remanded for a public hearing at the local level.

File 06-26. This is an appeal of a wetland exemption determination in Cass County. The LGU approved the wetland exemption. The TEP recommended the exemption not be approved. The activity involves the placement of drain tile in a Type 2 wetland that was previously hayed and is now a sod farm. The appeal has been accepted, a pre-hearing conference was held, a hearing before the DRC was scheduled but has been canceled while settlement discussions take place.

File 06-23. This is an appeal of a replacement plan decision in Kanabec County. The LGU denied the wetland replacement plan application. A previous denial of the same replacement plan application had been appealed, the appeal was remanded for a hearing, and now the current denial has been appealed. The appeal has been placed in abeyance pending the outcome of a lawsuit between the landowner and the county. The lawsuit concerns the county's possible noncompliance with the 60-day rule. The county prevailed in district court, however the decision has been appealed to the Court of Appeals.

File 06-17. This is an appeal of a replacement plan decision in the City of Montgomery in LeSueur County. The LGU denied an after-the-fact wetland replacement plan application based on a lack of sufficient reasons why the restoration could not be completed. The appeal has been remanded for further processing at the local level.

File 06-12. This is an appeal of a no-loss decision in Stearns County. It involves the same project and issues as File 06-6. After a restoration order was issued, a no-loss application was submitted by the developer and denied by the LGU. The appeal has been remanded for further technical evaluation.

File 06-6. This is an appeal of a restoration order in Stearns County. At issue are numerous wetlands impacted by filling, sedimentation, reduction of hydrology and lack of Best Management Practices associated with a residential development. The appeal has been denied in part. The Restoration Order has been affirmed in part and has been stayed in part.

File 06-5. This is an appeal of a wetland boundary and type decision in the City of Hermantown in St. Louis County. The appeal concerns the denial of a wetland delineation. There are issues regarding the soils and vegetation in a disturbed area. The area has been disturbed by wetland filling and a cease and desist order has been issued to the developer. The appeal has been remanded for further processing by the LGU.

File 06-4. This is an appeal of a restoration order in Carlton County. At issue is the unauthorized placement of fill in wetland for a roadway. The appeal is in abeyance pending completion of a wetland delineation during the growing season.

File 06-2. This is an appeal of a restoration order in Mille Lacs County. At issue is the unauthorized placement of fill in wetland for construction of a road. Also, unstable steep slopes exist along the edge of the fill in wetland. The appeal is in abeyance pending further technical work during the growing season.

File 06-1. This is an appeal of a replacement plan approval in Itasca County. The appeal contends that sequencing was not followed. The TEP recommended denial on a 3:1 vote. The SWCD approval was on a 3:2 vote. The application sought wetland filling for three outbuildings and lake access. The appeal has been accepted and is in abeyance pending settlement discussions.

File 05-26. This is an appeal of a replacement plan decision in Crow Wing County. The appeal concerns the denial of a wetland replacement plan application. The application was denied because there was no hardship to support approval. Upon inspection it appears a decision was made to deny a variance, however it is likely no WCA decision was made. The appeal has been accepted and is in abeyance pending settlement discussions.

File 05-24. This is an appeal, actually three appeals, of the Bois de Sioux Watershed District compensation to landowners related to a project. The appeal has been held in abeyance pending settlement discussions, was starting to be move forward for a hearing before the DRC, and now is in settlement discussions.

File 05-20. This is an appeal of a replacement plan decision in Cokato, Wright County. The decision approved the filling of a 0.2 acre Type 2 wetland on a residential lot for construction of a residence. There is a question about the alternatives proposed for sequencing. Also, no TEP was held. The appeal has been remanded for a TEP to be held and sequencing to be addressed.

File 05-17. This is an appeal of a replacement plan decision in the City of Holdingford in Stearns County. At issue is the denial of a replacement plan application relating to a residential development. Wetland impacts of 0.7 acres were proposed for construction of a road and multi-use trail. The TEP recommended approval of the application. The LGU denied the application on finding the development could proceed without wetland

impacts. The Corps issued a permit for the project. The appeal has been accepted and is in abeyance pending settlement discussions.

File 05-1. This is an appeal of a replacement plan decision by the Rice Creek Watershed District. The District previously made a decision that was appealed which resulted in a remand for an expanded TEP. Now there is an appeal of the decision made under remand since the decision differed from the TEP report. At issue is a wetland delineation and the Comprehensive Wetland Protection and Management Plan that BWSR approved. After a hearing before the DRC, the board remanded the matter for a new wetland delineation and for submission on an updated, complete replacement plan application.
File 04-26. This is an appeal of a restoration order in Spring Lake Township, Scott County. At issue is the placement of 4,300 feet of fill in a wetland for a driveway. The approved plat showed access to the lot without wetland impacts. The appeal is in abeyance pending a decision on a replacement plan application.

File 04-23. This is an appeal of a forestry exemption decision in Kittson County. Unpermitted fill was placed in a Type 7 wetland for a road. A Cease and Desist Order was issued. Additional filling has recently occurred in violation of the CDO. Corps and DNR violations also exist. The appeal has been accepted and is in abeyance pending completion of a wetland delineation and submittal of a replacement plan application.

File 04-15. This is an appeal of a wetland boundary and type decision in Anoka County. At issue is the decision by the Rice Creek Watershed District to classify a site as effectively drained. Previously a wetland delineation report identified most of the site as wetland. The appeal has been remanded for a technical evaluation panel to meet onsite. The appeal remains in abeyance under the remand.

COMMITTEE RECOMMENDATIONS

Northern Water Planning Committee

1. Benton County Priority Concerns Scoping Document (PCSD) – Quentin Fairbanks – ***DECISION ITEM***

2. Stearns County Priority Concerns Scoping Document (PCSD) - Quentin Fairbanks – ***DECISION ITEM***

3. Warroad Watershed District Revised Watershed Management Plan – Quentin Fairbanks – ***DECISION ITEM***

Minnesota Board of Water & Soil Resources

May 23, 2007

Benton County Commissioners
c/o Annie Felix
Benton Soil and Water Conservation District
14 West 2nd Avenue
Foley, MN 56329

Dear Benton County Commissioners,

SUBJECT: OFFICIAL COMMENTS PERTAINING TO THE STATE REVIEW OF THE BENTON COUNTY PRIORITY CONCERNS SCOPING DOCUMENT (PCSD)

Pursuant to M.S. Section 103B.313, subdivision 5, this letter communicates the State's official comments pertaining to the priority concerns that Benton County has chosen to address in the update of their Comprehensive Local Water Management Plan. The Board of Water and Soil Resources, along with the state review agencies, received the Benton County Priority Concerns Scoping Document on March 26, 2007. The Northern Water Planning Committee (hereinafter referred to as Committee) met on April 9, 2007, to discuss the state review agency comments, the content of the PCSD and recommendations for the content of the final plan.

The Committee commends the County for the process they used to select the concerns and does not recommend any changes or offer any to the priority concerns selected to be addressed by the plan.

The Committee offers the following specific suggestions to be considered in the development of the final plan:

- Include a communication and education Goal and/or Objective into each priority concern contained within the Local Water Management Plan
- Identify a goal that seeks to insure the implementation of regulations such as shoreland ordinances and subsurface sewage treatment systems (SSTS) through zoning and other efforts
- Include provisions that identify methods to protect the resource identified in Table 6 of the PCSD including Wetlands, Streams/Rivers and Lakes.

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Web: www.bwsr.state.mn.us TTY: (800) 627-3529 An equal opportunity employer Printed on recycled paper

The Board of Water and Soil Resources encourages Benton County to submit the final plan for board approval within (6) months of receiving this letter.

Sincerely,

Randy Kramer
Chairperson

cc: Ron Shelito, BWSR
David Weirens, BWSR
Jason Weinerman, BWSR
Becky Balt, MDA
John Wells, MN EQB
Art Persons, MDH

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Minnesota Board of Water & Soil Resources

May 23, 2007

Stearns County Commissioners
c/o Susan McGuire
Stearns County Environmental Services
Administration Center Room 343
705 Courthouse Square
St. Cloud, MN 56303

Dear Stearns County Commissioners,

SUBJECT: OFFICIAL COMMENTS PERTAINING TO THE STATE REVIEW OF THE STEARNS COUNTY PRIORITY CONCERNS SCOPING DOCUMENT

Pursuant to M.S. Section 103B.313, subdivision 5, this letter communicates the State's official comments pertaining to the priority concerns that Stearns County has chosen to address in the update of their Comprehensive Local Water Management Plan. The Board of Water and Soil Resources, along with the state review agencies, received the Stearns County Priority Concerns Scoping Document (PCSD) on February 14, 2007. The Northern Water Planning Committee (hereinafter referred to as Committee) met on April 9, 2007, to discuss the state review agency comments, the content of the PCSD and recommendations for the content of the final plan.

The Committee commends the county for the process they used to select the concerns and does not recommend any changes or offer any to the priority concerns selected to be addressed by the plan.

The Committee offers no specific suggestions to be considered in the development of the final plan, but encourages the county to submit the final plan for board approval within (6) months of receiving this letter.

Sincerely,

Randy Kramer
Chairperson
cc: Ron Shelito, BWSR
David Weirens, BWSR
Jason Weinerman, BWSR
Becky Balt, MDA
John Wells, MN EQB
Art Persons, MDH

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OVERVIEW
WARRAOD WATERSHED DISTRICT
OVRALL PLAN UPDATE

In the Fall of 2004 the Warroad Watershed District passed a resolution to update their Long Range Plan. The Plan had not been updated since the Minnesota Water Resources Board prescribed the original plan on September 13, 1965. There had been ongoing discussion with the Warroad WD board for about 3 years prior to them passing this resolution on the necessity to update their plan. It was a major flood event in the city of Warroad in 2002 that got the WWD board thinking about the future of the Watershed District. After many discussions on what the Watershed District's authorities are and how they could be utilized before, during, and after an event such as this, it was decided that there is a need for a more active Watershed District. Hence the development of a long-range plan that has a three-phase implementation plan for the next ten years:

Phase 1. Build internal capabilities and program set up. (Year 1)
Phase 2. Implement baseline programs, initiate inventories and specific plan/program development. (Year 2-3)
Phase 3. Implement baseline programs, specific issue implementation projects/programs. (Year 3 on)

The mission of the Warroad Watershed District is to: Take a proactive role in managing resources by providing leadership for water management and working in partnership with local, state, and federal partners to focus on water flow management, address issues related to surface water run-off, educate the public, and model good stewardship of the environment.

Summary of the planning process

In the fall of 2004 the WWD contracted with Dan Money of Prairie Aquatics and Jody Horntvedt with the U of M Extension Service to facilitate a planning process that provided for public identification of issues and problem areas within the District as well as prioritizing these issues.

Two public input meetings were held. In January of 2005 federal, state, and local agencies and organizations, and other interested parties where invited as members of a "technical advisory committee" to participate in a discussion identifying problem areas and offering possible solutions. As a result of this meeting the TAC and WWD thought it important to provide the general public an opportunity to hear what had been identified and to offer additional thoughts and considerations. This public input meeting was held in late February 2005 and was well attended. This being a small Watershed District it was felt that these two meetings adequately identified the issues within the District.

In addition to identifying the need to develop better and more active administration of the Warroad Watershed District, the planning process identified urban and rural issues within the District. Rural issues were localized flooding from out of bank flows of the Warroad River leading to erosion and the resulting sediment deposits in the river and Lake of the

Woods. Urban issues where localized flooding from stromwater run off from not only city stromwater management systems but also adjacent agricultural lands.

In March 2006, the WWD distributed a copy of the draft Plan for a 60-day review to those that participated on the citizens and technical advisory committees established for the purposes of this plan revision and to those identified in 103D.405 subd.3.

LOCATION & SIZE

The Warroad Watershed District consists of two distinct areas, described below. One part of the Watershed District lies north of the watershed of the Warroad River. This part of the District includes an approximately 24 square mile portion of Lake Township of Roseau County, and extends from the Warroad River Watershed boundary north to the Canadian border. It is approximately six miles north to south and 4 miles east to west, and lies west of the shoreline of Lake of the Woods.

The other area, the major portion of the District, is the land draining directly to the Warroad River. The area drained by the Warroad river and tributaries lies in the Lake of the Woods Drainage Basin, which in turn is a part of the Hudson Bay Basin. The Watershed District is located in the extreme north central –north western portion of Minnesota, next to the International Boundary with Manitoba, Canada and is mostly in eastern Roseau County and western Lake of the Woods County. The only population center located within the District is the City of Warroad, although the Cities of Roseau and Baudette are within short driving distance.

The District encompasses an area of about 312 square miles (199,680 acres) of which 190 square miles is in the Beltrami Island State Forest. It has a maximum length of 32 miles from north to south and a maximum of 19 miles from east to west.

The District has several distinct areas, relative to management and development. The southern ½ is largely undeveloped (approximately 70% wetlands), and is home to the Beltrami Island State Forest and the Red Lake Indian Reservation. There are also lands designated as "consolidated conservation" lands, and managed by the Minnesota DNR in this area. These areas are largely undeveloped and dedicated to forestry. To the north of this area from the State Forest to the international border, encompassing about 100 square miles is an area of agriculture and mixed commercial – industrial use. About 70 % of this northern area is utilized as ag.

LAND USE / PUBLIC & PRIVATE LAND OWNERSHIP

Approximately 60% of the District is either in the Beltrami Island State Forest, the Red Lake Indian Reservation, or otherwise under the management of the Minnesota DNR as a designated Consolidated Conservation land or Wildlife Management Area. Most of this area is vastly undeveloped, and is managed largely as forest lands.

The remaining 40% of the District, located in the northern regions, is either managed as agriculture, is within the City of Warroad, or is under private or industrial use.

Minnesota Board of Water and Soil Resources
520 Lafayette Road North
St. Paul, Minnesota 55110

In the Matter of prescribing a Revised Watershed Management Plan for the **Warroad Watershed District** pursuant to Minnesota Statutes Section 103D.405

ORDER PRESCRIBING WATERSHED MANAGEMENT PLAN

Whereas, the Board of Managers of the Warroad Watershed District (W WD) filed a proposed Revised Watershed Management Plan (Plan) dated January 24, 2007 with the Minnesota Board of Water and Soil Resources (Board) pursuant to Minnesota Statutes Section 103D.405, and;

Whereas, The Board has completed its review of the Plan;

Now Therefore, the Board hereby makes the following Findings of Fact, Conclusions and Order.

FINDINGS OF FACT

1. **District Establishment.** The W WD was established by the Minnesota Water Resources Board on September 20, 1963.

2. **Requirement to Plan.** A watershed district is required to revise their watershed management plan at least once every ten years pursuant to Minnesota Statutes Section 103D.405, Subd. 1 (a). This Plan is the first revision of the original W WD plan written in 1965. The revised Plan identifies the need and has developed responding actions to improve the leadership and management for the business of the Warroad Watershed District. Resource issues identified in the planning process identified rural and urban issues. Rural concerns are flooding and related damages to agricultural land and infrastructure, erosion and related sediment in streams and Lake of the Woods, and unique water/land and related resources. Urban concerns are flooding and related flood damages resulting from storm water runoff as well as high lake levels of Lake of the Woods, and groundwater quality. The Plan contains the District's Mission, Description of the District, Existing conditions, Related potential problems & solution alternatives, Watershed Goals & Strategies, Conflicts between existing programs & Policies of other Organizations, Policies & proposed actions of the District, and a Summary statement of District Policy & Commitment.
   The recently adopted mission statement of the W WD is to:
   "Take a proactive role in managing resources by providing leadership for water management and working in partnership with local, state, and federal partners to focus on water flow management, address issues related to surface water run-off, educate the public, and model good stewardship of the environment."

3. **Nature of the Watershed.** The Warroad Watershed District consists of two distinct areas. One part of the Watershed District lies north of the watershed of the Warroad River. This part of the District includes an approximately 24 square mile portion of Lake Township of Roseau County, and extends from the Warroad River Watershed boundary north to the

Canadian border. It is approximately six miles north to south and 4 miles east to west, and lies west of the shoreline of Lake of the Woods.
The other area, the major portion of the District, is the land draining directly to the Warroad River. The area drained by the Warroad river and tributaries lies in the Lake of the Woods Drainage Basin, which in turn is a part of the Hudson Bay Basin. The Watershed District is located in the extreme north central –northwestern portion of Minnesota, next to the International Boundary with Manitoba, Canada and is mostly in eastern Roseau County and western Lake of the Woods County. The only population center located within the District is the City of Warroad, although the Cities of Roseau and Baudette are within short driving distance.
The District encompasses an area of about 312 square miles (199,680 acres) of which 190 square miles is in the Beltrami Island State Forest. It has a maximum length of 32 miles from north to south and a maximum of 19 miles from east to west.
The District has several distinct areas, relative to management and development. The southern ½ is largely undeveloped (approximately 70% wetlands), and is home to the Beltrami Island State Forest and the Red Lake Indian Reservation. There are also lands designated as "consolidated conservation" lands, and managed by the Minnesota DNR in this area. These areas are largely undeveloped and dedicated to forestry. To the north of this area from the State Forest to the international border, encompassing about 100 square miles is an area of agriculture and mixed commercial – industrial use. About 70 % of this northern area is utilized as agricultural land.
There is one major city within the District, the City of Warroad. One major manufacturing company is located there, Marvin Windows. Tourism on Lake of the Woods is a major attraction for both summer and winter activities. On the outskirts of Warroad are many resorts and one major subdivision, Warroad Estates. The City and subdivision, shoreland areas of Lake of the Woods, Beltrami Island State Forest, and agricultural areas all present different challenges to water management.

4. **Local Review.** On March 31 2006, the W WD distributed a copy of the draft Plan for a 60-day review to those that participated on the citizens and technical advisory committees established for the purposes of this plan revision and to those identified in Minnesota Statutes Section 103D.405, subd.3.

5. **Department of Natural Resources Review**. No review comments where received. However the Divisions of Fisheries, Wildlife, Forestry, and Waters actively participated in the planning process. In response to the "Published Notice of Filing" the DNR did submit a letter dated March 1, 2007 stating, " The Department of Natural Resources (DNR) has been involved with the planning and review of this plan. The Department has no further comments at this time and approves the plan without further revisions."

6. **Pollution Control Agency Review.** Provided general comments on the need to include a discussion on "TMDL's" even though at present there are no identified impaired waters in the District. They did mention with additional monitoring there is some speculation that Lake of the Woods maybe placed on the impaired waters list due to eutrophication. They also identified concerns of septic system issues in the vicinity of the shores of Lake of the Woods.

7. **Roseau County Review.** Provided grammatical corrections only.

8. **Board Review.** Board staff from the regional office in Bemidji met early in the process with the W WD board and it's consultants to have a discussion on the planning process and provided plan format recommendations and guidance. Board staff participated with and assisted the W WD and its consultants throughout the plan revision process by attending task force meetings and one-on-one meetings. Board staff also provided periodic review and comment of draft materials during the planning process. In a letter dated May 23, 2006, Board staff provided its written comments, which offered a number of editorial suggestions,

needed clarifications, omissions, and recommended additions. The most significant suggestion was to arrange the implementation strategies in a "phased" manner that: 1) builds a local program 2) conduct inventories and studies on identified problems and related issues 3) implement projects and programs to address the results of the inventories and studies.

9. **Highlights of the Plan.** Critical elements in the Plan include:
   a. Input from citizens and local and state agency partners in bringing forth issues and concerns of the watershed,
   b. Participation from citizens and local and state agency partners on the task force committees to prioritize issues and concerns and provide input in the development of the Plan,
   c. Development of goals, objectives and policy guidelines that provide a framework for the W WD to base their decisions on,
   d. An implementation section of the Plan that contains specific actions to address four main goals of the W WD:

      Goal A) Provide leadership and management for the business of the Watershed District

      Goal B) Provide information and education to the public

      Goal C) Promote good stewardship of the environment

      Goal D) Partner with local, state, and federal entities

      Goal E) Focus on water flow management and water quality

10. **Publish Notice of Filing.** Legal Notice of Filing was published in the Warroad Pioneer on February 21, 2007. The Legal Notice of Filing was also mailed in a letter from Board staff Jim Haertel dated February 20, 2007 to several addressees including the affected county boards, county auditors, county water planners, cities, Soil and Water Conservation Districts, and the Department of Natural Resources Commissioner and Director of the Division of Waters.

11. **Public Hearing.** The Legal Notice of Filing was published pursuant to Minnesota Statutes Sections 103D.105, Subd. 2 and 103D.405, Subd. 5, which require within 30 days of the last date of publication of the Notice of Filing of the Plan that at least one request for hearing be received by the Board before a hearing will be held. No requests for hearing and no comments were received during the specified period of time and no hearing was held.

12. **Northern Water Planning Committee Meeting.** On May 9, 2007 the Board's Northern Water Planning Committee and staff met with representatives from the W WD in Brainerd to review and discuss the Plan. Those in attendance from the Board's Committee were, Quentin Fairbanks, Kay Cook, Paul Brutlag, Gene Tiedemann, and Brian Napstad. Board staff in attendance was northern region supervisor Ron Shelito and board conservationist Brian Dwight. Representatives from the W WD were manager Keith Landin, and planning consultant Dan Money. Board staff recommended approval of the Plan with the recommendation that the

W WD report back to the Board in two years on the progress they have made on Goal A: Provide Leadership and Management for the Business of the Watershed District. After discussion, the subcommittee unanimously voted to recommend approval of the Warroad Watershed District 2007 – 2016 Overall Plan to the full Board with the following conditions: 1) That the W WD provides a copy of the revised W WD long range Plan to the International Joint Commission (IJC); 2) That they meet with the Northern Water Planning Committee in two years to report on the progress they have made on Goal A.

CONCLUSIONS

1. All relevant, substantive and procedural requirements of law and rule have been fulfilled.

2. The Board has proper jurisdiction in the matter of approving a revised watershed management Plan for the Warroad Watershed District pursuant to Minnesota Statutes Section 103D.405.

3. The Warroad Watershed District 2007 – 2016 Overall Plan attached to this Order defines water-related problems within the W WD boundaries, possible solutions thereto, and an implementation program.

4. The attached Plan is in conformance with the requirements of Minnesota Statutes Section 103D, BWSR guidelines for Watershed District Plan content, and is consistent with the affected counties comprehensive water plans.

ORDER

The Board hereby prescribes the attached Plan as the 2007 – 2016 Overall Plan for the Warroad Watershed District.

Dated at Saint Paul, Minnesota this 23rd day of May, 2007.

MINNESOTA BOARD OF WATER AND SOIL RESOURCES

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BY: Randy Kramer, Chair

NEW BUSINESS

1. Sale of Wetland Mitigation Credits to Public Transportation Authorities – Dave Weirens – ***DECISION ITEM***

2. Plan for Soliciting Wetland Restoration Projects for the Local Road Wetland Replacement Program - Dave Weirens – ***DECISION ITEM***

3. Wetland Mitigation Memorandum of Understanding - Dave Weirens – ***DECISION ITEM***

Resolution # _____

Sale of Wetland Credits to Public Transportation Authorities
May 23, 2007

WHEREAS, pursuant to Minn. Stat. 103G.222, Subd 1(k), BWSR is authorized to sell wetland credits to public transportation authorities at BWSR's cost to establish wetland credits;

WHEREAS, BWSR adopted a policy on the cost of credits that has been in effect since July 1, 2005;

WHEREAS, since BWSR has been authorized to sell wetland credits to public transportation authorities, only public road authorities have purchased wetland credits;

WHEREAS, public airport authorities have recently inquired about the authority of BWSR to sell them wetland credits, prompting staff to seek direction from the Wetland Committee;

WHEREAS, the Wetland Committee reviewed this issue on April 24, 2007 and is recommending that the BWSR Board adopt the following policy regarding the sale of wetland credits to public transportation authorities:

1. Establish an interim policy on the sale of wetland credits to public transportation authorities that would limit the sale of wetland credits only to public road authorities, which has been the past practice; and
2. Ask the Legislature to clarify the intent of the law in 2008 with regards to which public transportation authorities are eligible to purchase wetland credits from the BWSR.

NOW THEREFORE BE IT RESOLVED, that the BWSR adopt the recommendation of the Wetland Committee.

_____ _____

Randy Kramer, Chair Date

Resolution # _____

Plan for Soliciting Wetland Restoration Projects
for the
Local Road Wetland Replacement Program
May 23, 2007

WHEREAS, BWSR is directed pursuant to Minn. Stat. 103G.222, Subd. 1(l) to replace wetlands drained or filled as a result of the repair, maintenance, or rehabilitation of existing public roads; and

WHEREAS, BWSR is authorized pursuant to 2005 Minn. Laws Chap. 20 Art. 1, Sec. 9 to enter into agreements with political subdivisions and fee owners to acquire land and restore wetlands to be used to replace wetlands lost as a result of the repair, maintenance, or rehabilitation of existing public roads; and

WHEREAS, pursuant to Minn. Stat. 103G.222, Subd 1(k), BWSR is authorized to sell wetland credits to public transportation authorities at BWSR's cost to establish wetland credits;

WHEREAS, BWSR and the Minnesota Department of Transportation (MN/DOT) entered into an agreement on August 24, 2005 whereby BWSR and MN/DOT agreed to cooperatively develop and manage the establishment of wetland credits to mitigate wetland impacts resulting from state highway projects; and

WHEREAS, the Wetland Committee reviewed the Plan for Soliciting Wetland Restoration Projects for the Local Road Wetland Replacement Program on April 24, 2007. The Committee is recommending that the BWSR Board authorize soliciting for wetland credits and wetland banking projects for the BWSR and MN/DOT Cooperative Wetland Mitigation Program, as follows:

1. Solicit private bank account holders in Bank Service Area 5 to purchase credits that have been certified and deposited into the Wetland Bank;
2. Solicit local governments and landowners for wetland banking projects under the Easement Agreement and Easement and Development Agreement options;
3. Projects meeting the following criteria will receive priority consideration:
   (A) located in major watersheds 22, 24, and 25;
   (B) located in Bank Service Areas 1, 2, 3, 4, 5, and 7;
   (C) located in the seven county metropolitan area; and
   (D) that maximize the restoration of wetland types 1, 2, 6, 7, and 8;
4. All project submissions and applications will be made to BWSR on the basis of bids;
5. Staff will prioritize potential projects based on program criteria that include location, price, wetland type and quality; and
6. the Wetland Committee will provide oversight to the process.

NOW THEREFORE BE IT RESOLVED, that the BWSR adopt the recommendations of the Wetland Committee.

_____ _____

Randy Kramer, Chair Date

2007 Wetland Banking Request For Proposal

Deadline: July 31, 2007

Draft
May10, 2007

The Minnesota Board of Water and Soil Resources again will be accepting wetland-banking proposals to supply the Cooperative Wetland Replacement Program with credits for road mitigation. The application period will run from June 1 to July 31, 2007. Those interested in submitting an application are encouraged to work with their Wetland Conservation Act Local Governmental Unit (LGU) and Soil and Water Conservation District (SWCD) staff to compile the necessary information required for a complete application.

Program Options

During this solicitation wetland banking *Easement Agreements* and *Easement and Development Agreements* will be accepted statewide. Both options require a BWSR-approved, perpetual conservation easement and compliance with both BWSR and ACOE mitigation banking requirements as written at the time of application. Option #2 proposals will need to include performance criteria, to be provided by BWSR (measurable attributes that can be used to judge whether project objectives have been met) for hydrology, native vegetation establishment, invasive species control and monitoring.

Option #1 *- Easement Agreement* – Under this program option, the fee title owner submits a bid, on a per acre basis, for an easement on the proposed wetland project area. The fee title owner is compensated for the easement at the agreed easement bid price. After the banking easement is recorded on the property deed and the landowner receives their easement payment, the State, through the Board of Water and Soil Resources, designs and implements the bank plan at the state's expense.

Option #2 *– Easement and Development Agreement* – Under this program option, the fee title owner submits a bid for an easement covering the land holding the deposited wetland credits and development costs associated with the proposed wetland project. This bid must include all costs associated with establishing the projected wetland credits and maintaining them in perpetuity. After the banking easement is recorded on the property deed, the State, through the Board of Water and Soil Resources, issues the first payment per the agreement. **Special Note**: Purchase agreement proposals are eligible during this solicitation only for wetland banking projects where an easement has <u>not</u> yet been recorded. In other words, considerable planning and implementation work could already be done but the banking easement is not recorded. Projects in this scenario are eligible to apply under this announcement and if you are in doubt ask either your local LGU or BWSR staff for an interpretation.

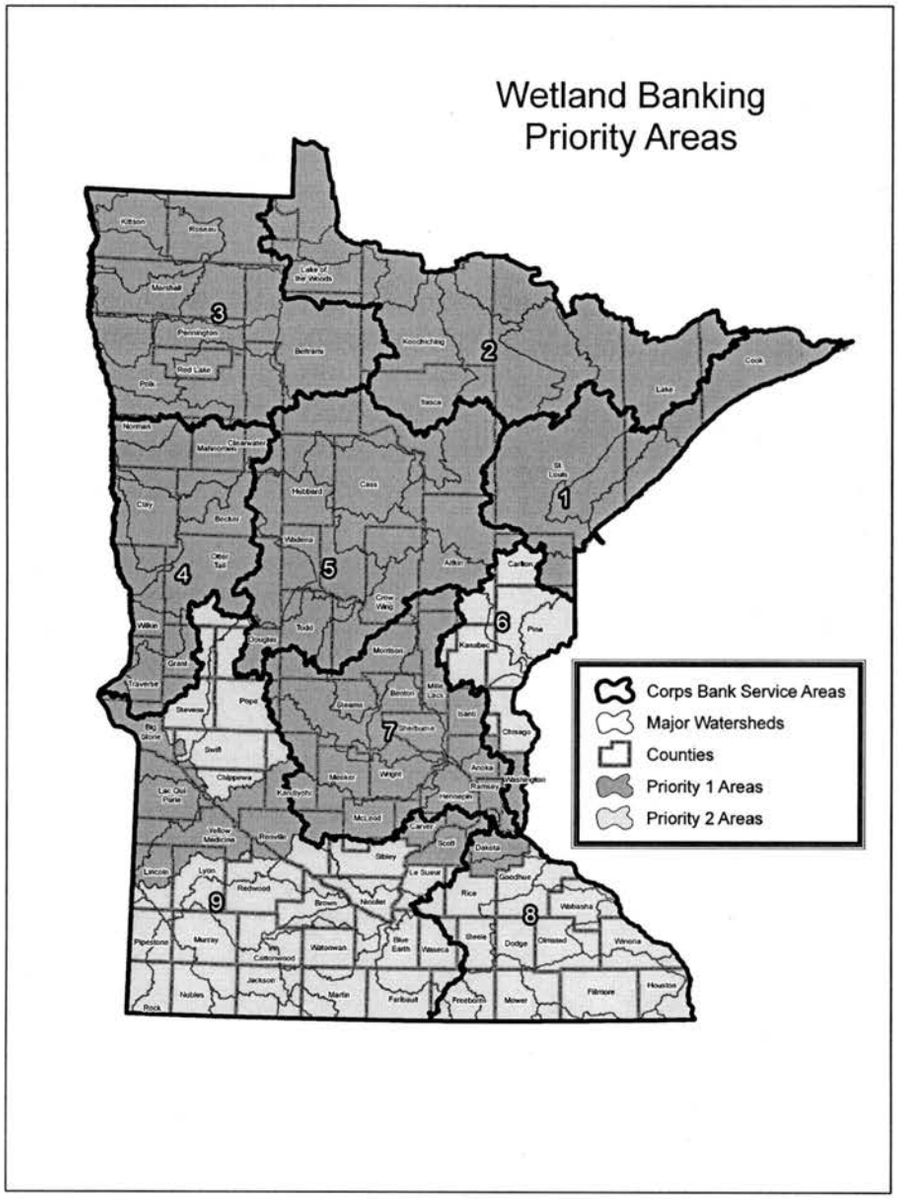
Screening Process – Location, Wetland Type and Value Determinations

All applications received by July 31, 2007 will be reviewed by the Minnesota Interagency Banking Team and ranked by BWSR staff using wetland type and location.

- Wetland type screening will be accomplished by prioritizing applications that maximize the restoration of wetland types 1, 2, 6, 7, and 8.

- Location screening will be accomplished by matching the location of proposals with targeted areas of the state, as identified below in Figure 1.
  - Projects located in watershed unit codes 22, 24, and 25.
  - Projects located in COE Bank Service Areas 1, 2, 3, 4, 5 and 7.
  - Projects located in the seven county metropolitan area.

Figure 1



How to Apply

Application Materials: Direct all questions regarding the application process toward the BWSR Wetland Specialist contact listed below in Figure 2.

All applications must be submitted to the appropriate BWSR Wetland Specialist by July 31st, 2007 to be considered. Application materials must include:

- A signed, complete Part A of the Wetland Banking Application form found at http://www.bwsr.state.mn.us/wetlands/wcamanual/bankapp_A.doc. Note: A topographic survey is not required.
- An estimate of the acres and types of credits to be realized by the proposed project.
- Evidence of land ownership or a signed option to purchase for the subject property. Both the seller and buyer must sign this document.
- Completed road program bid form.

Please Note: The BWSR Board retains the right to reject any and all bids at their sole discretion.

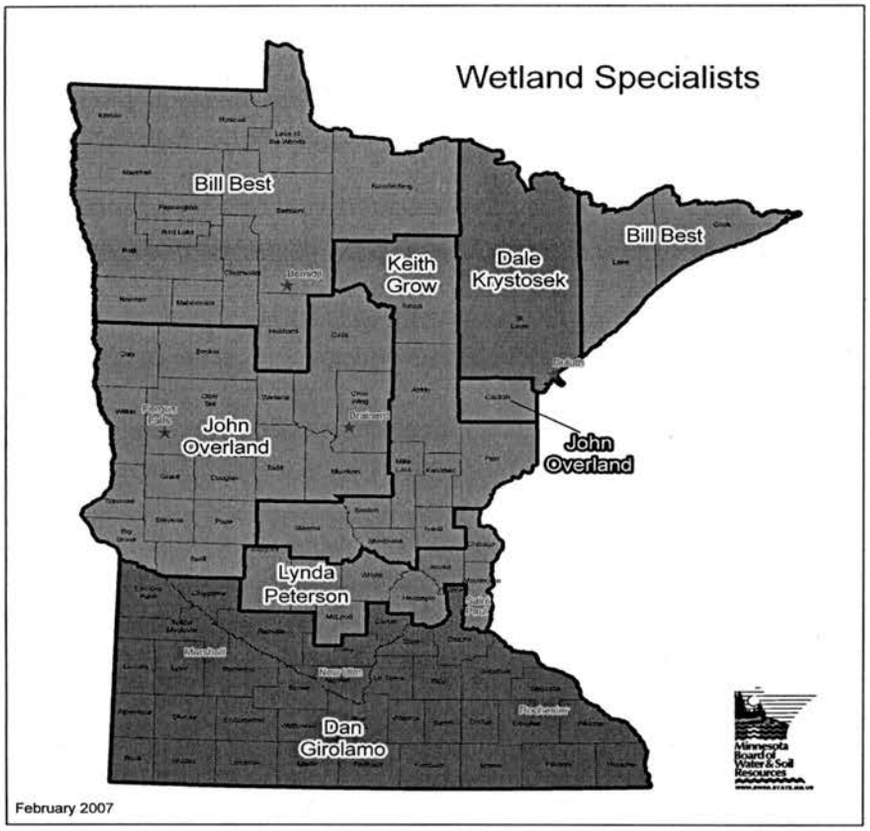
Completing the Bid Form: The bid form, to be considered complete, must include the required applicant information, bid price for the selected option and signatures from both the landowner and LGU.

Easement Agreement – Under this option the applicant only determines the land easement bid price and completes only that specific line on the bid form (See Figure 3.)

Easement and Development Agreement – Under this option the applicant must determine a comprehensive wetland credit bid price that includes all project components listed on the bid form (See Figure 3.) To better understand the potential costs and expectations of the wetland banking process, refer to both Parts A&B, including the appendices, of the BWSR Bank Application. Parts A and B can be found at http://www.bwsr.state.mn.us/wetlands/wcamanual/bankapp_A.pdf and . http://www.bwsr.state.mn.us/wetlands/wcamanual/bankapp_B.pdf respectively.

[Advanced Notice: BWSR will again be soliciting 2008 application from June 1, 2008 thru July 31, 2008.]

Figure 2



Wetland Specialists			
Bill Best – NW	(218) 333 - 8026	John Overland - West Central	(218) 825 – 6807
Dale Krystosek	(218) 333 - 8029	Keith Grow - East Central	(218) 828 - 6035
		Lynda Peterson – Metro	(612) 201 - 9806
		Dan Girolamo – South	(651) 215 - 1703

Central Office: • 520 Lafayette Road North • Saint Paul, MN 55155 • Phone: (651) 296-3767 • Fax: (651) 297-5615
WWW.BWSR.STATE.MN.US

US Army Corps of Engineers
St. Paul District

Wetland Mitigation Guidelines

For the State of Minnesota

Minnesota Board of Water & Soil Resources

Introduction.

The Minnesota Board of Water and Soil Resources (BWSR) and the U.S. Army Corps of Engineers (COE), St. Paul District have been leading discussions for the past two years on streamlining wetland compensatory mitigation requirements under the Minnesota Wetland Conservation Act and Section 404 of the Clean Water Act. The purpose of this effort is to increase state and federal regulatory consistency with the resulting programmatic and natural resource benefits.

These guidelines between BWSR and COE represent the programmatic changes that will be pursued to implement the Wetland Mitigation Guidelines. Each agency will make a good faith effort to implement these guidelines, but strict adherence to these guidelines is beyond the authority of the agencies to guarantee.

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1. ***ISSUE*** – Use of preservation as a wetland mitigation option.

GUIDELINES BETWEEN BWSR AND COE:

- Wetland to be preserved must be under demonstrable threat. Demonstrable threat is defined as follows: A proposed activity or potential activity(-ies) that would degrade or destroy wetland functions that are important to the watershed. Examples that document demonstrable threat include an approved development plat, approved building permit, zoning change or USDA authorization to fill/drain a non-jurisdictional wetland. Important functions can be determined by a functional assessment (e.g. MnRAM 3.0)
- Replacement credit is awarded at minimum 8:1 ratio or 12.5% (1 acre replacement credit for every 8 acres preserved)
- Preservation should be the last priority for compensatory mitigation
- Preservation may be considered for replacement credit statewide

2. ***ISSUE*** – Mitigation credit for stream restoration

GUIDELINES BETWEEN BWSR AND COE:

- Stream restoration projects confined to the channel (the area between the ordinary high water marks on each bank) should not be used as wetland mitigation. Stream restoration projects that include restoration of adjacent riparian wetlands are eligible to receive credit for the area of wetlands restored, enhanced, or created as part of the stream restoration project.

3. *ISSUE* – In-Lieu Fee (ILF) Mitigation

GUIDELINES BETWEEN BWSR AND COE:

- BWSR and the Corps do not support allowing in lieu fee mitigation to be used as a standard wetland mitigation option under the regulatory programs. However, discussions will continue between the Corps and BWSR regarding special circumstances where in lieu fee mitigation may be appropriate, such as for large impacts and enforcement penalties or after the fact compensatory mitigation.

4. *ISSUE* – Definition of In-kind, In-place and In-advance for wetland mitigation

A. GUIDELINES BETWEEN BWSR AND COE – IN-KIND:

- BWSR and the Corps support using the "Wetland Plant Community Types" by S. Eggers and D. Reed that will establish 12 wetland types for purposes of determining in-kind wetland mitigation. This will require establishing guidelines on how to translate these wetland types with those currently recognized in the WCA rule. (See table shown below)

Wetland Plant Community Types[1]	**Classification of Wetlands and Deepwater Habitats of the United States (Cowardin *et al.* 1979)**	**Fish and Wildlife Service Circular 39 (Shaw and Fredine 1971)**
Shallow, Open Water	Palustrine or lacustrine, littoral; aquatic bed; submergent, floating, and floating-leaved	Type 5: Inland open fresh water
Deep Marsh	Palustrine or lacustrine, littoral; aquatic bed; submergent, floating, and floating-leaved; and emergent; persistent and nonpersistent	Type 4: Inland deep fresh marsh
Shallow Marsh	Palustrine; emergent; persistent and nonpersistent	Type 3: Inland shallow fresh marsh
Sedge Meadow	Palustrine, emergent; narrow-leaved persistent	Type 2: Inland fresh meadow
Fresh (Wet) Meadow	Palustrine; emergent; broad- and narrow-leaved persistent	Type 1: Seasonally flooded basin or flat; Type 2: Inland fresh meadow
Wet to Wet-Mesic Prairie	Palustrine; emergent; broad- and narrow-leaved persistent	Type 1: Seasonally flooded basin or flat; Type 2: Inland fresh meadow
Calcareous Fen	Palustrine; emergent; narrow-leaved persistent; and scrub/shrub, broad-leaved deciduous	Type 2: Inland fresh meadow Type 6: Shrub swamp
Open Bog or Coniferous Bog	Palustrine; moss/lichen; and scrub/shrub; broad-leaved evergreen; and forested; needle-leaved evergreen and deciduous	Type 8: Bog

Shrub-Carr or Alder Thicket	Palustrine; scrub/shrub; broad-leaved deciduous	Type 6: Shrub swamp
Hardwood Swamp or Coniferous Swamp	Palustrine; forested; broad-leaved deciduous; needle-leaved evergreen and deciduous	Type 7: Wooded Swamp
Floodplain Forest	Palustrine; forested; broad-leaved deciduous	Type 1: Seasonally flooded basin or flat
Seasonally Flooded Basin	Palustrine; flat; emergent; persistent and nonpersistent	Type 1: Seasonally flooded basin or flat

[1] Plant communities are based on: S. Eggers and D. Reed. 1997. *Wetland Plants and Plant Communities of Minnesota and Wisconsin. Second Edition.* St. Paul District, U.S. Army Corps of Engineers. 264 pp.

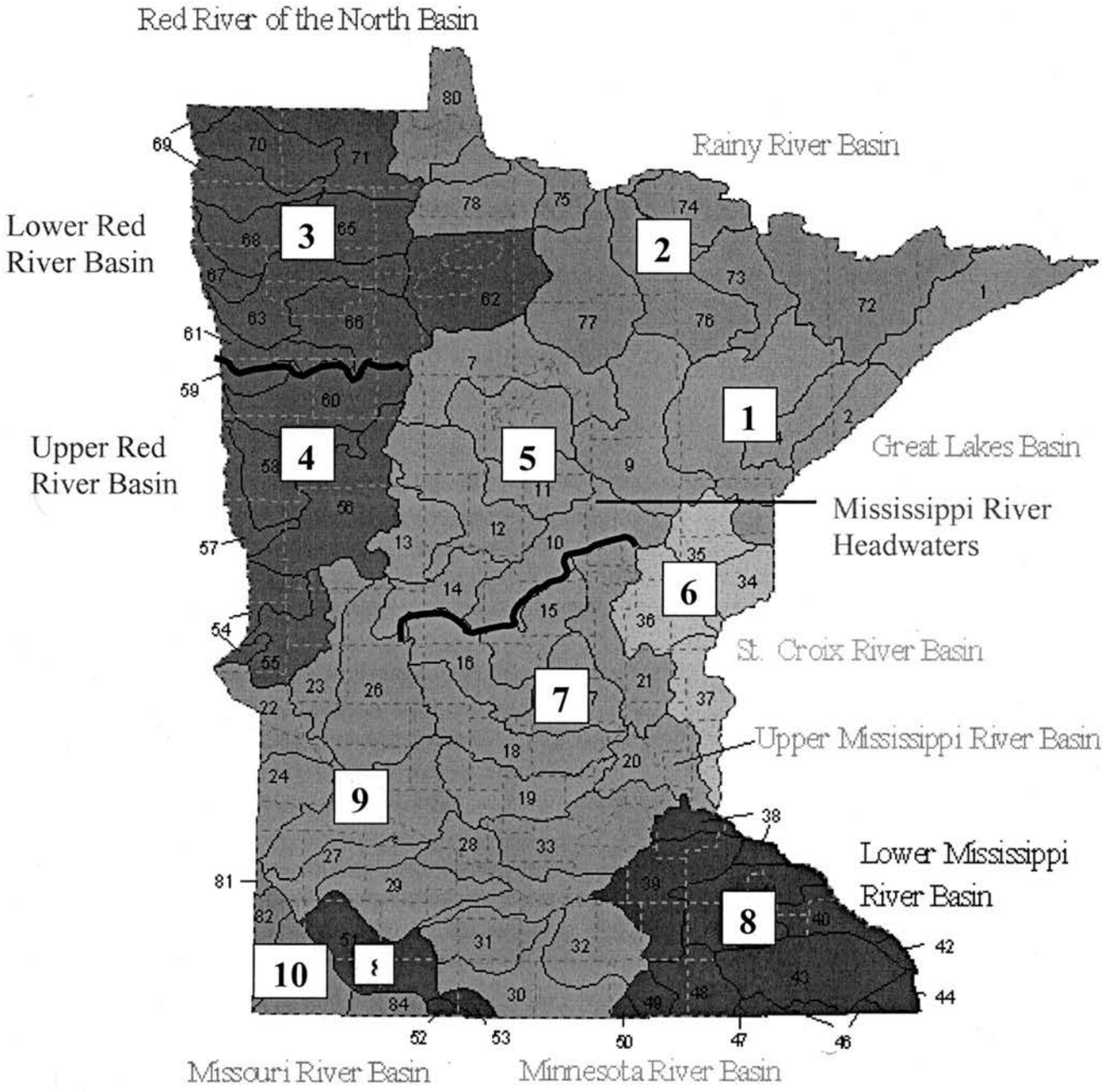
B. GUIDELINES BETWEEN BWSR AND COE – IN-ADVANCE:

- BWSR and the Corps support defining in-advance as: (1) approved bank credits; or (2) compensation sites that have established wetland hydrology and vegetation, but the vegetation may not be mature. The minimum requirement for (2) is that the compensation site has wetland hydrology and hydrophytic vegetation established a full growing season (April-October) prior to the authorized discharge of dredged/fill material. Further, the site must meet all performance standards applicable to that stage of the compensation site.

C. GUIDELINES BETWEEN BWSR AND COE – IN-PLACE:

- In-place means the mitigation occurs within the same major watershed (one of 81 in Minnesota) as the permitted activity or, if debits are withdrawn from a bank site, in the same bank service area as that where the permitted impact occurred. (See map below)
- Replacement for impacts in Bank Service Area 10 can be accomplished in Bank Service Area 9 or the Des Moines River Basin in Bank Service Area 8 with no increase in the replacement ratio.
- Replacement for impacts in Bank Service Area 1 can be accomplished in Bank Service Area 2 with no increase in the replacement ratio.
- A seven-county metropolitan area bank service area may be established in the future to acknowledge land value disparities that are not accounted for under a watershed approach.
- Comprehensive inventories of replacement opportunities may be used to establish special replacement siting criteria.

MAJOR BASINS AND WATERSHEDS OF MINNESOTA



5. *ISSUE* - Options for Mitigation Credit

GUIDELINES BETWEEN BWSR AND COE:

Proposed and Current Replacement Methods and Amount of Credit Under State and Federal Regulatory Programs

	Affected Wetland	Replacement Method	Proposed	Current Amount of Credit (x:1 = x acres of treatment to get 1 acre of credit)	
				WCA / WPP(DNR)	**Section 404**
Restoration	Completely drained or filled	Hydrologic and vegetative	100% of wetland area restored	NWC: 100% of area restored (MR 8420.0541 Subp. 2)	100% of area restored
	Partially drained	Hydrologic	Based on a percentage of wetland hydrology restored Variable credit is determined by the TEP and/or Corps based on professional judgment, using a functional analysis as a foundation.	in "<80% areas": NWC: 25% of total wetland area restored (includes areas that remained as wetland); requires establishment of permanent, native, non-invasive vegetation w/in restored wetland area and on upland buffer. or PVC: 50% of degraded wetland area restored in ">80% areas": NWC: 25% of total area (MR 8420.0541 Subp. 3 and Guidance)	50% or 100% of total wetland area restored, depending on a sliding scale that measured the degree that wetland functions were increased
	Cropped wetlands where hydrology is still intact (i.e., no ditches, tiles, etc.)	Vegetation	Based on percentage of wetland area restored and cropping history (% of years). Variable credit is determined by the TEP and/or Corps based on professional judgment, using a functional analysis as a foundation.	NWC: Up to 100% of area restored if farmed more than 10 years of previous 20; percent based on frequency of farming PVC: Up to 50% of wetland area restored if farmed at least six of previous 20 years (MR 8420.0541 Subp. 5)	33% credit; considered more vegetative enhancement as opposed to restoration

	Affected Wetland	Replacement Method	Proposed	Current Amount of Credit (x:1 = x acres of treatment to get 1 acre of credit) WCA / WPP(DNR)	Section 404
	Wetlands previously restored via conservation easements	Extending restoration	Up to 75% depending on cropping history prior to enrollment in easement program. Excludes any remnant wetland area that existed prior to restoration.	NWC: 75% of wetland area preserved (MR 8420.0541 Subp. 7)	12.5% of wetland area preserved; wetland must be under demonstrable threat of loss
Enhancement	Wetlands dominated by invasive or exotic species	Establish native, non-invasive vegetation	33% credit baseline if escrow account is established to ensure vegetative management plan is implemented for a period of ten years. Credit is determined by TEP and/or Corps based on professional judgment, using Floristic Quality Assessment as a foundation, degree of invasives, and establishment of escrow account to fund maintenance for a period of ten years.	PVC: 25% of total area vegetatively restored (MR 8420.0541 Subp. 8)	33% credit
	Upland buffer areas	Establish native, non-invasive, permanent vegetation	Required minimum upland buffer width of 50 ft. in non-municipal areas and 25 ft. in municipal areas; credit given at 10% (non-native vegetation) to 25% (native vegetation) depending upon quality of buffer; typically, no more than 25% of total credits at a compensation site can be composed of upland buffer.	PVC: 100% of the upland buffer area, up to the size of the replacement wetland it surrounds; must have 50 ft. avg. width in non-municipal areas, 25 ft. avg. width in municipal areas (MR 8420.0541 Subp. 6)	Required minimum upland buffer width of 50ft. in non-municipal areas and 25 ft. in municipal areas; credit given at 10:1 (non-native vegetation) to 4:1 (native vegetation) depending upon quality of buffer; typically, no more than 25% of total credits at a compensation site can be composed of upland buffer.

	Affected Wetland	Replacement Method	Proposed	Current Amount of Credit (x:1 = x acres of treatment to get 1 acre of credit) WCA / WPP(DNR)	Section 404
Preservation	Wetlands under demonstrable threat and providing important functions	Preservation	12.5% credit baseline for wetland area preserved, wetland must be under demonstrable threat and providing important functions based on professional judgment, using a functional analysis as a foundation	NWC: Up to 12.5% of wetland area preserved; must involve restoration of hydrology or vegetation over 25% of wetland area; must be under documented threat PVC: 25% of wetland area preserved (MR 8420.0541 Subp. 4)	12.5% of wetland area preserved; wetland must be under demonstrable threat of loss
Creation	Mineral extraction sites	Established via reclamation	Baseline is 50% to 100% of wetland area created depending on risk of failure and connection (or lack of) to other wetlands and upland habitats. See 404 column at right.	Up to 100% of wetland area (MR 8420.0541 Subp. 9)	
	Non-wetland areas	Wetland creation		100% of wetland area created; performance bond required (MR 8420.0541 Subp. 11)	50% credit if isolated from other habitats and/or has a higher risk of failure; 100% credit if has low risk of failure (adequate hydrology data to predict successful hydrology) and connected to other wetlands and upland buffers

	Affected Wetland	Replacement Method	Proposed	Current Amount of Credit (x:1 = x acres of treatment to get 1 acre of credit) WCA / WPP(DNR)	Section 404
	Water quality treatment areas in non-wetlands	Creation	No credit for single or primary cells; up to 50% credit for secondary or tertiary cells based on professional judgment, using a functional analysis as a foundation and after five-year monitoring period	NWC: 100% of normal pool area for downstream cell of two-cell system if certain criteria are met PVC: 100% of isolated one-cell system; upstream cell of two-cell system; or one year design pool of stormwater infiltration area that has native, non-invasive veg. cover (MR 8420.0541 Subp. 10)	No credit for primary stormwater/water quality cells. 50% credit for second or third cells if designed for saturated soils to 3-foot water depths; has less than a 12-inch bounce lasting less than 7 days for the 10-year, 24-hour event; and is successfully planted to native, non-invasive vegetation. Credit is limited to that acreage of the cell in excess of that needed to comply with local/state stormwater management requirements. A second compensation site is typically needed to replace additional wetland functions not adequately replaced by cells.

Notes:

1. The information found in the "Section 404" column of this table is based upon the draft Minnesota guidelines (St. Paul District Compensatory Mitigation Policy for Minnesota dated March 14, 2007).
2. The credit ratios adopted by the Corps are guidelines; they are not regulations.
3. NWC – New Wetland Credit: Must be used for all mitigation requirements up to 1:1. May also be used for mitigation requirement exceeding 1:1.
4. PVC – Public Value Credit: May only be used for the portion of mitigation requirements exceeding 1:1.
5. < 80% areas and > 80% areas refers to areas of the state having less than or more than 80% of their presettlement wetland acreage remaining (see MR 8420.0545).

6. *ISSUE* – Mitigation Ratios

Proposed WCA/Section 404 Mitigation Ratios

Impact Location	Replacement Location (in-place)	Type of Replacement Wetland (in-type)	Replacement Process (in-time)	Minimum Replacement Ratio Proposed WCA/ Section 404 (see notes)
> 80% area (or agricultural land – WCA)	In-Place	Same type as impact wetland	In advance	1:1
			Not in advance	1.25:1
		Different type	In advance	1.25:1
			Not in advance	1.5:1
	Not In-Place	Same type as impact wetland	In advance	1.25:1
			Not in advance	1.5:1
		Different type	In advance	1.5:1
			Not in advance	1.5:1
< 80% area (and non-agricultural land – WCA)	In-Place	Same type as impact wetland	In advance	2:1
			Not in advance	2.25:1
		Different type	In advance	2.25:1
			Not in advance	2.5:1
	Not In-Place	Same type as impact wetland	In advance	2.25:1
			Not in advance	2.5:1
		Different type	In advance	2.5:1
			Not in advance	2.5:1

Note: Ratio guidelines for Section 404 only pertain to < or > 80% areas (not related to agricultural areas). Existing U.S. Army Corps of Engineers Section 404 regulations regarding agricultural areas are unchanged by this MOU.

Unresolved Issues:

1. *ISSUE* – Agency participation in developing local wetland plans

GUIDELINES BETWEEN BWSR AND COE:

- BWSR and the Corps will continue to explore and work on methods to ensure that locally generated wetland plans can be accepted by all state and federal regulatory agencies.

US Army Corps of Engineers
St. Paul District

INTERAGENCY MEMORANDUM OF UNDERSTANDING

WETLAND MITIGATION GUIDELINES

Minnesota Board of Water & Soil Resources

This Memorandum of Understanding (MOU) is made and entered into by the Minnesota Board of Water and Soil Resources and the U.S. Army Corps of Engineers.

WHEREAS, the Minnesota Board of Water and Soil Resources has state oversight responsibilities for the Wetland Conservation Act and the rules through which it is implemented (Minnesota Rules Chapter 8420);

WHEREAS, the U.S. Army Corps of Engineers administers Section 404 of the Clean Water Act, which regulates the discharge of dredged or fill material into waters of the United States. Under Section 10 of the Rivers and Harbors Act, the Corps also regulates any work done below the ordinary high water mark of traditionally navigable waters;

WHEREAS, these State and Federal authorities regulate impacts to wetlands/waters and require that unavoidable impacts be offset through compensatory mitigation;

WHEREAS, increased efficiency and effectiveness in program administration, reduced cost to the governments that administer these programs, and reduced cost for the regulated public can be gained through increased consistency between and among these State and Federal agencies;

WHEREAS, the discussions over how to reconcile programmatic differences have led to proposals to increase state and federal program consistency in the following areas:

- Criteria for the use of preservation as a wetland mitigation option;
- Mitigation credit for stream restoration;
- In lieu fee mitigation;
- Definition of in kind, in place, and in advance for wetland mitigation;
- Options for mitigation credit, including credit for water quality treatment areas; and
- Mitigation ratios.

THEREFORE, the undersigned agencies concur that it is in the public interest to implement changes to bring their programs into conformance with the wetland mitigation requirements that are contained within the "Wetland Mitigation Guidelines" and hereby incorporated into this MOU.

GENERAL.

1. The policies and procedures contained within this MOU does not create any rights or obligations, either substantive or procedural, enforceable by any party or any third party. Deviation or variance from the wetland mitigation guidance included in this MOU will not constitute a defense for violators or others concerned with any State or Federal action.

2. Nothing in this MOU is intended to diminish, modify, or otherwise affect statutory or regulatory authorities of any signatory agencies. All formal guidance interpreting this MOU and background materials upon which this MOU is based will be issued after consultation with the signatory agencies.

3. All responsibilities identified in this MOU are subject and dependent on the availability of sufficient funds appropriated and allocated for that purpose.

4. This MOU will take effect on the date of the last signature below and will continue in effect until modified or revoked by the signatory agencies.

5. This MOU is based on the state and federal authorities as they exist on the date of signature. Subsequent changes to these authorities are not binding on the parties to this MOU.

Randy Kramer Chair Minnesota Board of Water and Soil Resources	Date	Colonel Michael Pfenning District Engineer and Commander St. Paul District U.S. Army Corps of Engineers	Date

Attachment: Wetland Mitigation Guidelines

FOR YOUR INFORMATION

May 23, 2007

- Updated Board Member Listing
- Updated Staff Listing
- BWSR Committee Schedule (tentative agenda items)
- "Board Members' Handbook of Legal Issues", January 2, 2007 Edition
- News Release, "White Earth tribe becomes Minnesota's first tribal conservation district"
- Supreme Court Opinions – In the Matter of the Cities of Annandale and Maple Lake NPDES/SDS Permit Issuance for the Discharge of Treated Wastewater, and Request for Contested Case Hearing

MINNESOTA BOARD OF WATER AND SOIL RESOURCES
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May 2007

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BWSR Committee Schedule (tentative agenda items)

May 21, 2007

(Contact Mary Jo Anderson @ 651-297-4290 if you have any questions)

May 23, 2007 Board Meeting

- RIM Strategic Planning Committee (immediately following Board meeting)

June 6, 2007

- Public Relations, Outreach and Strategic Planning Committee

June 11, 2007

- Wetlands Committee (8:30 a.m.)
  - Rules
- Metro Water Planning Committee (1:00 p.m.)
- Grants Program and Policy Committee (3:15 p.m.)
  - '08 SWCD Grants Allocations
    - Easement Services
    - General Services
    - State Cost-Share Program
      - Base Grants Allocation
      - Feedlot Water Quality Management Grant Allocation
  - '08 NRBG Authorization
    - LWM
    - WCA
    - Shoreland
    - Feedlot
    - SSTS
    - NPEA
  - LCCMR Challenge Grants

June 13, 2007

- Northern Water Planning Committee

June ???

- RIM Strategic Planning Committee
- Dispute Resolution Committee (possibly)
- Wetlands Committee (rulemaking)
  1. WCA Rulemaking
  2. Policy - Sale of Wetland Mitigation Credits to Public Transportation Authorities
  3. WCA LGU Reporting
  4. WCA Exemption Study

June 27, 2007 Board Meeting

- Public Relations, Outreach and Strategic Planning Committee (immediately following Board meeting)

July 25, 2007 (no Board Meeting)

- Grants Committee
- Wetlands Committee
  1. Wetland Banking Fee Policy-Update Average Agricultural Land Values
  2. Sale of Wetland Credits to Public Transportation Authorities - Cost of Credits
  3. WCA Rules – Update on Exempt Rules, and Plans for Permanent

August 22-23, 2007 (tour/meeting) – Koochiching & Lake of the Woods Counties

BOARD MEMBERS' HANDBOOK
OF
LEGAL ISSUES

LORI SWANSON
Attorney General
State of Minnesota

January 2, 2007 Edition

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INTRODUCTION

This Manual is designed to be a guide for state boards, their members and staff. It generally describes the role of boards in state government and the role of the Attorney General's Office in representing them. It also discusses several important laws that apply to the operations and activities of state boards. Although it is intended to be educational and informative about potential legal questions which may arise, it should not be viewed as a substitute for boards actually seeking advice from their assigned attorneys when specific situations raise questions of a legal nature.

Our Office hopes that the Manual will serve both as a handbook for new board members and staff as well as a review of relevant laws for the more experienced. We suggest that you use a loose-leaf notebook format in maintaining the Manual. The pages are numbered and dated in a manner which will allow us to send updated substitute pages when applicable statutes change or when a new court decision may affect the operation of state boards.

I. ROLE OF ADMINISTRATIVE AGENCIES IN GOVERNMENT

A. What Is An Administrative Agency

A fundamental principle of the United States Constitution requires that the executive, legislative, and judicial powers be exercised by separate branches of government, each of which may check or balance the actions of the others. Administrative agencies occupy a unique place in government because they have the statutory authority to exercise all three types of powers in the course of performing their official business. An administrative agency is an entity within the executive branch of government. It exercises its authority to enforce the statutes enacted by the Legislature. It also exercises "quasi-legislative" authority granted to it by the Legislature by adopting rules to further implement applicable statutes. Finally, it also has powers similar to courts to resolve particular kinds of disputes and to require individuals to give testimony as witnesses.

Because administrative agencies combine the powers of all three branches of government, the very existence of early administrative agencies troubled the courts. Courts finally resolved this issue by recognizing that the danger to citizens' liberty is not in blended power itself, but in unchecked power. Two checks on agency powers have been established. First, only the Legislature may create agencies. The Legislature must declare a legislative policy and establish primary standards for agency actions. Agencies are permitted the authority to fill in details, through rules or adjudication, but such agency action must be consistent with legislatively-determined policy. Second, the judiciary operates as a check by retaining residual authority to prevent and rectify errors or abuses.

Judicial review of agency decisions is important. The role of the courts is twofold: 1) to make sure that the Legislature does not unlawfully vest powers in an administrative agency and 2) to ensure that administrative agencies exercise their powers within the limits set by the Legislature and without violation of the legal rights of any persons. If a court finds that an

agency has exercised powers beyond the limits set by the Legislature or that it has violated a person's rights, the administrative agency's decision or action may be overturned.

State boards are a type of administrative agency. In the case of licensing boards, the Legislature has reposed in such boards the power to regulate specialized professions for which licenses or certificates are required. The boards are mainly composed of persons in those professions who, thus, are best prepared to undertake regulation. These specialists are often complemented by public members, bringing other backgrounds, knowledge and experience to board activities.

B. Administrative Agencies And The Due Process Clause

The due process clause is found in the Fourteenth Amendment to the U.S. Constitution and states that "No State shall . . . deprive any person of life, liberty, or property without due process of law. . . ." The courts have held that a professional license is a property right to which the Fourteenth Amendment applies. In reviewing procedures used by boards in dealing with the property rights of applicants or licensees courts recognize two types of due process: substantive and procedural. Substantive due process requires that agency actions relate to the purpose for which the agency exists. Procedural due process requires an agency to use methods which deal fairly with those it regulates.

Due process primarily affects the adjudicatory functions of a board. A board acts in its adjudicatory capacity whenever it reviews the activities of a particular individual or party, makes determinations of fact based upon such a review, and issues an order affecting that specific individual or party. A party is entitled to notice of a proposed board action and, in some instances, to a "contested case hearing" before a board makes findings of fact or issues an order affecting the party's activities. For further discussion of contested case hearings, especially in the context of licensing board activities, see section IV of this Manual.

Boards must take great care in implementing their responsibilities. The requirements of procedural due process are contained in court interpretations of the United States and Minnesota

Constitutions, the Minnesota Administrative Procedures Act, Rules of the Office of Administrative Hearings and in other statutes and rules. Although some of the requirements may seem technical, their underlying purpose is to ensure fundamental fairness.

The law also requires that boards be bound by certain requirements in establishing jurisdiction, interpreting legislative standards, and imposing remedies. Courts may review actions of all boards to determine whether or not the boards complied with due process requirements, acted within their jurisdiction, and interpreted the governing law reasonably.

II. ROLE OF THE ATTORNEY GENERAL IN GOVERNMENT

A. Authority Of The Attorney General

The power of the Attorney General stems from three sources: the Minnesota Constitution, Minnesota Statutes, and the common law derived from court decisions. The constitution establishes the Office of Attorney General as a separate entity within the executive branch. The Attorney General is chosen by the state's voters. Minnesota Statutes, particularly chapter 8, set forth some of the Attorney General's responsibilities. Chapter 8 requires the Attorney General to "appear for the state in all causes . . . wherein the state is directly interested; also . . . whenever, in the attorney general's opinion, the interests of the state require it." Minn. Stat. § 8.01. In addition, chapter 8 directs the Attorney General to act as the attorney for all state officers, boards, or commissions in all matters pertaining to their official duties. Minn. Stat. § 8.06. Chapter 214, which prescribes some of the duties of boards, is another statute that describes the role of the Attorney General. Minnesota Statutes sections 214.10 and 214.103 specifically define the role of the Attorney General with regard to investigating complaints against licensees.

But the common law (decisions by Minnesota courts) is the most extensive source of the Attorney General's authority. The Minnesota Supreme Court has described the expansive powers of the Attorney General:

> The attorney general is the chief law officer of the state. His powers are not limited to those granted by statute but include extensive common law powers inherent in his office. He may institute, conduct, and maintain all such actions and proceedings as he deems necessary for the enforcement of the laws of the state, the preservation of order, and the protection of public rights. He is the legal adviser to the executive officers of the state, and the courts will not control the discretionary power of the attorney general in conducting litigation for the state. He has the authority to institute in a district court a civil suit in the name of the state whenever the interests of the state so require.

Slezak v. Ousdigian, 260 Minn. 303, 308, 110 N.W.2d 1, 5 (1961).

As an elected constitutional officer, the Attorney General has authority to make independent legal decisions, based on the public interest, regarding the representation of client

agencies and boards. This authority distinguishes the relationship between the Attorney General and his clients from the attorney-client relationship found in the private sector. Although it is rare for the Attorney General and a given client to disagree on what course of legal action it is best to take, when that happens the Attorney General exercises the final judgment.

B. Structure Of The Attorney General's Office

The Attorney General has divided the office into five sections, each of which holds several divisions. The Chief Deputy, Solicitor General and three deputies head up the five sections; division managers and deputies are responsible for the day-to-day operations of the divisions.

Many of the divisions have been created to serve the needs of the various departments and agencies within state government. The Transportation Division, for example, represents the Department of Transportation. Other divisions, on the other hand, exist to carry out special Attorney General responsibilities. The Residential Utilities Division, for example, devotes its energies to protecting the interests of residents and small businesses with respect to utility issues. In these matters, the Attorney General, not a state agency, is the party.

C. Legal Representation Of State Boards

Legal advice is regularly sought by state boards and board staff on a variety of issues. These range from questions about jurisdiction to data practices to due process. The Attorney General's Office tries to offer advice that includes alternative courses of action, when appropriate, as well as ramifications of any board action being considered.

Representation of non-health-related boards is largely consolidated in the Office's Public Finance/Opinions/Agriculture/Natural Resources Division. The Health Licensing Division represents health-related boards. The purpose of this consolidation is to ensure efficient service to board clients and consistency of legal advice. It will also develop a nucleus of highly accessible attorneys with legal expertise regarding issues commonly facing boards. These attorneys work to ensure that legal advice is consistent from one client to another. Memoranda

of advice on crucial issues are shared with the appropriate attorneys. Occasionally, however, board staff may discover instances of inconsistent advice being offered by different attorneys on the same issue. We encourage clients to bring such inconsistencies to the attention of the board's general counsel.

Representing state boards generally includes four functions: representation in adversarial proceedings; assisting in investigations; client advice; and rulemaking. Investigations and rulemaking are discussed later in this Manual in section VI. Adversarial proceedings, discussed further in section III.B, include representation of the board's disciplinary committee at conferences, board meetings, contested cases and in court proceedings which may occur from time to time. Court proceedings may be appropriate when a board wishes to prevent an unauthorized person from engaging in a profession for which a license or certificate is required. Occasionally, a licensee will try to prevent a board from moving forward with disciplinary action by suing the board in district court. Finally, a board's decision following a contested case may be appealed, resulting in a case being filed in the Court of Appeals.

When a matter proceeds to a contested case or a suspension proceeding, more than one attorney from the Attorney General's Office will become involved in the case. The first attorney will be the prosecuting attorney for the committee while the second attorney will be the advising attorney for the board. The prosecuting and advising attorney roles are discussed further in section IV-5 of the Manual.

III. LICENSING BOARD RESPONSIBILITIES

As administrative agencies, licensing boards have only those powers given to them by the Legislature, as set forth in the statutes. Minnesota Statutes chapter 214 and the boards' individual practice acts are the principal statutes that define and limit a licensing board's powers and responsibilities. Licensing board duties fall into two major categories: 1) granting and denying licensure and certification, and 2) complaint resolution, including discipline. The goal of board actions must always be to preserve the health, safety, and welfare of Minnesotans.

A. Licensure And Certification

A board is given authority to ensure that only qualified persons engage in a profession. The Legislature has predetermined which individuals are "qualified" for licensure through the legislative prescription of requirements for licensure found in every board's practice act.

As opposed to the disciplinary function of a board, which is often discretionary, the licensing or certifying function of a board is primarily "ministerial" in nature. A "ministerial" act is one that involves executing fairly specific standards which allow for little interpretation by a board. The Legislature determines the qualifications needed for a profession by setting out specific education and experience requirements. If those requirements are met, a board may not deny licensure or certification, except as set out below. In this way, the Legislature mandates that boards license or certify particular persons while withholding approval from others.

Even though licensing or certification is largely ministerial, a board can and does exercise a certain degree of discretion. First, while a board's practice act sets out mandatory requirements for licensure or certification, the act also allows the board to adopt rules to implement the legislative standards. For example, even if a practice act has a mandatory examination requirement, the board has discretion to define in its rules the nature and scope of the examination or a passing score.

Second, many practice acts require that applicants be "of good moral character" or that they have not "engaged in conduct warranting disciplinary action." Such requirements also

afford boards some discretion. A board must decide how a statutory criterion applies to each applicant. If information is received about an applicant which demonstrates that the applicant should not hold an unlimited license or certificate to engage in a profession, a board may attach conditions or restrictions to the license. For those cases a board's discretion, as warranted by the evidence could range from restricting the scope of practice or requiring monitoring or supervision of a licensee or certificate holder, to less stringent conditions such as requiring additional educational courses.

B. Complaint Resolution

The second major type of licensing board function, the complaint resolution process, is outlined in parts B.1 - B.5 below. The Peace Officer Standards and Training Board has unique statutory procedures governing complaint resolution, which are outlined in section B.6 below.

1. Initial Handling of Complaints

A licensing board's receipt of a complaint begins the complaint resolution process. Most complaints consist of a statement of grievances or accusations against a licensee or certificate holder and a request or demand for board intervention. A complaint may be submitted orally or in writing. Minn. Stat. § 214.10, subd. 1. Before an oral complaint is investigated further, the Attorney General's Office may require that the complaint be stated in writing. Complaints may be submitted by anyone, including a board member or board staff.

A licensing board generally has the authority to act on any complaint that is jurisdictional. A complaint is jurisdictional if it "alleges a violation of a statute or rule which the board is empowered to enforce." Minn. Stat. § 214.10, subd. 1. Thus, jurisdictional determinations relate exclusively to whether a board has legal authority to act based on the facts presented by the particular complaint. Whether a complaint is true or can be proven is not germane to the determination of jurisdiction.

Complaints that are determined to be non-jurisdictional are dismissed by the board and, when possible, referred to other agencies that may have jurisdiction. Examples of non-

jurisdictional complaints may include those that allege a licensee's commission of a crime not related to the licensee's practice or a licensee's offensive personality.

Many of the licensing boards have established a complaint panel or committee. The panels normally consist of one or more board members. The complaint panel may make recommendations on how best to pursue a complaint. Options may include requesting the licensee's written response to the complaint; asking the complainant for additional information; referring the matter to the Attorney General for investigation; referring the matter to an outside consultant for expert advice; scheduling a disciplinary conference or educational meeting; or dismissing the complaint. A board member who has had a financial or professional relationship with the subject of a complaint may be prohibited from participating in complaint panel activities involving that person. A detailed discussion of conflicts of interest issues appears in section VII.C of this Manual. Members of health-related licensing boards should also be aware of the prohibition regarding conflicts of interest in Minn. Stat. § 214.10, subd. 8(b).

2. Investigation of Complaints

Each licensing board has developed procedures for investigating complaints. Minnesota Statutes section 214.10, subdivision 2 allows a non-health licensing board's complaint committee to decide whether it wishes to conduct the investigation with the assistance of board staff and to consult with the Attorney General's Office if legal issues arise, or whether to have the Attorney General's Office take the lead in an investigation. Health licensing boards are required to refer any matter requiring investigation to the Attorney General's Office. Minn. Stat. § 214.103, subd. 5. Sometimes boards will need to hire an outside consultant to assist on the investigation of a particular complaint on the complaint or on the investigation of the complaint. If this is done, a nondisclosure agreement should be signed by the consultant to ensure the privacy of data related to the active investigation of the complaint.

The collection, storage and dissemination of data during a board's investigation of a complaint must be consistent with the requirements of the Minnesota Government Data Practices

Act, Minnesota Statutes chapter 13. This Act is discussed in detail in section VII of this manual. This section presents a brief overview of how the Government Data Practices Act affects the investigation of complaints.

The Government Data Practices Act classifies a complainant's identity as private data unless the complainant consents to disclosure. Therefore, a complainant's identity should not be revealed to third parties without first obtaining the complainant's written permission. If this permission is not given, then the identity cannot be disclosed. Minn. Stat. § 13.41, subd. 2. Also, before an investigator interviews people or asks them to provide information related to the complaint, a warning as to the use of the data commonly known as the Tennessen Warning,[1] should be given. In conjunction with this warning, it is a good idea to briefly describe the complaint resolution process to the person from whom information is being sought. Further, data collected and maintained as part of a complaint against a licensee are classified as confidential under Minn. Stat. § 13.41, subd. 4. A board should take appropriate measures to protect the confidentiality of this data.

The Tennessen Warning, found in Minn. Stat. § 13.04, subd. 2, should be given to all witnesses and to other third persons from whom information is sought. This statute requires that whenever a governmental agency asks an individual to provide private or confidential information about himself or herself, the individual must be informed of:

a. The purpose and intended use of the information within the collecting agency;

b. Whether or not the individual is legally required to supply the requested data;

c. Any known consequences of giving or refusing to give the information; and

d. The identity of other persons or agencies authorized by state or federal law to receive the information.

[1] The commonly used reference to the "Tennessen Warning" is derived from Robert Tennessen who was the chief author of the original Government Data Practices Act.

At the investigation stage, third parties do not have to provide the information requested unless they are subpoenaed by the board or the board's statutes and rules require the third party to make the disclosure. Some boards' statutes specifically require third parties to provide information requested by a board complaint committee without the necessity of issuing a subpoena. All licensing boards can ultimately rely on the subpoena power found in Minn. Stat. § 214.10, subd. 3 to obtain information relevant to a complaint. Board subpoenas may be enforced in district court if the subpoenas are not honored by the recipient.

After witnesses are interviewed and acquired documents are reviewed, an interview with the subject of the investigation may be required. That person may be contacted by telephone, in person or by letter, and advised of the complaint. As with all persons interviewed, the licensee should be given the Tennessen Warning and information concerning the complaint resolution process. The licensee should also be informed that he or she may have an attorney present during the interview.

Members of health-related licensing boards, except the Board of Veterinary Medicine, should also be familiar with the special requirements for investigations, information exchanges, and handling of complaints which are found in Minn. Stat. § 214.10, subd. 8.

3. Conferences

The conference is the complaint panel's chief vehicle for resolving complaints. A conference may be held for the purposes of investigation, negotiation, education, or conciliation. The licensee is notified of the conference by service of a notice of conference which sets forth the conduct alleged to violate the board's practice or certification act and gives the licensee information about the process. Generally, a licensee receives the notice about thirty days before the conference, although this is not a statutory requirement. In emergency cases, the licensee may receive only a few days' notice.

Thorough conference preparation by the complaint panel members and board counsel is essential to accomplishing the purpose of the conference. This includes review of the notice of

conference, any investigative data, any licensee's letter of response to the allegations, and all other written material relevant to the complaint. A licensee may be represented by an attorney at a disciplinary conference.

The panel chair or board attorney generally opens the conference with a brief statement about procedural matters. A Tennessen Warning should be given before anyone asks questions of the licensee. The panel then questions the licensee about the allegations found in the notice of conference. In addition to the panel members, board staff and board counsel sometimes ask questions. Questioning should be relevant to the complaint's subject matter and help panel members develop a full understanding of the licensee's position with respect to the allegations. This discussion should also allow the panel to assess the licensee's credibility and candor regarding the allegations, as well as the licensee's understanding of the appropriate statutes and rules. This gathering of information permits the panel to decide how it will proceed with the case. Sometimes, when highly technical issues are involved, the panel will hire an outside consultant to participate in the conference.

When the questioning is complete, the licensee is excused while the panel deliberates. The panel has a variety of options, including dismissal of the complaint, a continuance to gather additional information, or negotiation of disciplinary action pursuant to a consent stipulation and order. If the panel and the licensee cannot agree on a stipulation for disciplinary action, the panel may decide to recommend to the board that certain disciplinary action be taken, and that a contested case hearing be held to determine whether that disciplinary action is appropriate and proper.

Health-related licensing boards have the additional option of "corrective action." Minn. Stat. § 214.103, subd. 6. Corrective action is intended to be used when the panel identifies practice problems but the deficiency does not warrant disciplinary action or the evidence is insufficient to sustain disciplinary action. Corrective action is memorialized in a written agreement, reviewed and approved by the Attorney General, between the panel and the licensee. Once the licensee completes the corrective action, the complaint is dismissed.

4. Disciplinary Action

As discussed above, disciplinary action, such as reprimands, imposition of civil penalties or suspensions or revocations of licenses, may be accomplished through a consent order or through a contested case. A consent order is issued after the full board reviews and approves a written stipulation setting forth facts and discipline to which both complaint committee and the licensee have agreed. Generally, the complaint panel does not resort to a contested case unless the licensee has refused to sign a stipulation for disciplinary action. Contested cases are discussed more fully below.

Licensing boards also have the option of seeking an injunction from the district court. Minnesota Statutes section 214.11 empowers boards to seek injunctive relief for two purposes: to restrain any unauthorized practice or activities or to prevent a threatened violation or violation of any statute or rule which the board has the authority to enforce. If an injunction is granted, the board can still proceed with its own disciplinary action in respect to the person's license or application for license or renewal. Obtaining an injunction also does not preclude an appropriate criminal prosecution of the person who has been enjoined.

The legislature has also given many boards specific authority to issue cease and desist orders. This type of board order requires that certain conduct in violation of a board's rules or statutes stop. A cease and desist order must be served on the person(s) whose conduct is the subject of the order. The order must also contain language providing an opportunity to request a hearing before an administrative law judge concerning the allegations in the order. If a hearing is not requested within thirty days, the cease and desist order becomes final. A final cease and desist order is a public document under the Data Practices Act. A violation of a properly served, final cease and desist order may form the basis for a board to seek injunctive relief in district court.

The Legislature also requires boards to initiate contested case proceedings to suspend or revoke a license, or to refuse to renew a license, of a person convicted of certain criminal offenses. Minn. Stat. § 214.10, subd. 2(a).

5. Temporary Suspensions

Some boards have at their disposal the extraordinary remedy of temporary suspension. It is reserved for emergency cases in which the threat to the public of a licensee's continued practice is immediate. Although each board with authority to temporarily suspend licenses may have slightly different procedures, the following is a general description of how the process works. A board with such authority may temporarily suspend the license of a licensee without a full trial-type hearing if it has probable cause to believe that the licensee has violated a rule or statute which the board is empowered to enforce and continued practice by the licensee would create a serious or imminent risk of harm to the public. The suspension is effective upon written notice to the licensee, specifying the rule or statute violated. The suspension remains in effect until the board issues a final order in the matter. When the board issues the suspension notice, it must commence a disciplinary hearing within a specified period, often thirty days.

a. Record to be considered by the board on temporary suspension

When the complaint committee decides that a case warrants temporary suspension, the full board must be asked to take this action, usually by filing a petition for temporary suspension. The prosecuting attorney from the Attorney General's office is responsible for working with board staff in compiling the record provided to the board by the complaint committee. The prosecuting attorney provides a copy of the materials to the board's advising attorney, simultaneously serving a complete copy of the materials on the licensee, and filing them with the board for distribution to the deliberating board members. The materials filed by the prosecuting attorney become part of the record before the board, along with any other materials submitted by the licensee.

b. Notice

Because of the nature of temporary suspension cases, the board generally acts quickly to consider the committee's petition. Efforts are made to provide reasonable notice to the licensee regarding the time, date and place of the board meeting at which temporary suspension will be considered. The licensee is served with a copy of the materials to be submitted to the board by the prosecuting attorney, and is informed that the licensee has the opportunity to present argument and information to the board regarding the proposed temporary suspension. The licensee or the licensee's attorney is also informed that any questions regarding procedures to be followed should be raised with the board's advising attorney. The advising attorney also receives a copy of this notice.

c. Evidence

Evidence presented by the prosecuting attorney or the licensee is in affidavit form only. The board does not hear testimony at the hearing on the temporary suspension.

d. Board order of temporary suspension

The prosecuting attorney submits a proposed order of temporary suspension to the board in advance of the meeting. A copy is simultaneously provided to the licensee. After the meeting, the board must issue an order, either suspending or not suspending the licensee. If suspension is ordered, the board will schedule a contested case hearing within a specified period after issuance of the suspension order. If a contested case hearing is held, the administrative law judge (ALJ) typically will issue a report within thirty days after closing of the contested case hearing record. Some practice acts require that the board issue a final order within thirty days after receiving the ALJ's report and any exceptions to it.

The emergency nature of temporary suspension proceedings may require that one or more of the above procedures be dispensed with in an unusual case. In an extreme emergency, an *ex parte* proceeding (one in which the licensee does not participate) could be held involving the temporary suspension of the licensee's license.

6. Complaint Resolution Procedures of the Peace Officer Standards and Training Board

Under Minn. Stat. § 214.10, subds. 10, 11, 12 and 13, when the executive director or a board member of the POST Board receives a complaint that alleges a violation of the board's statutes or rules, the executive director and the chair of a three member committee (discussed below) must select a law enforcement agency to investigate the complaint. The law enforcement agency has 30 days to investigate the complaint and submit a written report to the executive director.

Following the investigation, the executive director must schedule a meeting between the licensee, who is the subject of the complaint, and a three-member committee of the board to determine whether there are reasonable grounds to believe the licensee has violated the board's statutes or rules. The three-member board committee must include at least two board members who are peace officers.

At least 30 days before the meeting, the executive director must give the licensee and the complainant written notice of the meeting and give the licensee a copy of the complaint. At the meeting, the committee must give both the licensee and the complainant a reasonable opportunity to be heard.

After considering the investigative report and the information provided by the licensee and the complainant, the committee, by majority vote, must take one of the following actions:

a. Find that there are reasonable grounds to believe that the licensee has violated the board's rules and order an administrative hearing; or

b. Decide that no further action is warranted; or

c. Continue the matter.

The executive director is required to promptly give notice of the committee's action to the complainant and the licensee.

If an administrative hearing is ordered, the administrative law judge makes a recommendation on the matter and the full board makes the final decision on the complaint.

Before the board meets to consider the matter, however, the executive director must notify the licensee and the complainant of the meeting. After the board has made its decision, the executive director must notify the licensee, the complainant, and the chief law enforcement officer of the employer of the licensee of the decision of the board.

IV. CONTESTED CASES

A. Adjudicatory Functions of the Board

Whenever a board reviews the activities of a particular individual or party, makes determinations of fact based upon this review, or issues an order with regard to that specific individual or party, it is acting in an adjudicatory capacity, like a court. For example, when a licensee and a board complaint panel cannot agree on the facts or the disciplinary action to be taken concerning a licensee, a contested case becomes the method of resolving the disputes.

The term "contested case" is defined in Minn. Stat. § 14.02, subd. 3 as a "proceeding before an agency in which the legal rights, duties, or privileges of specific parties are required by law or constitutional right to be determined after an agency hearing." Put another way, a contested case is a type of proceeding in which the board makes a specific factual, legal or factual and legal determination regarding a specific party. Thus, it differs from a rulemaking proceeding, in which the board is establishing general standards for future conduct by all licensees and future determinations by the board. Rulemaking involves the making of laws by the board, pursuant to the board's legislative authority. Contested cases involve a resolution of particular cases pursuant to the board's "adjudicative" or quasi-judicial authority.

A contested case hearing is necessary only if there are adjudicative facts which are in dispute. Generally, for licensing boards, contested cases will involve one of two situations:

a. The board denies licensure to an applicant because of a failure to meet qualification requirements or because of some past activity of the applicant. For example, an applicant's ethical standards might be called into question because of some past activity; or

b. The board initiates a disciplinary hearing because of past or current activities engaged in by an individual already licensed or registered by the board.

A non-licensing board may be required to use a contested case if the board statute requires such a process or if a constitutionally protected interest is involved. The determination of whether a contested case hearing is necessary should be made after consultation with the

Attorney General's Office. The following is a description of the contested case hearing process in the context of a licensing board.

B. Steps In The Contested Case Process

A contested case proceeding involves a number of steps, beginning with a decision of the board's complaint panel or discipline committee and its executive director to initiate a contested case hearing and ending, potentially, with review by an appellate court. The various steps will be briefly reviewed below.

1. Initiation of a Hearing

Minnesota Statutes section 214.10, subdivision 2 states that if, after investigation, certain board representatives believe that a licensee has engaged in illegal or unauthorized activities warranting board action, a disciplinary hearing may be initiated. A hearing is initiated when a notice of and order for hearing is issued by the executive director of the board. This document is drafted for the board by the attorney who will be "prosecuting" the case for the complaint committee.

Upon initiation of a contested case proceeding, an agency may, by order, provide that the report or order of the administrative law judge constitutes the final decision in the case. Minn. Stat. § 14.57(a).

2. Agreement to Arbitrate

As an alternative to initiating or continuing with a contested case proceeding, the parties, subsequent to agency approval, may enter into a written agreement to submit the issues to arbitration by an administrative law judge according to Minn. Stat. §§ 572.08 to 572.30. Minn. Stat. § 14.57(b).

3. The Hearing

A contested case hearing is a formal proceeding similar to a trial by a judge, without a jury. The hearing is presided over by an administrative law judge (ALJ) appointed by the Office

of Administrative Hearings. Each ALJ is an attorney, independent from any state agency other than the Office of Administrative Hearings. In the hearing process, one party is the board's complaint or disciplinary panel, represented by the Attorney General's Office. The licensee or a license applicant is the other party. Each party has a right to present witnesses and documentary evidence, and to cross-examine any witnesses presented by the other party. The investigative report which is used by the board's complaint panel in determining whether the hearing should be initiated does not become a part of the hearing record unless it is introduced as evidence. After completion of the hearing, the ALJ issues a report to the board consisting of findings of fact, conclusions and a recommendation. This report, a transcript of the testimony, all documentary evidence, and the written arguments of the parties are submitted to the board following the completion of the hearing. The ALJ's report is a recommendation to the board. The board is not bound by the report and is, in fact, obliged to make its own determination. However, any modification or rejection of the report must be based on evidence contained in the hearing record.

4. Board Decision

Upon receipt of the ALJ report, the board must review the report as well as the hearing record. In some cases where the record is voluminous questions are often raised whether board members have to review the entire record but instead abbreviate the scope of their review. Such exceptions should be rare and only upon the advice of counsel. Failure to do an adequate review of the record can led to reversal on appeal. In *Morgan v. United States,* 298 U.S. 468 (1936), the court held that the decision-making process was defective where the Secretary of Agriculture did not read any of the evidence or briefs, did not hear the oral arguments, and relied solely on what he derived from consultation with Department employees. The court ruled that the official who decides the matter must consider the evidence and argument.

In *Urban Council on Mobility v. Minnesota Dep't of Natural Resources,* 289 N.W.2d 729 (Minn. 1980), the issue before the court was whether the agency head had adequately reviewed the record. The court upheld the agency's decision, stating:

> [T]he commissioner made an informed decision, after adequate consideration of the voluminous evidence submitted at the hearing. He spent about ten hours personally studying the record. The commissioner reviewed the entire transcript 'reading verbatim those areas of testimony which (he) felt were of substance or were in dispute,' and examined every exhibit submitted at the hearing. In addition, he received a four-or-five-hour briefing from his staff, which consisted of a review of the evidence and the arguments made by the parties.

289 N.W.2d at 736 (parentheses in original).

In most cases an entire review of the record should be made by board members. A review of the record also includes review of any "exceptions" made by the aggrieved party.

Parties must have an opportunity to file "exceptions" or objections to the ALJ report. A minimum of ten days is provided to the aggrieved party to file exceptions. Minn. Stat. § 14.61, subd. 1. Each licensing board generally schedules a specific time following review of the record for the attorneys representing each party to present oral argument on the case.

Except as provided below, the report of the ALJ does not bind the board to a particular outcome, and the board must review the ALJ report as well as the hearing record. Once the board determines the facts of the case and whether those facts constitute a violation of the board's statute or rules, it must decide what action, if any, should be ordered. The board's decision and order must be in writing, be based on the record, and include the findings of fact and conclusions on all material issues. Minn. Stat. § 14.62, subd. 1.

The board decision should be reached at a meeting following discussion by all board members eligible to vote on the matter. The decision should not be reached through meetings or telephone calls involving only two or three board members at a time. The advising attorney responsible should be present to give advice on legal issues that arise during the deliberations

and to ascertain the board's wishes so that the attorney can draft a decision accurately reflecting the board's findings and conclusions. These board deliberations are typically conducted in a closed portion of an official board meeting.

The contested case record must be closed upon the filing of any exceptions to the report and presentation of argument or upon the expiration of the time allowed for exceptions and arguments. The agency shall notify the parties and the presiding administrative law judge of the date when the hearing record is closed. Minn. Stat. § 14.61, subd. 2. If a decision or order rejects or modifies a finding of fact, conclusion or recommendation contained in the report of the administrative law judge, it must include the reasons for each rejection or modification. Minn. Stat. § 14.62, subd. 1.

5. Administrative Law Judge Decision Could Become Final

The report or order of the administrative law judge constitutes the final decision in the case unless the agency modifies or rejects it under Minn. Stat. § 14.62, subd. 1 within 90 days after the record of the proceedings closes. When an agency fails to act within 90 days in a licensing case, the agency must return the record of the disciplinary proceeding to the administrative law judge for consideration of disciplinary action. Minn. Stat. § 14.62, subd. 2a.

6. Board Order

The board order is public under the Data Practices Act whether or not disciplinary action is taken by the Board.

7. Judicial Review

Under Minn. Stat. §§ 14.63 - 14.69 any person who is aggrieved by a board's final decision in a contested case may seek review of that decision in the Minnesota Court of Appeals. The attorney who prosecuted the case before the board will represent the board during any appeal. The standard which the Court of Appeals must apply in reviewing the board decision is

set forth in Minn. Stat. § 14.69. Under that statute, the court may reverse or modify the board's decision if it is:

(a) in violation of constitutional provisions; or

(b) in excess of the statutory authority or jurisdiction of the board; or

(c) made upon unlawful procedure; or

(d) affected by other error of law; or

(e) unsupported by substantial evidence in view of the entire record; or

(f) arbitrary or capricious.

A reviewing court should overturn the board's factual findings only if they are unsupported by substantial evidence contained in the record. The court can substitute its own legal determinations for those of the board. Generally, however, the court will show some deference to the board's interpretation of statutes and rules which it enforces because of the agency's expertise in the field. The court should reverse or modify the board's discretionary decisions only if it concludes that the board decision is arbitrary or capricious or on the basis of one of the other grounds in Minn. Stat. § 14.69. Courts often characterize the "arbitrary and capricious" standard as the agency exercising its will rather than its judgment.

C. Prosecuting And Advising Attorneys

Whenever the board's complaint panel or disciplinary committee decides to initiate a contested case or temporary suspension proceeding, the attorney assigned to the case assumes a role very similar to a prosecutor. It is that attorney's responsibility to present and advocate a case supporting the complaint panel's or disciplinary committee's position on disciplinary action against the licensee. As an advocate, that attorney may not advise the full board when it assumes its quasi-judicial role as the final decision-maker in a contested case; however, the full board needs the services of an attorney to advise it on any legal issues that arise. Case law holds that the attorney advising the board at the decision stage of the contested case process must not have

been involved in prosecuting the case before the ALJ. The Attorney General's Office has, therefore, created separate roles for "advising" and "prosecuting" attorneys in contested cases.

As soon as the attorney for the complaint or disciplinary committee determines that there is a good probability that the matter he or she is working on will proceed to a contested case hearing, an advising attorney is appointed for the full board unless a permanent advisor has already been assigned. (Some boards have permanent advising attorneys because of the large volume of cases for those boards.) The advising attorney is someone who has not been involved in the handling of the case or any discussions relating to it. Upon designating an advising attorney, all other division attorneys, as well as board staff, are informed of the appointment. The advising attorney is then isolated from the prosecution of the case.

Until the case goes to the board for a decision, the advising attorney does not review any of the case files and avoids discussion about the matter with the attorney prosecuting the case or any individuals with knowledge of the case. Once the case is referred to the board, the advising attorney reviews the record. At that point, while the advising attorney may meet with the deliberating board members and discuss the case with them, the advising attorney continues to refrain from discussing any issue of law or fact raised by the case with any person who has been involved in the hearing or investigation. The advising attorney may, however, discuss administrative and procedural matters with board staff. The advising attorney assists the board in drafting the decision and will provide the board with advice about any legal issues or other matters involved in the case. Once the board issues its decision, the advising attorney also advises the board in connection with any request for reconsideration, for a stay of the decision pending appeal, or for a waiver of bond. The prosecuting attorney, however, handles any appeal.

D. Disqualification Of Board Members

Some board members may be prohibited from participating in a decision in a contested case or in a temporary suspension of licensure under certain circumstances. For example, Minn. Stat. § 214.10, subd. 2 states that any board member who was consulted during the course of the

investigation may not vote on any matter pertaining to the case once it goes before the board following a formal contested case proceeding. This prohibition is followed with respect to temporary suspensions as well. (Note, the statute does not prohibit complaint panel members from participating in a board final decision to adopt an agreed-upon stipulation. The prohibition only applies to a formal contested case proceeding.)

Finally, a board member's personal familiarity with the person subject to the contested case should be taken into account when deciding whether to disqualify oneself. Familiarity with the person who is the subject of the proceedings does not in itself disqualify a board member. As a general rule, a board member should disqualify himself or herself if the board member's familiarity with the person will affect the board member's ability to render a fair and impartial decision. With regard to health licensing boards, Minn. Stat. § 214.10, subd. 8(b) states that "a board member who has a direct, current or former financial connection or professional relationship to a person who is the subject of board disciplinary activities must not participate in board activities relating to that case." Note that this prohibition prevents participation in any board activities relating to a case in which the conflict is presented. Thus, the board member may not participate either on a complaint committee or as a board member in issuing a final decision. *See also* section VII.C of this Manual, dealing with conflicts of interest.

V. THE ROLE OF BOARD MEMBERS IN HEARINGS

A. Judicial Demeanor

A member of a state board acts in a quasi-judicial role when serving as the "finder of facts" and the decision-maker over a particular set of facts. In this quasi-judicial role, the board members want and expect to be treated with respect. It is therefore important that the board members act in ways that will generate respect from those who appear in front of them.

It is the responsibility of a judge to be patient, dignified, and courteous to litigants, jurors, witnesses, lawyers, and staff (Code of Judicial Conduct). Members of a state board acting in a quasi-judicial capacity should demonstrate the same patience, dignity and courtesy that a judge would.

At times there may be understandable temptation to be disrespectful to people who appear before the board as advocates for particular points of view. Remember it is the advocate's job to make the best and most persuasive argument he or she can for the position desired. Although the board member may not agree with the position advocated, he or she should not try to discourage it through discourtesy, belittling statements or by being excessively argumentative.

B. Consistency

A board member in a quasi-judicial role should give, and be perceived as giving, consistent and fair treatment to all those who appear in front of the board. Consistency is important. It helps regulated individuals and the general public to predict how the board will view a certain situation. Yet a board should also not blindly follow its previous decisions on a particular topic. If the facts of a contested case differ significantly from a previous case, the board does not always have to follow its prior decision. In addition, consistency does not mean that a board cannot change its position or interpretation of a law. A change in the board's interpretation of its statutes may have to be implemented through rulemaking if the board's new position will be generally applicable to the public in the future.

C. Objectivity

The role as a board member acting in a quasi-judicial capacity is as decision-maker, not advocate. The question of fairness involves many competing factors, but the board member must be sure that he or she does not act as a promoter of either side. It is very important that oral arguments are carefully listened to and all the exhibits in the record, including any written exceptions and the report of the administrative law judge are reviewed before the board votes on its decision. This will ensure that the board makes decisions in an impartial manner.

Objectivity or, at a minimum, the perception of objectivity, is threatened by *ex parte* communications and contact. *Ex parte* contact is contact by a decision-maker with only one party, without the knowledge or consent of the other party. For instance, if one party to a hearing before the board saw a board member having lunch with a witness for the other side during a break from the adjudicatory hearing (even if discussing unrelated matters), that party might feel that he or she would likely not be treated fairly. If information is received outside of the administrative hearing process pertaining to a contested case, no one has the ability to challenge or disprove that information. Ideally, although the Open Meeting Law does not apply to board deliberations in a contested case proceeding, it can preserve the integrity of the decision-making process and maximize the perception of objectivity and open-mindedness by not discussing the matter currently before the board with anyone, even other members of the board, outside the forum for adjudication.

D. Judicial Review Of An Agency Or Board Decision Following A Hearing

1. Decisions Based on the Official Record Before the Board

A board or agency's decision can be challenged in an appeal to the Minnesota Court of Appeals on the grounds that it is arbitrary and capricious. "An agency's decision is arbitrary and capricious if it represents the agency's will and not its judgment." *Petition of N. States Power Gas Util.,* 519 N.W.2d 921, 924 (Minn. Ct. App. 1994) (citing *Markwardt v. Water Resources Bd.,* 254 N.W.2d 371 (Minn. 1977)). "Will" is when there is a desire to achieve a certain result

but without factual support. "Judgment" is when there is a desire to achieve a certain result and have the facts to support the conclusions.

The Minnesota Court of Appeals has also stated that

> An agency ruling will be determined by the courts to be arbitrary and capricious if: '(a) an agency relied on factors not intended by the legislature; (b) it entirely failed to consider an important part of the problem; (c) it offered an explanation that is contrary to the evidence; or (d) the decision is so implausible that it cannot be explained as a difference in view or a result of the agency's expertise.'

Petition of N. States Power Gas Util., 519 N.W.2d 921, 925 (Minn. Ct. App. 1994) (citing *Space Ctr. Transp.*, 444 N.W.2d at 581).

Therefore, board members should always base their decisions on the facts in the official record of the matter before them.

2. Judicial Deference to the Board's Interpretation of Statutes and Rules

A reviewing court will consider and will usually give some weight to a board decision on technical issues within its area of expertise. For example, a board's decision that a machine does not meet the technical parameters set forth in board rules will usually be given much deference. However, a board's decision that a licensee did not properly deliver a document to the board will probably not. A court will probably feel freer to closely scrutinize an issue which either falls outside an area of board expertise or is a legal question of procedure or statutory interpretation. Nevertheless, sometimes a reviewing court gives great weight to a board's long-standing interpretation of a statute or rule, especially if the legislature has not acted to overturn that long-standing administrative interpretation.

VI. RULEMAKING

A. Introduction

The authority of a state agency or board to adopt, amend and repeal rules is one of its most important tools for refining and implementing the public policy set by the Legislature for the state. This portion of the Manual is designed to familiarize board members with the concept of rulemaking, and provide them with practical information relating to rulemaking and their role in it. The sections that follow explain what rulemaking is, the authority to establish rules, basic rulemaking procedures, and the major responsibilities of board members during rulemaking.

B. What Is Rulemaking

> Rulemaking by an agency or board is often described as a quasi-legislative function. It is the part of the administrative process that resembles a legislature's enactment of a statute. The term "rule"[2] is defined in the Administrative Procedure Act, Minn. Stat. § 14.02, subd. 4 (2002), as: "[E]very agency statement of *general applicability and future effect*, including amendments, suspensions, and repeals of rules, adopted to implement or make specific the law enforced or administered by it or to govern its organization or procedure." (Emphasis added.)

Rulemaking is designed to relieve the Legislature from the burdensome task of enacting detailed and specialized laws in numerous complex areas for which the Legislature has no expertise. Administrative rules are legally binding; they have the force and effect of law within the state. Typically, rules are directed to a particular group of people. This is the case with the boards, whose rules regulate only those persons subject to the jurisdiction of the board. Although both statutes and rules are intended to guide or restrict future behavior, they are enforced differently.

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[2] Minnesota Statutes section 14.03 excludes several items from the definition of a rule, including standards concerning only the internal management of the agency or other agencies that do not directly affect the rights of or procedures available to the public.

C. Statutory Authority

The adoption of rules by a state agency or board constitutes the exercise of legislative power which has been delegated to it by the Legislature. Under Minnesota's Constitution, the Legislature has the power to establish the state's policy but may delegate its lawmaking authority to agencies and boards to make more specific and implement that policy, so long as the Legislature gives the agencies and boards reasonably clear standards to guide their actions.

Legislative power is delegated to agencies and boards by statute. In order for a board to adopt rules, there must be a statute in effect granting rulemaking authority to the board on a given subject matter. Any rules adopted by a board must be authorized by statute and must not exceed the scope of, or conflict with, the authority granted by the Legislature.

D. Basic Rulemaking Procedures

Rulemaking is a lengthy and involved process. It is more than simply drafting rules. In fact, rule drafting is only the first of approximately twenty steps which must be followed in sequence before rules go into effect. This section will not attempt to explain the intricate procedures involved. Instead, it will provide board members with an overview.

The Administrative Procedure Act ("APA") establishes two different procedures for adopting rules: (1) procedures applicable to *controversial* rules (Minn. Stat. §§ 14.131 - 14.20); and (2) procedures applicable to *non-controversial* rules (Minn. Stat. §§ 14.22 - 14.28). There are also some general requirements applicable to all rules (Minn. Stat. §§ 14.05 - 14.126); a procedure for an exemption from rulemaking requirements for good cause, such as an immediate threat to public health or welfare (Minn. Stat. § 14.388); an expedited procedure to repeal obsolete rules (Minn. Stat. § 14.3895); and an expedited procedure that applies only if the law requiring or authorizing adoption of rules states that the expedited procedure may be used. (Minn. Stat. § 14.389).

The main difference between controversial and non-controversial rules is that a public hearing before an administrative law judge (ALJ) is required for controversial rules. A proposed rule is considered controversial if twenty-five or more people request a hearing on it. Interested

persons may appear and testify at the hearing and submit written comments. The ALJ recommends whether the board may adopt the rules or should modify or withdraw them. After considering the ALJ's recommendation, the board may adopt the rules. If the board makes any modification to the rules, it must return the adopted rules to the Chief ALJ for a review of the legality of the modifications, including the issue of whether the rule as modified is substantially different from the rule as originally proposed. Minn. Stat. § 14.16, subd. 1. Non-controversial rules may be adopted after a period for written comment by the public, and, after adoption, must be approved by an ALJ. Minn. Stat. § 14.26.

Whichever procedures apply, rulemaking proceeds slowly. Excluding the time for drafting the rules, which in itself may be many months, the series of steps involved in rulemaking[3] require a minimum of six to nine months, depending upon whether the rules are non-controversial or controversial. It is realistic to expect non-controversial rule procedures to take about nine months, and for controversial rule procedures to take twelve months or longer, because of the public hearing and additional review requirements involved.

E. Major Rulemaking Responsibilities Of Board Members

The first major responsibility of board members is to decide what needs to be accomplished by rulemaking and then to draft the rule language. This can be a difficult and time-consuming task. Rules must be drafted in a way to accomplish the board's intent as well as being clear enough to be understood by those being regulated and those administering the rules.

The next major responsibility is to draft the "statement of need and reasonableness" (also referred to as the "SONAR") for the rules. The APA precludes the adoption of rules unless a

[3] These steps include soliciting outside comment from affected persons before beginning the process; drafting rules and a statement of need and reasonableness; publishing and mailing various notices; receiving outside comment on the rules as drafted, including a public hearing in some cases; submitting the rules for review and approval by the Revisor of Statutes, the Governor's Office and an administrative law judge at various stages and, in certain cases, the Chief Administrative Law Judge and legislative bodies.

board or agency can make, during the formal rulemaking process, an affirmative presentation of facts establishing that each rule is both needed and reasonable.

Establishing that a rule is needed and reasonable requires evidence that 1) there is a problem which needs to be addressed by rulemaking; and 2) the specific rule being proposed by the board is an appropriate response to the problem. To support its conclusion that a rule is needed, a board must explain the facts and circumstances creating the need for the proposed rule, citing specific evidence relied upon by the board. This evidence may be in the form of public testimony, scientific data, studies, statutory requirements, or board experience. To show that the specific requirements of a proposed rule are reasonable, the board must explain why the proposed rule is an appropriate means of addressing the problem. This should include an explanation of the expected benefits of the rule, as well as the impact the rule will have on those who must comply with it. The probable costs of complying with the proposed rule must also be addressed.

Drafting the rules and the SONAR are the key responsibilities of board members during the rulemaking process. The remaining steps of the rulemaking process are accomplished mainly by board staff, with the assistance of board counsel.

The governor may veto all or a severable portion of a rule of an agency by submitting notice of the veto to the State Register within 14 days of receiving a copy of the rule from the Secretary of State or agency. The veto is effective when the veto notice is submitted to the State Register. *See* Minn. Stat. § 14.05, subd. 6.

If standing committees of the House of Representatives and the Senate, with jurisdiction over the subject matter of a proposed rule, both vote to advise an agency that a proposed rule should not be adopted as proposed, the agency may not adopt the rule until the legislature adjourns the annual legislative session that began after the vote of the committees. *See* Minn. Stat. § 14.126, subd. 1. In addition, if the cost of compliance with a rule exceeds a certain threshold, it will not take effect with respect to certain small businesses and small cities until the

rules are approved by a law enacted after adoption of the rules. *See* Minn. Stat. § 14.127 (enacted in 2005 Minn. Laws ch. 156, art. II, §§ 9-10).

Even if a rule is exempt from the "formal" rulemaking provisions of the APA, it must follow certain procedures to have the force and effect of law. *See* Minn. Stat. §§ 14.386 (rules excluded from rulemaking requirements or excluded from the definition of "rule"); 13.388 ("good cause" exemption). With certain important exceptions, exempt rules are only effective for two years.

Any elected governing body of a statutory or home-rule city, a county or a sanitary district may petition an agency to amend or repeal a rule or a specified portion of a rule. The petition must demonstrate that since the adoption of the rule, there has been either 1) significant new evidence relating to the need for or reasonableness of the rule; or 2) less costly or intrusive methods of achieving the purpose of the rule exist. Within 30 days of receiving a petition, an agency shall reply to the petitioner in writing stating that the agency will either a) give notice of its intent to adopt the amendment or repeal requested; or b) give notice that it does not intend to amend or repeal the rule and that it has requested the Office of Administrative Hearings to review the petition. *See* Minn. Stat. § 14.091. Any other person may request adoption, amendment or repeal of a rule, and the agency must respond within 60 days regarding its intentions. Minn. Stat. § 14.09.

A person or entity may petition an agency for a variance from a rule adopted by the agency, as it applies to the circumstances of the petitioner. General terms that apply to variances include 1) the agency may attach conditions to the granting of a variance that the agency determines are needed to protect public health, safety, or the environment; 2) a variance has prospective effect only; 3) the conditions are an enforceable part of the rule; and 4) the agency may not grant a variance from a statute or court order. Minn. Stat. § 14.055, subd. 2.

An agency is required to grant a variance if it finds that the application of the rule, as applied to the circumstances of the petitioner, would not serve any of the purposes of the rule. An agency may grant a variance if the agency finds: 1) the application of the rule to the

petitioner would result in hardship or injustice; 2) the variance would be consistent with the public interest; and 3) the variance would not prejudice the substantial legal or economic rights of any person or entity. An agency must issue a written order granting or denying a variance within 60 days of receipt of the completed petition, unless the petitioner agrees to a later date. Failure of the agency to act on a petition within 60 days constitutes approval of the petition. *See* Minn. Stat. § 14.056, subd. 5. The agency may adopt rules establishing general standards for granting mandatory or discretionary variances from its rules. *See* Minn. Stat. § 14.055, subd. 5. An agency may also grant or deny variances based on standards or requirements in other law. *See id.*, subds. 5 and 6.

A person may petition the office of administrative hearings seeking an order of an administrative law judge determining that an agency is engaging in improper legal rulemaking by enforcing or attempting to enforce a policy, guideline, bulletin, criterion, manual standard, or similar pronouncement as though it were a duly adopted rule. *See* Minn. Stat. § 14.381. In addition, the legislature has provided agencies with a process for repealing obsolete rules. *See* Minn. Stat. § 14.3895.

State agencies may not impose new fees or increase existing fees through rulemaking. Instead, they are required to have new fees or increased fees approved by the legislature and governor. *See* Minn. Stat. § 16A.1283. Some types of fees are exempt from this prohibition.

VII. SPECIAL STATUTES THAT AFFECT LICENSING BOARDS

A. Open Meeting Law

1. What is the Open Meeting Law?

The Minnesota Open Meeting Law, Minnesota Statutes chapter 13D, *et seq.*, requires that, except as otherwise expressly provided by statute, all meetings, including executive sessions, of any state board, and of any committee or subcommittee of the board, shall be open to the public. It also requires that the votes of the members of a board, committee, or subcommittee on any action taken in such a meeting be recorded in a journal kept for that purpose. The journal is to be open to the public during all normal business hours.

The Minnesota Supreme Court has articulated three purposes of the Open Meeting Law. First, the law prevents "actions being taken at a secret meeting where it is impossible for the interested public to become fully informed concerning board decisions or to detect improper influences." *Lindahl v. Independent School Dist. No. 306,* 270 Minn. 164, 167, 133 N.W.2d 23, 26 (1965). Second, the law assures the "public's right to be informed." *Channel 10, Inc. v. Independent School Dist. No. 709,* 298 Minn. 306, 313, 215 N.W.2d 814, 821 (1974). Finally, it gives the public an "opportunity to present its views to the board." *Sullivan v. Credit River Township,* 299 Minn. 170, 175, 217 N.W.2d 502, 506 (1974).

Meetings at which a state board exercises quasi-judicial functions involving disciplinary proceedings, including complaint committee meetings, are not subject to the Open Meeting Law. Minn. Stat. § 13D.01, subd. 2.

2. What Constitutes a Meeting?

The Open Meeting Law has been broadly construed in favor of the public. In *Moberg v. Independent School Dist. No. 281,* 336 N.W.2d 510 (Minn. 1983), the Minnesota Supreme Court held all gatherings of at least a quorum of a board or of a committee or subcommittee at which members discuss, decide or receive information as a group on issues relating to official business of the board are "meetings" subject to the act. Although non-business occasions such as purely

social gatherings are not subject to the requirements of the law, a quorum may not as a group discuss or receive information on official business in any setting including a social gathering without complying with the open meeting requirements. In *Thuma v. Kroschel,* 506 N.W.2d 14 (Minn. Ct. App. 1993), when the mayor and enough council members to constitute a quorum of the Afton Planning Commission left a Planning Commission meeting for eight minutes and were seen talking at an anteroom counter regarding a contract matter and the mayor later stated at the commission meeting, "what 'we' had decided to do" with respect to the contract, the mayor and council members were found to have violated the Open Meeting Law. Even though the court viewed the council members' action as a "misstep--a stumble--", it remained a violation and the members were subject to the monetary sanctions. In addition, in *Kroschel v. City of Afton,* 524 N.W.2d 719 (Minn. 1994), the court found that neither the City nor its insurer were required to reimburse the mayor and council members for the fees and costs incurred in defending an action alleging a violation of the Open Meeting Law.

The statute has been held not to apply generally to communications among fewer than a quorum. However, discussion and persuasion among small groups of members may be improper under the Open Meeting Law when designed to avoid public discussions, to forge a majority in advance of public hearings on an issue, or to hide improper influences such as the personal or pecuniary interest of a public official.

The Minnesota Supreme Court held that previously-scheduled informational seminars about board business, attended by the whole board, must be publicized and open. It makes no difference if board members took no official action to resolve specific problems and no decisions or pre-decisions were made on any issue. If information was received and discussions held at such meetings could foreseeably influence later decisions of the board. *St. Cloud Newspapers, Inc. v. District 742 Community School,* 332 N.W.2d 1, 6 (Minn. 1983).

In any open meeting, at least one copy of any printed materials relating to the agenda items of the meeting, which are prepared, distributed, or available to board members, must be available in the meeting room for inspection by the public while the board considers the subject

matter of the materials. These requirements do not apply to materials classified by law as not public under the Government Data Practices Act or to materials relating to the agenda items of a meeting permitted to be closed.

3. Electronic Meetings

Meetings subject to the Open Meeting Law may be conducted by interactive television if specific statutory requirements are satisfied. Absent other statutory authority, electronic meetings via telephone are not authorized.

4. Notice To Public Of Meetings

a. Regular meetings

The Open Meeting Law requires a board to keep on file at its offices a schedule of all regular meetings. If a regular meeting is held at a time or place different from the time or place stated in the schedule of regular meetings, the board must provide the same notice of the meeting that the board is required to provide for special meetings. In *Merz v. Leitch,* 342 N.W.2d 141, 146 (Minn. 1984), the court held that conducting business about one-half hour before the time the public was told the meeting was to start was a violation.

b. Special meetings

For special meetings, except emergency meetings or special meetings for which there is a separate statutory procedure for notice, the board must post a written notice containing the date, time, place and purpose of the meeting on the board's bulletin board or on the door of its usual meeting room. A bulletin board for this purpose must be located in a place reasonably accessible to the public. *Rupp v. Mayasich,* 533 N.W.2d 893, 895 (Minn. Ct. App. 1995). The notice shall also be mailed or otherwise delivered to each person who has filed a written request for notice of special meetings. Notices of special meetings must be posted, mailed, or delivered, as appropriate, at least three days in advance of the date of the meeting. In lieu of mailing or personal delivery to persons who have filed written requests for notice of special meetings, a board may publish notice in the State Register at least three days before the meeting. Presently

the State Register is published each Monday, and generally requires that notices for publication be submitted by the Tuesday before the publication date.

c. Emergency meetings

An "emergency" meeting is a special meeting called under circumstances that, in the judgment of the board, require immediate consideration by the board. For emergency meetings, boards must make good-faith efforts to provide notice, which may be by telephone, to each news medium filing a written request for such notice. Notice shall include the subject of the meeting. Posted or published notice is not required. In the event the board discusses or acts upon matters not directly related to the emergency, the minutes of the emergency meeting must include a specific description of those matters.

d. Recessed meetings

For recessed or continued meetings, Minn. Stat. § 13D.04, subd. 4 provides that no further published or mailed notice is necessary, provided that the time and place of reconvening the recessed or continued meeting was established during the previous meeting and recorded in the minutes of that meeting.

e. Committee meetings

Care should be taken that a properly noticed committee meeting not evolve into an unannounced meeting of the full board. The Attorney General has held that board members who are not members of a committee may attend public committee meetings. However, if they participate in the committee's discussion and a quorum of the entire board is present, the meeting could be considered an unannounced meeting of the full board.

5. Relationship of the Open Meeting Law to Other Laws

The Open Meeting Law must sometimes be construed with other legislation such as the Minnesota Government Data Practices Act. Occasionally, a board needs to discuss data classified as not public at a meeting. In most circumstances, the board may not close the meeting to discuss the data. Such data may be discussed without liability or penalty if the disclosure

relates to a matter within the board's authority, is reasonably necessary to address the item before the board at a required public meeting, and is disclosed without malice. The board must make reasonable efforts to protect such data from disclosure, however.

6. Closed Meetings

Closed meetings are subject to the same notice requirements as other meetings. The law does specify certain instances in which meetings must be closed to discuss nonpublic information. Minn. Stat. § 13D.05. Instances in which meetings must be closed include discussions of:

a. Data that would identify alleged victims or reporters of criminal sexual conduct, domestic abuse or mistreatment of minors or vulnerable adults;

b. Active investigative data or internal affairs data relating to allegations of law enforcement personnel misconduct collected or created by a state agency, statewide system, or political subdivision; or

c. Educational data, health data, medical data, welfare data, or mental health data that are not public data under certain sections of the data practices law.

In addition, a board must close one or more meetings for preliminary consideration of allegations or charges against an individual subject to its authority. However, such meetings must be open at the request of the individual who is the subject of the meeting. If the members conclude that discipline of any nature may be warranted as a result of those specific charges or allegations, further meetings or hearings relating to those specific charges or allegations held after that conclusion is reached must also be open. As noted above, however, the Open Meeting Law, including this provision, does not apply to meetings at which a board exercises quasi-judicial disciplinary functions.

A public body may close a meeting to evaluate the performance of an individual who is subject to its authority. The public body shall identify the individual to be evaluated prior to closing a meeting. At its next open meeting, the public body shall summarize its conclusions regarding the evaluation. A meeting must be open at the request of the individual who is the subject of the meeting.

A body may also close a meeting to review not-public property appraisals or other information related to pricing, offers or counter-offers for purchase or sale of property. Before closing the meeting the body must identify on the record the particular property at issue. The meeting must be recorded. Any final purchase or sale agreement must be approved at an open meeting.

The application of the statutory attorney-client privilege exception to the Open Meeting Law, which is much narrower than the privilege recognized in the private sector, has evolved over time. Currently, the courts require a balancing test before the need for absolute confidentiality will be recognized. *Prior Lake American v. Mader,* 642 N.W.2d 729, 737-38 (Minn. 2002); *Brainerd Daily Dispatch v. Dehen,* 693 N.W.2d 435 (Minn. Ct. App. 2005). The "public's right to be informed of all actions and deliberations made in connection with activities geared to ultimately affect the public interest" must be balanced with the policies served by the attorney-client privilege in order to determine whether there is a need for absolute confidentiality. *Mader*, 642 N.W.2d at 738-39, 742.

The privilege does not normally apply to ordinary legal advice, or to evaluating the potential for litigation in connection with a proposed action of the body. *Mader.* However, in appropriate circumstances the privilege may be invoked where specific litigation has been threatened, but not actually commenced. *Dehen.*

Minn. Stat. § 13D.01, subd. 3 requires that before closing a meeting, the body must state on the record the specific grounds permitting closure and describe the subject to be discussed. In *Free Press v. County of Blue Earth,* 677 N.W.2d 471 (Minn. Ct. App. 2004), the court held that a mere statement that the meeting would be closed "under the attorney-client privilege to discuss pending litigation" was insufficient. Rather, a more detailed description of the matter was required.

7. Penalties for Violation of the Law

Any person who intentionally violates the requirements of the Open Meeting Law, including the recording of votes, is subject to personal liability in the form of a civil penalty of up to $300 for a single occurrence, which may not be paid by the public body. In *Brown v. Cannon Falls Township,* 723 N.W.2d 31 (Minn. Ct. App. 2006), the Minnesota Court of Appeals held that town board members could not avoid a finding of intentional violation by claiming reliance on advice from the town's attorney, where the specific facts of the case showed that such reliance was clearly unreasonable. The *Brown* court also found that a town board member had committed an intentional violation, where he had agreed to the holding of a noncomplying meeting, even though he did not himself attend. The court also found it significant that the member's absence was for personal reasons, and was not motivated by a desire to avoid violating the Open Meeting Law. If a person is found to have intentionally violated the law in three or more separate actions connected with the same board, such person shall forfeit any further right to serve on the board, or in any other capacity with the board, for a period of time equal to the term of office the person was then serving. The court, upon finding the occurrence of a third violation, unrelated to the previous violations, is directed to issue its order declaring the position vacant and notify the appointing authority or clerk of the board. As soon as practical thereafter, the appointing authority shall fill the position. Minn. Stat. § 13D.06.

8. Public Meetings Prohibited on Certain Days

No state agency, board, commission, department, or committee shall conduct a public meeting on the day of the state primary or general election (Minn. Stat. § 204C.03, subd. 4), or after 6:00 p.m. on the day of a major political party precinct caucus. Except in cases of necessity, public meetings may not be held on official state holidays listed in Minn. Stat. § 645.44, subd. 5.

9. Advisory Opinions on Open Meeting Law Issues

A government entity such as a state board may ask the Commissioner of Administration for a written opinion on any question relating to the entity's duties under the Open Meeting Law. An opinion may also be requested by a person who disagrees with how members of a governing body perform their duties under the Open Meeting Law. The government entity or person requesting this type of opinion must pay a fee of $200 to the Commissioner of Administration. Minn. Stat. 13.072, subd. 1.

Opinions issued by the Commissioner on Open Meeting Law questions are not binding on the government entity or members of a body subject to Minn. Stat. ch. 13D, but a court must give deference to an opinion. A government entity or members of a body subject to the Open Meeting Law acting in conformity with a written opinion of the Commissioner is not liable for fines, awards of attorney fees, or any other penalty under chapter 13D. A member of a body subject to chapter 13D and who acts in reliance on an opinion of the Commissioner is not subject to forfeiture of office. *Id.*, subd. 2.

B. Government Data Practices Act

1. Introduction

The Minnesota Government Data Practices Act, which is found in Minnesota Statutes chapter 13, is a complex piece of legislation which has been frequently amended over the years. The correct legal analysis of issues concerning application of this Act depends on the specific facts presented.

The thrust of the Act is that all government data collected, created, received, maintained, or disseminated by any state agency or board are public unless classified otherwise by federal law, state statute, or temporary classification by the Commissioner of Administration. Minn. Stat. § 13.01, subd. 3. The major exceptions are data on employees, applicants, and contractors

(Minn. Stat. § 13.43) and data on students (Minn. Stat. § 13.32), which are presumed private unless specifically classified as public. A chart summarizing the classification of some types of board data under the Act is found at the end of this section. Because issues concerning disclosure of government data are complicated and fact-specific, the assistant attorney general representing a board should be consulted when a particular question arises. Consultation is also important in order to avoid statutory penalties for violating the Act.

Basic definitions employed throughout the statute include the following:

"Data on individuals" means all government data in which any individual is or can be identified as the subject of that data. Minn. Stat. § 13.02, subd. 5.

"Confidential data on individuals" means data that are made not public by statute or federal law and are inaccessible even to the individual subject of that data. Minn. Stat. § 13.02, subd. 3.

"Private data on individuals" means data that is not accessible to the public but is accessible to the individual subject of that data. Minn. Stat. § 13.02, subd. 12.

"Protected nonpublic data" means data not on individuals which is made by statute or federal law applicable to the data (a) not public and (b) not accessible to the subject of the data. Minn. Stat. § 13.02, subd. 13.

"Nonpublic data" means data not on individuals that is made by statute or federal law applicable to the data: (a) not accessible to the public; and (b) accessible to the subject, if any, of the data. Minn. Stat. § 13.02, subd. 9.

"Summary data" means statistical records and reports derived from data on individuals but in which individuals are not, and cannot be, identified. Minn. Stat. § 13.02, subd. 19.

The "responsible authority" in a state agency means the state official designated by law as the person responsible for the collection, use, and dissemination of any data on individuals, government data or summary data. Minn. Stat. § 13.02, subd. 16. The responsible authority must establish procedures to ensure that requests for government data are received and complied with in an appropriate and prompt manner. Minn. Stat. § 13.03, subd. 2. The responsible

authority is required to prepare public access procedures in written form and update them as necessary no later than August 1 of each year, to reflect changes in personnel or circumstances that might affect public access to government data. The responsible authority must make copies of the written public access procedures easily available to the public by distributing free copies of the procedures to the public or posting a copy of the procedures in a conspicuous place within the government entity that is easily accessible to the public. Minn. Stat. § 13.03, subd. 2(b).

"State agency" includes any state board. Minn. Stat. § 13.02, subd. 17.

2. Duties of Responsible Authority and Compliance Official

Each agency's responsible authority must prepare a public document containing the agency's name, title and address, and a description of each category of record the agency maintains containing private or confidential data on individuals. The collection, storage, use, and dissemination of private and confidential data on individuals is limited to that necessary for administering specifically authorized programs. Individuals must be informed at the time of collection of the purposes for collecting, storing, using, or disseminating data. Data cannot be used for any other purpose.

The responsible authority must establish procedures to assure that all data on individuals is accurate, complete and current for the purposes for which it was collected. The responsible authority must also establish appropriate security safeguards for all records containing data on individuals. When a board enters into a contract that requires board-collected data to be made available to the contracting party, the contracting party is bound to maintain the data according to its chapter 13 classification. Minn. Stat. § 13.05, subd. 6.

A state agency that collects, creates, receives, maintains or disseminates private or confidential data on individuals is required to disclose any breach of the security of the data following discovery or notification of the breach. Notification must be made to the individual subject of the data whose private or confidential data was, or is reasonably believed to have been, acquired by an unauthorized person. Notification must be within the most expedient time

possible, consistent with the legitimate needs of a law enforcement agency as well as with any measures necessary to determine the scope of the breach and restore the reasonable security of the data. If a law enforcement agency determines that the notification will impede an active criminal investigation, the notification may be delayed. Alternate methods of notification include first class mail, electronic notice, and "substitute notice." Electronic notice must be consistent with the provisions regarding electronic records and signatures as set forth in 15 U.S.C. § 7001. Nationwide consumer reporting agencies must also be notified, without unreasonable delay, if the state agency discovers circumstances requiring notification of more than 1,000 individuals at one time of a breach of the security of private or confidential data. *See* Minn. Stat. § 13.055 (enacted in 2005 Minn. Laws ch. 163, § 21).

The use of summary data derived from private or confidential data on individuals is permitted. Any person may request an agency to prepare summary data. The cost of preparing the summary data is borne by the requesting person. Minn. Stat. § 13.05, subd. 7.

The responsible authority must also prepare a public document setting forth in writing the rights of the data subject and the specific procedures for access by the data subject to public or private data on individuals. Minn. Stat. § 13.05, subd. 8. A responsible authority shall allow another responsible authority access to data classified as not public only when the access is authorized or required by statute or federal law. An agency that supplies government data under this provision may require the requesting agency to pay the actual cost of supplying the data. Minn. Stat. § 13.05, subd. 9.

Contracts by a government entity with a private person to perform any of its functions, must include contract terms making it clear that all data created, collected, received, stored and used, maintained, or disseminated by the private person in performing those functions is subject to the requirements of Minn. Stat. ch. 13 and that the private person must comply with those requirements as if it were a government entity. Minn. Stat. § 13.05, subd. 11(a). This does not create a duty, however, on the part of the contractor to provide access to public data if the public

data are available from the government entity unless the terms of the contract create such a duty. Minn. Stat. § 13.05, subd. 11(b).

Minnesota Statutes section 13.05, subdivision 13 requires appointment or designation of an employee of a government entity to act as its data practices compliance official. People may direct questions or concerns regarding problems in obtaining access to data or other data practices problems to the data practices compliance official. The responsible authority may also be the data practices compliance official.

3. Rights of the Subject of Data

a. Rights before collection: Tennessen Warning

Individual subjects of data are given specific rights by the Data Practices Act. Perhaps the most well-known of these is the so-called "Tennessen Warning" contained in Minn. Stat. § 13.04, subd. 2. An individual asked to supply private or confidential information concerning the individual must be informed of: a) the purpose and intended use of the requested data; b) whether the individual may refuse or is legally required to supply the requested data; c) any known consequence arising from providing or refusing to provide private or confidential data; and d) the identity of other persons or entities authorized by state or federal law to receive the data. The Tennessen Warning is not required to be given in writing, but if given orally, it should be documented in the appropriate board file.

If an investigation is an attempt to gather factual information about an incident, and identification of a particular individual is only incidental to the focus of the inquiry, it is possible that a Tennessen Warning may not be required. However, legal counsel should be consulted before deciding not to give the warning.

b. Rights after collection

i) Access by subject of data

Upon request to a responsible authority, an individual must be informed whether he or she is the subject of stored data and whether the data is classified as public, private or confidential. Upon request, an individual who is the subject of public or private data must be shown the data without any charge and if requested, shall be informed of the data's meaning if the data is unclear. After the individual has been shown the data, it need not be disclosed to that individual for six months thereafter unless an action or dispute is pending or additional data have been collected or created. If possible, the responsible authority must comply immediately with any request, or within ten working days of the date of the request if immediate compliance is not possible. The responsible authority may require the requesting person to pay the actual cost of making, certifying and compiling copies. Minn. Stat. § 13.04, subd. 3.

ii) Inaccurate data

An individual subject of data may contest its accuracy or completeness. To exercise this right the individual must notify the responsible authority in writing, describing the nature of the disagreement. The responsible authority must then either correct any data found to be inaccurate or incomplete and notify past recipients of inaccurate or incomplete data, or notify the individual that the authority believes the data to be correct. Minn. Stat. § 13.04, subd. 4. Data in dispute shall be disclosed only if the individual's statement of disagreement is included with the disclosed data. The determination of the responsible authority may be appealed pursuant to the provisions of the Administrative Procedure Act relating to contested cases. Data on individuals that have been successfully challenged by an individual must be completed, corrected, or destroyed by the board, depending on the nature of the inaccuracy.

4. Rights of Third Persons to Discover Data

Upon request to a responsible authority or designee, a person must be permitted to inspect and copy public government data at reasonable times and places, and, upon request, shall

be informed of the data's meaning. Minn. Stat. § 13.03, subd. 3. Unless authorized by statute, an agency or board cannot require a person to identify himself, state a reason for, or justify a request to gain access to public government data. Minn. Stat. § 13.05, subd. 12.

No fee is to be charged to inspect such data. Minn. Stat. § 13.03, subd. 3(a). Inspection includes, but is not limited to, the visual inspection of paper and similar types of government data. It does not include printing copies unless printing a copy is the only method to provide for inspection of the data. If data is stored by the government entity in electronic form and made available to the public on a remote access basis, inspection includes remote access to the data by the public and the ability to print copies of or download the data on the public's own computer equipment. If the government entity has a specific grant of statutory authority, it may charge a reasonable fee for remote access to data. A government entity may charge a fee for remote access to data where either the data or the access is enhanced at the request of the person seeking access. Minn. Stat. § 13.03, subd. 3(b). If a person requests copies or electronic transmittal of the data to the person, the responsible authority must provide copies, but may require the requesting person to pay the actual costs of searching for and retrieving the government data, including the cost of employee time, and for making, certifying, compiling and transmitting the copies. If 100 or fewer pages of black and white, letter or legal size paper are requested, however, actual costs cannot be charged. Instead, the responsible authority may charge no more than 25 cents for each page copied. The authority may not charge for separating public from not public data. If copies are not able to be provided at the time a request is made, the responsible authority shall provide them as soon as reasonably possible. Minn. Stat. § 13.03, subd. 3(c) (as amended by 2005 Minn. Laws ch. 163, § 8).

If the responsible authority maintains public government data in a computer storage medium, the agency must provide, upon request, a copy of public data contained in that medium, in electronic form, if a copy can reasonably be made. However, data only has to be provided in the same electronic format or program used by the agency. Minn. Stat. § 13.03, subd. 3(e).

If the responsible authority determines that the requested data is classified so as to deny the requesting person access, the responsible authority must inform the requesting person of the determination either orally at the time of the request, or in writing as soon after that time as possible, and must cite the specific statutory section, temporary classification, or specific provision of federal law on which the determination is based. Upon the request of any person denied access, the responsible authority is required to certify in writing that the request has been denied and state on what legal basis the denial is made. Minn. Stat. § 13.03, subd. 3(f).

If a state agency opposes discovery of government data on the grounds that the data are classified as not public, a party seeking access to the data may bring an action to compel discovery before the appropriate presiding judicial officer or administrative law judge. The judge must first decide whether the data are discoverable or releasable pursuant to the rules of evidence and of criminal, civil, or administrative procedure appropriate to the action. If the data are discoverable, the judge must then decide "whether the benefit to the party seeking access to the data outweighs any harm to the confidentiality interests of the agency maintaining the data, or of any person who has provided the data or who is the subject of the data, or to the privacy of an individual identified in the data." *Montgomery Ward and Co., Inc. v. County of Hennepin,* 450 N.W.2d 299, 306 (Minn. 1990). In making this decision the judge is required to consider whether notice to the subject of the data is warranted, and may fashion and issue any protective orders necessary to assure proper handling of the data by the parties. Minn. Stat. § 13.03, subd. 6. The Minnesota Supreme Court has held that failure by the judge to use this two-prong analysis is an abuse of discretion.

5. Dissemination

Private data may be used and disseminated to any person or agency if the individual subject of the data has given informed consent. Informed consent may be given by signing a consent statement, but informed consent authorizing any person or agency to disclose information about the individual to an insurer is not valid unless the statement is 1) in plain

language; 2) dated; 3) specific in designating the particular persons or agencies authorized to disclose information about the data subject; 4) specific as to the nature of the information the subject is authorizing to be disclosed; 5) specific as to the persons or agencies to whom the subject is authorizing information to be disclosed; 6) specific as to the purpose or purposes for which the information may be used by any of the parties named both at the time of disclosure and at any time in the future; and 7) specific as to its expiration date which should be within a reasonable period of time not to exceed one year. Minn. Stat. § 13.05, subd. 4. Private data may also be disseminated as authorized by law and to individuals within the agency whose job duties reasonably require access to it.

In 2005, the Legislature amended Minn. Stat. § 13.37 to allow government entities, in consultation with appropriate law enforcement, emergency management, or other officials to share security information to "aid public health, promote public safety, or assist law enforcement" (enacted in 2005 Minn. Laws ch. 163, § 35).

6. Licensing Data

The licensing data section of the Data Practices Act is frequently encountered by state boards. "Licensing Agency" means any board, department or agency which is given statutory authority to issue professional or other types of licenses, except those administered by the Commissioner of Human Services. Minn. Stat. § 13.41. Under that section, data collected by a licensing agency during an active investigation of complaints against a licensee are confidential. The identity of complainants who have made reports concerning licensees can only be released if the complainant consents. When a licensing agency has completed its work on a case, the data become inactive investigative data, which are private. Minn. Stat. § 13.39, subd. 3. Orders for hearing, findings of fact, conclusions of law and the final disciplinary action contained in the record of the disciplinary action generally are considered public. If the licensee and the licensing agency settle the dispute in writing, the agreement is public data.

A board must include in its final order only those findings of fact that form the basis for disciplinary action. In *Doe v. Minnesota State Bd. of Med. Exam'rs,* 435 N.W.2d 45 (Minn. 1989), the Board of Medical Examiners found Dr. Doe guilty of misconduct on one charge of malprescribing and dismissed the remaining charges of sexual improprieties with former patients. The board released portions of the decision relating to the dismissed charges of sexual improprieties. Dr. Doe sought an injunction to prevent board disclosure of the dismissed charges. The Supreme Court held that a "final decision" of the board following a contested case disciplinary action includes its "finding of fact, conclusions of law and order," and that that document is a public document. However, the Court also held it was improper for the board to incorporate in its final decision the discussion of the dismissed charges because the board's rule limits the scope of the data which can be made public in a final decision. Dr. Doe was awarded attorney fees pursuant to Minn. Stat. § 13.08, subd. 4.

7. Investigative Data

Data collected by state boards as part of an active investigation undertaken to commence or defend a pending civil legal action, or which are retained in anticipation of a pending civil legal action, are protected nonpublic data (data not on individuals) or confidential (data on individuals). A "pending civil legal action" includes but is not limited to judicial, administrative or arbitration proceedings. Whether a civil legal action is pending should be determined by the board's general counsel. State boards may, however, make any such data classified as confidential or protected nonpublic accessible to any person, agency or the public if a board determines that access will aid law enforcement, promote public health or safety, or dispel widespread rumor which poses a threat. Release of such data is highly sensitive. If a state board is considering providing access to such confidential or protected nonpublic data, it should consult its assistant attorney general. Minn. Stat. § 13.39.

8. Penalties for Violating the Act

a. Board liability

Violation of the Data Practices Act may subject the state agency and individual state officers or employees to a variety of civil sanctions. A board that violates any provision of the act is liable to a person or representative of a decedent who suffers any damages as a result of the violation. An action may be brought to recover any damages sustained, plus costs and reasonable attorney's fees. Minn. Stat. § 13.08, subd. 1. In the case of a willful violation the board shall, in addition, be liable for exemplary damages of not less than $100 nor more than $10,000 for each violation. The state is deemed to have waived any immunity to a cause of action brought under the Act. The responsible authority may also be enjoined by the district court to stop further violations of the Act. In addition, any aggrieved person may bring an action in district court to compel compliance with the Act and may recover costs and disbursements, including reasonable attorney fees. On the other hand, if the court determines the action brought is frivolous, it may award reasonable costs and attorneys' fees to the responsible authority. Courts can also impose a civil penalty of up to $300 against the government entity if an order to compel compliance is issued. Minn. Stat. § 13.08, subd. 4.

In any action involving a request for government data under sections 13.03 or 13.04, the court may inspect *in camera* the government data in dispute but must conduct its hearing in public and in a manner which protects the security of data classified as not public. An agency that releases data pursuant to the order of the presiding officer under section 13.03, subdivision 6 is immune from civil and criminal liability for the data's release. Minn. Stat. § 13.08, subd. 5.

b. Individual liability

Any person who willfully violates the provisions of the Data Practices Act or any rules adopted under it is guilty of a misdemeanor. Willful violation of the Data Practices Act by any public employee constitutes just cause for suspension without pay or dismissal of the public employee. Minn. Stat. § 13.09.

9. Opinions by the Commissioner of Administration

A government entity such as a state board may request an opinion from the Commissioner of Administration on any question relating to public access to government data, rights of subjects of data, or classification of data under Minn. Stat. ch. 13 or other Minnesota Statutes governing government data practices. An opinion of the Commissioner of Administration may also be requested by any individual who disagrees with a determination regarding data practices made by a government entity regarding the individual's rights as a subject of government data or right to access to government data.

Opinions issued by the Commissioner under Minn. Stat. § 13.072 are not binding on the government entity whose data is the subject of the opinion, but must be given deference by a court in a proceeding involving the data. This law does not preclude a person from bringing any other action or law in addition to or instead of requesting a written opinion. A government entity or person that acts in conformity with a written opinion of the Commissioner issued to the government entity or person or to another party is not liable for compensatory or exemplary damages or awards of attorney fees in actions under Minn. Stat. § 13.08 or for a penalty under Minn. Stat. § 13.09. A court shall award reasonable attorney fees to a prevailing plaintiff who has brought an action in district court under Minn. Stat. § 13.08, subd. 4 if the government entity that is the defendant was the subject of a written opinion of the Commissioner and the court finds that the opinion is directly related to the cause of action being litigated and that the government entity did not act in conformity with the opinion. Minn. Stat. § 13.08, subd. 4.

DATA PRACTICES ACT

Public	Private	Confidential
All data that is not made private or confidential by state or federal law	*Accessible to data subject but not the public*	*Not accessible to data subject or public*
Applicant name and address		
Application data submitted by *licensees*	Data submitted by licensure *applicants*, except for names and addresses	
Orders for Hearing, unless specifically exempt by statute Findings of Fact, Conclusions of Law and Order, Stipulation Agreement	*Inactive* investigative data	*Active* investigative data
Disciplinary Orders and the Record of disciplinary hearing if hearing was public	Name of complainant when it appears in inactive investigative data	
Board staff and consultants: name; salary or contract fees; pension and benefits information; expense and other reimbursement paid; job title and description; education, training and work experience; dates of employment; existence and status of any complaints and final disciplinary action, including reasons therefor; payroll records, work phone number and designated address	Information relating to unsubstantiated complaints Patient names and patient records Record of disciplinary proceeding except for items classified as public All other data on staff and consultants is private, including unsubstantiated complaints, record of disciplinary proceeding, and non-designated address	
Job applicants: Vet status; test scores; eligibility ranking; job history; education and training; names of job finalists	Names of job applicants, except for finalists	

"Data not on individuals" is public under Minn. Stat. § 13.03. MN Dept. of Admin. Adv. Op. 02-038 and 03-004.

"Data on individuals" listed in Minn. Stat. § 13.41, subd. 2 are private. MN Dept. of Admin. Adv. Op. 02-038 and 03-004.

C. Ethics in Government

There are many state statutes that deal with ethics in government, some of which apply to members and employees of state boards. The two statutes that primarily affect state boards are Minn. Stat. ch.10A (Ethics in Government Act) and Minn. Stat. § 43A.38 (Code of Ethics for Employees in Executive Branch). If a conflict occurs between section 43A.38 and chapter 10A, the provisions of chapter 10A take precedence. The provisions in chapter 10A are enforced by the Campaign Finance and Public Disclosure Board (CFPDB), which regulates lobbying, conflicts of interests, political committees, and campaign funding practices. The CFPDB is authorized to investigate any alleged violations of the chapter and to make findings of whether there is probable cause to believe a violation has occurred.

1. Conflicts of Interest

Minnesota Statutes section 10A.07 governs conflicts of interest. It provides that any Public official who, in the discharge of official duties, would be required to take an action or make a decision which would substantially affect the official's financial interests or those of an associated business, must follow specified procedures. Minnesota Statutes section 10A.01, subdivision 35 defines "Public official" to include any member, chief administrative officer, or deputy chief administrative officer of a state board that either has the power to adopt, amend or repeal rules, or has the power to adjudicate contested cases or appeals.[4] The procedures are not required when the effect on the official is no greater than on other members of the Public official's business classification, profession, or occupation.

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[4] Certain state boards such as the Council on Asian-Pacific Minnesotans, the Council on Black Minnesotans, the State Council on Disabilities, The Law Examiner's Board, the Ombudsperson for Corrections, the Ombudsperson for Families, the Ombudsperson for Mental Health and Retardation, the Council on Chicano-Latino People, and the Strategic and Long Range Planning Office do not have the power to adopt, amend or repeal rules or the power to adjudicate contested cases or appeals. Therefore, members or administrative officers of those boards are not subject to the requirements of chapter 10A that apply to "Public officials." However, all employees of the executive branch are subject to the requirements of Minn. Stat. § 43A.38. Questions regarding whether an individual is an employee in the executive branch can be directed to your board's general counsel.

When faced with a potential conflict of interest, the Public official must give notice and not participate in the action giving rise to the potential conflict of interest. Minn. Stat. §§ 10A.07 and 43A.38, subd. 7. Notice is given by completing a conflict of interest form and delivering copies of the notice to the CFPDB and to the chair of the board on which the official serves. If the potential conflict of interest presents itself where there is insufficient time to file in advance, then the Public official must orally inform the board chair or appointing authority and file the required written notice within one week.

The Public official who has a potential conflict of interest should remove himself from the conflict. In the case of a decision made by a state board, a member cannot "chair a meeting, participate in any vote, or offer any motion or discussion on the matter giving rise to the potential conflict of interest." Minn. R. 4515.0500.

The question arises whether abstention is sufficient without complying with the notice provision. The notice and filing requirements of section 10A.07 apply only if the Public official "would be required to take an action or make a decision" in the course of his or her official duties. That phrase is ambiguous. It can be argued that it does not apply if a board member excuses himself or abstains from the decision so that he or she is not "required to make the decision." The counter argument is to reject that interpretation because of the use of the subjunctive "would be required" and because of the apparent legislative purpose of the conflict of interest provisions of section 10A.07 of promoting disclosure and openness. In 1987, the Minnesota Supreme Court appeared to believe that both steps were required of a Public Utilities Commissioner faced with a conflict of interest. *Petition of N. States Power Co.,* 414 N.W.2d 383, 386 (Minn. 1987) (noting that both steps must be taken when a potential conflict arises). The Court's comments were dicta, however, so some ambiguity remains.

Upon request of an individual, the CFPDB is authorized to publish advisory opinions on any of the requirements of chapter 10A based upon real or hypothetical situations. An individual may, in good faith, rely on an advisory opinion response. A written advisory opinion issued by the CFPDB is binding on the CFPDB in any subsequent CFPDB or judicial proceeding brought

against the person who made the request or was covered in the request, unless the opinion has been amended or revoked, or the requester has omitted or misstated material facts. If the CFPDB intends to apply new principles of law or policy from the opinion more broadly, the CFPDB must adopt rules. Nevertheless, the CFPDB advisory opinions are useful guides to boards with questions regarding chapter 10A. The opinions are available on the CFPDB's web site.

Substantially similar conflict of interest provisions apply to all employees in the executive branch under Minn. Stat. § 43A.38.[5] If an executive branch employee is faced with the potential for a conflict of interest, it is the employee's duty to avoid the situation. If the employee or the appointing authority determines that a conflict does exist, the matter must be assigned to another employee if possible. If reassignment is not possible, interested persons must be notified of the conflict. The statute enumerates several situations which are deemed to be conflicts of interest.

Two boards have additional, board specific conflict of interest rules. The Agricultural Chemical Response Compensation Board's rule mandates that if a member of the board has a direct or indirect financial or employment interest relating to a matter before the board that is likely to affect the member's impartiality, that member must make the interest known and refrain from participating in or voting upon the matter. The abstention of a board member or members does not prevent the remaining members from conducting a legal vote. Minn. R. 1512.0500. The Harmful Substance Compensation Board has a similar rule except that its rule discusses what to do if a quorum is lost as a result of members abstaining. The rule states that in the case of loss of a quorum, the entire board shall select from among themselves a majority of members whose interests are least likely to affect their impartiality or judgment, and these members must vote upon the matter before the board. Minn. R. 7190.0004.

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[5] The Minnesota Historical Society is not considered part of the Executive Branch for purposes of section 43A.38. Minn. Stat. § 43A.02, subd. 22.

2. Statements of Economic Interest

Under Minn. Stat. § 10A.09, Public officials are required to file statements of economic interest. A Public official must file a statement of economic interest with the CFPDB within 60 days of the effective date of appointment to the state board. The statement is made on a form prescribed by the CFPDB which calls for the following information: name, address, occupation, and principal place of business; the name of each associated business[6] and the nature of that association; a listing of all real property within the state, excluding homestead property, in which the individual holds an interest valued in excess of $2,500 or an option to buy property worth $50,000 or more; a listing of all securities in which the official's share has a market value of $2,500 or more; a listing of all real property in the state in which a partnership of which the individual is a member holds a value in excess of $2,500 or an option to purchase property worth $50,000 or more; and a listing of any investments and property interests held by the official or an immediate family member in the United States or Canada connected with pari-mutuel horse racing. Although Minn. Stat. § 10A.09 is not as clear as might be desirable as to whether reporting of investments is limited to pari-mutual horse racing, the CFPDB has interpreted this statute to require reporting of all investments, including shares of stock and mutual funds.

Each individual required to file a statement of economic interest must file a supplementary statement on April 15 of each year that he or she remains in office, if information on the most recently filed statement has changed. If a supplementary statement is required, it shall include the amount of each honorarium in excess of $50 received since the previous statement, together with the name and address of the source of the honorarium.

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[6] "Associated Business" means any association in connection with which, the individual is compensated in excess of $50 except for actual and reasonable expenses in any month as a director, officer, owner, member, partner, employer or employee, or is a holder of securities worth $2,500 or more at fair market value. Minn. Stat. § 10A.01, subd. 5.

3. Gifts

Minnesota Statutes section 10A.071, subdivision 2 prohibits Public officials from accepting any gifts whatsoever from lobbyists or their employers, with very minor exceptions. Most professional associations are lobbyists, or employers of lobbyists, for these purposes.

A gift is defined as "money, real or personal property, a service, a loan, a forbearance or forgiveness of indebtedness, or a promise of future employment, that is given and received without the giver receiving consideration of equal or greater value in return." This broad rule includes entertainment, loans of personal property for less than payment of fair market value, preferential treatment for purchases or honoraria, and food or beverages provided at a meeting, unless the Public official is appearing to make a speech or answer questions as part of a program.[7]

Again, Minn. Stat. § 43A.38 has substantially similar provisions prohibiting all executive branch employees from accepting any payment of expense, compensation, gift, reward, gratuity, favor, service or promise of future employment or other future benefit from *any source,* except the state, for any activity related to the duties of the employee unless otherwise provided by law. Specific exceptions to the prohibition are enumerated in the statute. There is also a prohibition on gifts related to state contracts. *See* Minn. Stat. § 15.43, subd. 1.

4. Lobbyist Registration

Minnesota Statutes section 10A.03 requires lobbyists to register with the CFPDB. A lobbyist is defined by Minn. Stat. § 10A.01, subd. 21 and does not include state employees or "public officials." Therefore, in general, members and employees of state boards appearing

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[7] Some exceptions to the gift prohibition include:

a. services to assist an official in the performance of official duties,
b. services of insignificant monetary value,
c. a plaque or similar memento recognizing individual services in a field of specialty or to a charitable cause,
d. a trinket or memento of insignificant value, or
e. informational material of unexceptional value.

before the Legislature in connection with board business are not considered lobbyists under the statute and need not register with the CFPDB. However, if a state board member appears before the Legislature under other circumstances, registration as a lobbyist may be required by section 10A.03.

5. Use of State Time, Resources and Information

a. Confidential Information

Minnesota Statutes section 43A.38, subdivision 3 prohibits an executive branch employee from using confidential information to further the employee's private interest and from accepting outside employment or involvement in a business or activity that will require the employee to disclose or use confidential information.

b. Property, Time and Supplies

Section 43A.38, subdivision 4 prohibits a state employee from using or allowing the use of state time, supplies, property or equipment to be used for the employee's private interests or any other use not in the interest of the state, except as provided by law. This includes the use of state stationery, postage, telephones, WATTS lines, electronic mail, fax machines and photocopying equipment. The fact that the non-state use does not increase the cost to the state is not an exception to the rule, nor is prompt reimbursement of any costs that may be inadvertently incurred.

One small exception to this general rule has been carved out regarding use of electronic communication (i.e., electronic mail). Executive branch employees may use state time, property or equipment to communicate electronically with other persons provided the use, including the value of the time spent, results in no incremental cost to the state or results in an incremental cost that is so small as to make accounting for it unreasonable or administratively impracticable. The Commissioners of Administration and Employee Relations have been directed by the statute to issue a statewide policy on the use of electronic mail, etc., but as yet, have not issued such a policy.

6. Political Activity

The Fair Campaign Practices Act, Minn. Stat. § 211B.09, provides that an employee or official of the state may not use official authority or influence to compel a person to apply for membership in or become a member of a political organization, to pay or promise to pay a political contribution, or to take part in political activity. Using an official position to influence political activity is also prohibited in Minn. Stat. § 43A.32, subd. 1.

7. Gubernatorial Appointees

Past governors have issued executive orders which establish a code of ethics for appointees of the governor. The past orders have strongly paralleled the code of ethics for executive branch employees in the areas of conflict of interest, gifts, use of state time, resources and information, and political activity. In the past, some executive orders have contained stricter provisions. To date, Governor Pawlenty has not issued a similar order.

The provisions discussed above establish ethical principles to preserve public confidence in the integrity of government officials. The intent is to eliminate any potential conflicts of interest, the appearance of impropriety, or influence in government. All board members are encouraged to be cognizant of these prohibitions. Questions about the Act's implications may be addressed to the board's general counsel.

D. The Equal Access to Justice Act

The Equal Access to Justice Act, Minn. Stat. § 15.471 *et seq.* was enacted by the Legislature in 1986. The key provision of the Act is found at Minn. Stat. § 15.472 (a), which states:

> If a prevailing party other than the state, in a civil action or contested case proceeding other than a tort action, brought by or against the state, shows that the position of the state was not substantially justified, the court or administrative law judge shall award fees and other expenses to the party unless special circumstances make an award unjust.

The term "party" in the above section is defined by statute to mean a person named or admitted as a party in a court action or contested case proceeding, who is a small business,

including a partner, officer, shareholder member or owner. Minn. Stat. § 15.471, subd. 6. The term "state" is defined as "the State of Minnesota or an agency or official of the state acting in an official capacity." Minn. Stat. § 15.471, subd. 7. The term "fees" includes attorney fees not to exceed $125.00 per hour. Minn. Stat. § 15.471, subd. 5(c). The term "substantially justified" is defined as "the state's position had a reasonable basis in law and fact, based on the totality of the circumstances before and during the litigation or contested case proceeding." Minn. Stat. § 15.471, subd. 8. The fact that a party prevailed on the merits in an action against the state does not automatically mean that the state's position was not "substantially justified." *Donovan Contracting v. Minnesota Dep't of Transportation,* 469 N.W.2d 718, 720-21 (Minn. Ct. App. 1991) (citing Minn. R. 1400.8401, subp. 3(A)(2)(c) (1989)).

There is some question whether this statute applies in licensing proceedings, since the law focuses on small businesses and a license is typically held in a person's individual capacity. However, licensees could argue that it does apply to them. Thus, if a complaint committee brings a disciplinary case and does not prevail, the licensee may bring an action under the Equal Access to Justice Act for costs and attorney fees. However, to succeed, the licensee must demonstrate that the complaint committee's position had no reasonable basis in law and fact and that the licensee is a "party" as defined in the Act.

The term "expenses" includes filing fees, subpoena fees and mileage, transcript costs and court reporter fees, expert witness fees, photocopying and printing costs, postage and delivery costs, and service of process fees. It also includes the reasonable cost of any "study, analysis, engineering report, test or project" incurred by a party in the litigation. Minn. Stat. § 15.471, subd. 4.

E. Tort Claims

A "tort" is a non-contractual civil wrong that is generally defined as the violation of a duty of care owed to a party which results in damage to property, personal injury, or death. The

liability of board members for tortuous acts is controlled by Minn. Stat. § 3.732 *et seq.*. Section 3.736, subdivision 1, provides as follows:

> The state will pay compensation for injury to or loss of property or personal injury or death caused by an act or omission of an employee of the state while acting within the scope of office or employment . . . and who is acting in good faith . . . under circumstances where the state, if a private person, would be liable to the claimant, whether arising out of a governmental or proprietary function. Nothing in this section waives the defense of judicial or legislative immunity except to the extent provided in subdivision 8.

For purposes of section 3.736, "state" is defined to include each of the departments, boards, agencies, commissions, courts, and officers in the executive, legislative, and judicial branches of the State of Minnesota. Minn. Stat. § 3.732, subd. 1(1). An "employee of the state" means all present or former officers, members, directors, or employees of the state. Minn. Stat. § 3.732, subd. 1(2). However, rulings of personal liability against board members are rare.

Under the above definitions, state boards are the "state" and their members and employees are "employees of the state" for purposes of the Tort Claims Act.

1. Liability Under Minnesota Statutes and Common Law

a. Statutory exclusions from liability

The Tort Claims Act contains several exclusions so that boards and board members are immune from tort liability for several kinds of conduct. The following exclusions apply to the activities of state boards: good faith immunity; discretionary immunity; and (when applicable) licensing immunity. Minn. Stat. § 3.736, subd. 3.

i. Good faith immunity

Good faith immunity provides immunity for "a loss caused by an act or omission of a state employee exercising due care in the execution of a valid or invalid statute or rule." Minn. Stat. § 3.736, subd. 3(a). Good faith immunity applies when, as a matter of law, an employee of the state has a duty to act and does so exercising due care in the execution of that duty. *Johnson v. Dirkswager,* 315 N.W.2d 215, 223 (Minn. 1982).

ii. Statutory discretionary immunity

Statutory discretionary immunity provides immunity for "a loss caused by the performance or failure to perform a discretionary duty, whether or not the discretion is abused." Minn. Stat. § 3.736, subd. 3(b). The doctrine of statutory discretionary immunity recognizes that the courts, through the vehicle of a negligence action, are not an appropriate forum to review and second guess the acts of government which involve the exercise of judgment or discretion. *Cairl v. State,* 323 N.W.2d 20, 24 (Minn. 1982). In determining whether statutory discretionary immunity will shield the state and its employees, the Minnesota Supreme Court has distinguished between "planning" and "operational" decisions. *Holmquist v. State,* 425 N.W.2d 230, 232 (Minn. 1988); *Hansen v. City of St. Paul,* 214 N.W.2d 346, 350 (Minn. 1974). "Decisions intended to be protected by discretionary immunity are those made upon the planning level of conduct." *Larson v. Ind. School Dist. No. 314, Braham,* 289 N.W.2d 112, 120 (Minn. 1979).

"Planning level decisions are those involving questions of public policy, that is, the evaluation of factors such as the financial, political, economic, and social effects of a given plan or policy. . . . Sometimes the implementation of a policy itself requires policy-making." *Holmquist v. State,* 425 N.W.2d 230, 232, 234 (Minn. 1988). In contrast, "operational level" decisions include scientific or professional decisions that do not involve balancing of policy with political, economic and social considerations. *Nusbaum v. Blue Earth County,* 422 N.W.2d 713, 720 (Minn. 1988).

In response to misconduct allegations, the Minnesota Court of Appeals stated:

> Determinations ... [of] ... appropriate action to take under these circumstances were necessarily beset with policy-making considerations. For example, management needed to consider the importance of maintaining a workplace free of sexual harassment and the importance of deterring future misconduct. But while considering these policies, management may also have weighed competing policies, such as avoiding unnecessary disruption of the workplace and imposing discipline for alleged harassment only upon the establishment of substantial cause, both for the sake of staff and for protection from expense associated with proceedings premised on a claim of wrongful discipline.

> ... [I]vestigation and disciplinary decisions involved the type of legislative or executive policy decisions that we believe must be protected by discretionary immunity. The center's decisions did not simply require the application of professional judgment to a given set of facts, but were necessarily entwined in a layer of policy-making that exceeded the mere application of rules to facts.

See Oslin v. State, 543 N.W.2d 408, 416 (Minn. Ct. App. 1996).

Statutory discretionary immunity does not apply to whistleblower claims against boards. *See Janklow v. Minn. Bd. of Exam'rs,* 552 N.W.2d 711, 716-718 (Minn. 1996) (holding that the Whistleblower Act operates as an implied waiver of the statutory immunity provision of Minn. Stat. § 3.736); *Carter v. Peace Officers Standards and Training Bd.,* 558 N.W.2d 267, 269 (Minn. Ct. App. 1997) (concluding that statutory immunity is not available to the Board as a defense to the Whistleblower Act).

iii. Licensing immunity

Licensing immunity provides immunity for "a loss based on the failure of a person to meet the standards needed for a license, permit, or other authorization issued by the state or its agents." Minn. Stat. § 3.736, subd. 3(k). The application of licensing immunity is not limited to actions taken with respect to the issuance of a license.

Minnesota Statutes section 3.736, subdivision 3(k) also immunizes the State and its employees against allegations arising from its licensing activities, including inspections, evaluations, supervision and related functions. *See Andrade v. Ellefson,* 391 N.W.2d 836, 837 (Minn. 1986) (county immune from liability for claims of negligent licensing, inspection and supervision) and *Gertken v. State,* 493 N.W.2d 290, 292-93 (Minn. Ct. App. 1992) (state immune from liability for claims of negligent advice related to licensing standards during licensing inspection). In short, immunity applies if the actions in question were directly related to the scope of the subject matter considered or involved in the issuance of the license. *Id.* at 292.

In addition to those immunities provided by the Tort Claims Act, a second source of statutory immunity provided by the Legislature to protect boards and their members is found in

the individual practice acts of the boards. For example, Minn. Stat. § 147.121, subd. 2 provides immunity from civil liability and criminal prosecution for members of the Board of Medical Practice and employees and consultants retained by the board for actions taken relating to their duties under the practice act.

b. Common Law Exclusions From Liability

In addition to statutorily afforded immunity for tort actions, board members are entitled to the application of certain common law immunities as a protection against claims of allegedly tortuous conduct. The most applicable of these immunities are discussed below.

i) Official immunity

The doctrine of official immunity protects from personal liability a public official charged by law with duties that call for the exercise of judgment or discretion unless the official is guilty of a willful or malicious wrong. *Elwood v. County of Rice,* 423 N.W.2d 671, 677 (Minn. 1988); *Rico v. State,* 472 N.W.2d 100, 106-07 (Minn. 1991). Although the discretionary immunity afforded under the Tort Claims Act and the common law doctrine of official immunity both protect discretionary acts, "discretion" has a broader meaning in the context of official immunity. "Official immunity involves the kind of discretion which is exercised on an operational rather than a policymaking level, and it requires something more than the performance of 'ministerial duties.'" *Pletan v. Gaines,* 494 N.W.2d 38, 40 (Minn. 1992).

Official immunity is not granted for ministerial duties. *Ireland v. Crow's Nest Yachts, Inc.,* 552 N.W.2d 269, 272 (Minn. Ct. App. 1996). Ministerial duties have been defined as duties "in which nothing is left to discretion . . . a simple, definite duty arising under and because of stated conditions and imposed by law." *Cook v. Trovatten,* 200 Minn. 221, 223, 274 N.W. 165, 167 (1937).

The discretionary immunity provided by the Tort Claims Act is designed primarily to protect the separation of powers by insulating executive and legislative policy decisions from judicial review through tort actions. Official immunity, however, is "intended to insure that the

threat of potential personal liability does not unduly inhibit the exercise of discretion required by public officials in the discharge of their duties." *Holmquist v. State,* 425 N.W.2d 230, 233 n. 1 (Minn. 1988); *Rico,* 472 N.W.2d at 107. While official immunity ordinarily applies to the decisions of individuals, it was recently extended by the Minnesota Supreme Court to a policy adopted by a committee. *Anderson v. Anoka Hennepin Indep. School Dist.,* 678 N.W.2d 651 (Minn. 2004) (policy adopted by committee of shop leaders on use of table saws).

ii) Vicarious official immunity

The doctrine of official immunity can be extended to protect the government employer from liability for the acts of its employees. In this regard, the Minnesota Supreme Court has recognized the doctrine of vicarious official immunity in order to avoid defeating the purpose of official immunity in cases where a claimant brings suit against the governmental employer based upon the alleged negligence of the government employee. *Pletan* 494 N.W.2d at 42. The decision of whether to extend official immunity to the government employer is a policy question. *Ireland,* 552 N.W.2d at 272. In determining whether official immunity should be extended to the government employer, "[t]he relevant inquiry is whether, if no immunity were granted, the public employee would think that his performance was being evaluated so as to 'chill' the exercise of his independent judgment." *Id.* (citing *Leonzal v. Grogan,* 516 N.W.2d 210, 214 (Minn. Ct. App. 1994)).

iii) Quasi-Judicial immunity

"[J]udicial immunity is an immunity from suit, not just from ultimate assessment of damages." *Mireles v. Waco,* 502 U.S. 9, 11, 112 S. Ct. 286, 288 (1991). The only two circumstances in which judicial immunity is unavailable are: (1) when a judge's action is not taken in the judge's judicial capacity; and (2) when a judge's action is taken in the complete absence of all jurisdiction. *Id.* But for these two narrow exceptions, judicial immunity completely protects a judge from suit based on judicial decision making.

Licensing boards act in a quasi-judicial capacity when making decisions involving the imposition of remedial sanctions against a licensee. When performing this function, there is a strong argument licensing boards and their members are entitled to quasi-judicial immunity. This immunity is the functional equivalent of judicial immunity and it would provide complete protection for a board and its members.

c. Punitive damages

As a general rule, punitive damages may not be assessed against a governmental entity in the absence of statutory authority. *See generally,* 1 American Law Reports 4th 448, 453. Under the Minnesota Tort Claims Act the state is immune from payment of punitive damages. Minnesota Statutes section 3.736, subdivision 3 specifically states: "The state will not pay punitive damages." The Attorney General's Office has argued in certain court cases that because punitive damages are normally awarded to punish a guilty party for the benefit of society, recovery of punitive damages against the government would contravene public policy in that payment of said damages would be forced upon innocent taxpayers.

While it is clear that the state cannot be forced to pay punitive damages for tort claims, since there have been no court decision on the point, it is less clear whether this prohibition applies to punitive damages awarded against individual employees, since there are no cases on point. Arguably, the statutory prohibition of punitive damages against the state must also apply to state employees acting within the scope of their authority.

d. Liability limits

Minnesota Statutes section 3.736, subdivision 4 establishes that the total liability dollar cap of the state and its employees acting within the scope of their employment on any tort claim shall not exceed $300,000 per individual and $1,000,000 for any number of claims arising out of a single occurrence. On January 1, 2008, the limit will rise to $400,000/$1.2 million and on July 1, 2009, the limits will rise again to $500,000/$1.5 million.

Although municipalities, counties, and school boards often purchase liability insurance to cover tort claims, the state generally does not. Pursuant to Minn. Stat. § 3.738, subd. 8, the purchase of insurance waives the state's liability limits under the Tort Claims Act "to the extent that valid and collectible insurance . . . exceeds those limits and covers the claim." *Id.*; *see also Pirkov-Middaugh v. Gillette Children's Hosp.*, 495 N.W.2d 608, 611 (Minn. 1993).

In 2003, the Legislature amended Minn. Stat. § 604.02, subd. 1 to eliminate joint and several liability for defendants found to be less than 50 percent at fault. Previously, a defendant had been required to pay up to the entire award when another at-fault party was insolvent.

e. Indemnification

The Tort Claims Act requires the State of Minnesota to defend, save harmless, and indemnify any employee of the state against expenses, attorney's fees, judgments, fines, and amounts paid in settlement in connection with any tort, civil, or equitable claim or demand. Minn. Stat. § 3.736, subd. 9. Pursuant to this general rule, the State of Minnesota has agreed to indemnify state officials and employees provided that certain criteria are met. In summary, those conditions require that the officer or employee: (1) meet the definition of "employee of the state," which includes board members; (2) has been acting within the scope of his or her employment; and (3) provide complete disclosure and cooperation in the defense of the claim or demand. Minn. Stat. § 3.736, subd. 9.

"'Scope of office or employment' means that the employee was acting on behalf of the state in the performance of duties or tasks lawfully assigned by competent authority. Minn. Stat. § 3.732, subd. 1 (3). The definition of "scope of office or employment," however, limits the application of the statute to those acts of board members which constitute the lawful duties or tasks of the boards as set out in the boards' practice acts, chapter 214, the Administrative Procedure Act, and other statutes which give boards their authority.

The Tort Claims Act does not require the state to indemnify employees or officers in cases of malfeasance, willful or wanton actions, neglect of duty, nor for expenses, attorneys'

fees, judgments, fines, and amounts paid in settlement of claims for proceedings brought by or before responsibility or ethics boards or committees.

Except for elected officials, an employee of the state is conclusively presumed to have been acting within the scope of employment if the employee's appointing authority issues a certificate to that effect. This determination may be overturned by the Attorney General. The final determination, however, of whether an employee of the state was acting within the scope of employment is a question of fact to be determined by the trier of fact, based on the circumstances of each case. Minn. Stat. § 3.736, subd. 9. If a state board is considering denying certification, the board should contact its Assistant Attorney General before taking any action for advice on whether denying certification is appropriate and what steps are required to provide sufficient due process.

Minnesota Statutes section 8.06 provides that the Attorney General is to be the attorney for all state boards. The Attorney General's Office generally provides the legal defense in most claims against state officials. Exceptions would be those claims not covered by the Tort Claims Act, such as claims for willful and wanton acts or malfeasance. In addition, the Attorney General also has broad discretionary powers to represent the interests of the state and state officials. *See Slezak v. Ousdigian,* 260 Minn. 303, 110 N.W.2d 1, 5 (1961). The Attorney General has discretion to decide whether to represent state officials or employees. Occasionally, in instances of conflicts or when special expertise is needed, outside counsel is appointed. Minn. Stat. § 8.06.

If a party brings an action under section 3.736 against an employee of the state and obtains a judgment, the party is barred from bringing any action against that employee for the same conduct in any other proceeding. Minn. Stat. § 3.736, subd. 10.

F. Violations Of Federally Protected Rights (Section 1983 Actions)

1. What is a Section 1983 Action?

A federal statute, 42 U.S.C. § 1983, creates a right to sue for the deprivation of rights established by the United States Constitution or by federal statutes. Section 1983 establishes no substantive rights but merely creates the right to sue for a violation of rights established elsewhere. Potential defendants in a section 1983 suit are those persons who act "under color of any statute, ordinance, regulation, custom, or usage, of any State. . . ." Since board members act under color of state law, board members are potential defendants in section 1983 actions.

2. Defense, Indemnification, and Scope of Liability

The state has applied the indemnification and defense provisions of the Tort Claims Act to section 1983 actions. Accordingly, for the state to provide defense and indemnification, the act complained of must have been within the course of the defendant's employment. Further, as in an action based on a tort claim, the state's indemnity for defendants in section 1983 actions does not extend to punitive damages. Consequently, a board member will be personally responsible for any punitive damage award. Unlike tort claims, however, there is no cap on money damages in a section 1983 lawsuit because the liability limits in the Tort Claims Act are preempted by federal law. In addition, pursuant to 42 U.S.C. § 1988, a prevailing plaintiff in a section 1983 action is entitled to reimbursement of reasonable costs and attorneys' fees. An attorneys' fees award is also not subject to the liability limits of the Tort Claims Act.

3. Board Member Immunity

Both judicial and legislative immunity are available defenses to a section 1983 suit. A disciplinary proceeding is a quasi-judicial process. Quasi-judicial immunity applies to those who exercise quasi-judicial authority and to persons integral to the judicial process who must perform their functions without the chilling effect of potential lawsuits. Actions that are legislative in nature, such as rulemaking, are considered quasi-legislative. When state employees are performing quasi-judicial or quasi-legislative functions they are entitled to absolute immunity.

Qualified immunity is a more limited kind of immunity granted for administrative and investigative acts. Qualified immunity is available in a section 1983 action if the state official did not violate any clearly established statutory or constitutional right which a reasonable person should have known. *Johnson v. Morris,* 453 N.W.2d 31, 38-39 (Minn. 1990).

The question of law in section 1983 suits against board members is whether they are analogous to judges and prosecutors and thus possess absolute immunity. If board members are viewed as analogous to administrators or investigators, they will only have qualified immunity. The difference between these two types of immunities is that absolute immunity defeats a lawsuit at the outset without the necessity of arguing the substance of the claims. Qualified immunity, on the other hand, does not avoid a review of the merits of a particular claim, but may ultimately be a defense to the imposition of liability on an official.

Even if a board member is entitled to absolute immunity, that immunity extends only to money damages. A party who believes that a federally-protected right is being, or is about to be, violated may sue for prospective injunctive relief. An example of such relief would be a lawsuit in which the plaintiff asks that the court declare a rule of the board invalid because it violates the U.S. Constitution.

The United States Supreme Court has held that when a plaintiff prevails in a section 1983 suit for prospective declaratory relief, judicial immunity does not bar an award of attorney's fees under 42 U.S.C. § 1988 against a judicial officer. *Pulliam v. Allen,* 466 U.S. 522, 104 S. Ct. 1970, 1981-82 (1984).[8] Therefore, if a plaintiff obtains injunctive or declaratory relief against a board or a board member, the board or board member could be liable for an award of costs and reasonable attorney's fees. However, Minn. Stat. § 3.736, subd. 9 provides for indemnification

[8] On October 19, 1996 Congress enacted the Federal Courts Improvement Act of 1996 ("FCIA"), Pub. L. No. 104-317, which purported to legislatively reverse the *Pulliam* decision. Section 309 of the FCIA appears to bar awards of costs or attorney's fees against judges in cases based on their judicial acts. It also appears to bar actions for injunctive relief against a judicial officer.

of a board member or employee from any personal liability for the award for any act within the scope of the board member's or employee's duties.

4. Insurance Against Section 1983 Liability

Some local government entities, such as municipalities, counties, and school boards, purchase special insurance policies to cover liability for section 1983 actions. The state, however, has remained either uninsured or self-insured. The Department of Administration, Risk Management Division, is a resource for state boards to contact about insurance questions. The Risk Management Division can make recommendations to a state board about appropriate insurance coverage based on the board's specific needs and obtain insurance quotes for a board before insurance is purchased.

VIII. OTHER POTENTIAL BASES FOR BOARD LIABILITY

A. Antitrust Actions

Antitrust actions against state boards generally arise in one of two ways. First, a government enforcement agency (Department of Justice, Federal Trade Commission or state Attorney General) may bring a complaint against a board if the statutes or rules under which the board acts constitute an unreasonable restraint on competition. Second, an individual injured by board action may bring an action against the board claiming a rule as applied to him or her violates the state or federal antitrust laws.

B. Defamation

1. Elements of a Defamation Claim

For a statement to be considered defamatory "it must be communicated to someone other than the plaintiff, it must be false, and it must tend to harm the plaintiff's reputation and to lower him in the estimation of the community." *Stuempges v. Parke Davis & Co.*, 297 N.W.2d 252, 255 (Minn. 1980); Restatement (Second) of Torts §§ 558-559.

Based on this definition of a defamatory communication, the following are the common law elements of a defamation claim:

1. The statement must be defamatory.
2. The statement must be false.
3. The statement must refer to the plaintiff.
4. The statement must be published.

2. Defenses to a Defamation Claim

The two defenses to a claim of defamation are truth and privilege. Truth is an absolute defense to a defamation claim. A defense based on privilege may be applicable when a state board is the defendant in a defamation action. If an absolute privilege applies, immunity is given even for intentionally false statements made with malice. *Matthis v. Kennedy,* 243 Minn. 219, 67 N.W.2d 413, 416 (1954).

3. Immunities

Not all immunities apply to defamation claims. In *Johnson v. Dirkswager,* 315 N.W.2d 215, 223 (Minn. 1982), the Minnesota Supreme Court held that Minn. Stat. § 3.736, subd. 3(a) (good faith immunity) immunized the State and its employees from defamation claims. In *Bird v. Dep't of Pub. Safety,* 375 N.W.2d 36, 41 (Minn. Ct. App. 1985), the Minnesota Court of Appeals held that Minn. Stat. § 3.736, subd. 3(b) (discretionary immunity) does not apply to defamation cases. In *Bauer v. State,* 511 N.W.2d 447, 448 (Minn. 1994), the Minnesota Supreme Court held that official immunity does not apply to a defamation action against public officials.

4. Opinions

The Supreme Court has made clear that not all opinions are protected under the First Amendment. *Milkovich v. Lorain Journal Co.,* 497 U.S. 1, 18-21, 110 S. Ct. 2695, 2705-07 (1990). Only statements about matters of public concern not capable of being proven true or false and statements that cannot be interpreted reasonably as stating facts are protected from defamation actions under the First Amendment. *Id.; see also Geraci v. Eckankar,* 526 N.W.2d 391, 397 (Minn. Ct. App. 1995).

5. Qualified Privilege

Qualified privilege protects the state and its employees from liability for allegedly defamatory statements on matters that are related to their duties as public officials. *See Bird,* 375 N.W.2d at 41. Qualified privilege also exists for all defendants if the defendant establishes that the allegedly defamatory statement was made on a proper occasion, for a proper purpose, and upon reasonable grounds for believing the truth of the statement. *Stuempges,* 297 N.W.2d at 256-57.

6. Absolute Privileges

a. Publications required by law

Public officials and public bodies, such as state boards, have an absolute privilege to publish defamatory matter when required by law to do so. This rule is set forth in the Restatement (Second) of Torts § 592A as follows: "One who is required by law to publish defamatory matter is absolutely privileged to publish it." Because some boards' practice acts require publication of all disciplinary measures taken by the board, those boards and their members have an absolute privilege against a defamation claim based on the contents of the published disciplinary action. *See, e.g.,* Minn. Stat. § 147.02, subd. 6; *LeBaron v. Minn. Bd. of Pub. Def.,* 499 N.W.2d 39 (Minn. Ct. App. 1993) (statement in letter by district public defender to Board of Public Defense regarding the reasons for termination of an employee were absolutely privileged because Minn. Stat. §§ 611.26 and 611.215 require the district public defenders to report to the State Board of Public Defense regarding the standards of competency of public defenders). In addition, Minn. Stat. § 13.41, subd. 4, classifies a licensing board's final disciplinary action as public data, thereby requiring a board to disclose its final decision as public data. The absolute privilege extends to a board and its members for disclosing public data.

b. Judicial and quasi-judicial proceedings

There is an absolute privilege for communications made in a judicial or quasi-judicial proceeding. *See Matthis v. Kennedy,* 243 Minn. 219, 224, 67 N.W.2d 413, 417 (1954). In *Freier v. Ind. Sch. Dist. No. 197,* 356 N.W.2d 724 (Minn. Ct. App. 1984), a school board and its members were not liable for defaming a teacher when they published a termination decision which was subsequently reversed on appeal. The court reasoned that teacher discharge proceedings were quasi-judicial proceedings and communications incidental to judicial proceedings are absolutely privileged, whether or not they are defamatory. *Freier,* 356 N.W.2d at 728-29. From this case it appears to follow that a state board will not be held liable for

defamation for disclosing the results of a disciplinary action. However, as discussed earlier, the Data Practices Act or the board's practice act may prohibit disclosure of certain information.

c. Legislative proceedings

There is an absolute privilege for all statements made during the course of legislative proceedings stemming from the speech and debate clause of the Minnesota Constitution, Article IV, section 10. *See Carradine v. State,* 511 N.W.2d 733, 734-35 (Minn. 1994).

C. Violations of the Minnesota Governmental Data Practices Act

The Minnesota Governmental Data Practices Act ("MGDPA"), Minn. Stat. ch. 13, has become an increasing source of litigation in recent years. The Act governs nearly every aspect of a government entity's collection, creation, storage, maintenance, or dissemination of information and provides for the recovery of civil damages, punitive damages, and attorneys' fees for violations. Minn. Stat. § 13.08, subd. 1. The MGDPA specifically waives the state's immunity from liability and government entities have been held liable for releasing or refusing to release information. *See, e.g., Navarre v. S. Washington County Schs.,* 652 N.W.2d 9 (Minn. 2002) ($520,000 jury award for loss of reputation and emotional distress after information released about complaints concerning teacher's competency); *Wiegel v. City of St. Paul,* 639 N.W.2d 378 (Minn. 2002) (city liable for attorneys' fees for failing to disclose interviewers' notes about applicants who failed civil service exams).

A government entity may request an advisory opinion from the Commissioner of the Department of Administration concerning the application of the MGDPA. Minn. Stat. § 13.072, subd. 1. Although the opinion is non-binding, acting in conformance with the opinion provides an agency immunity for paying damages, penalties, or attorneys' fees. *Id.*, subd. 2. This provision was amended in 2003 to require a court to award attorneys' fees to a prevailing party if

the government entity failed to act in conformance with an opinion issued by the Commissioner. Act of May 30, 2003, ch. 8, art. 2, § 3, Minn. Laws Ex. Sess. 1502.

With some exceptions, the MGDPA classifies most data held by the government as public data. *See* Minn. Stat. § 13.03, subd. 1. The MGDPA provides that, upon request, a government entity must provide access to public data at a reasonable time and place. Minn. Stat. § 13.03, subd. 3(a). A request by a person who is the subject of the information must be honored immediately, or within ten days of the date of the request if immediate compliance is not possible. Minn. Stat. § 13.04, subd. 3.

Particular attention should be paid to the treatment of personnel data. Certain types of personnel data are public -- e.g., name, salary, job title, education, etc. Minn. Stat. § 13.43, subds. 1 and 2. Most other types of personnel data are private, including the specific reasons and data documenting the basis for a complaint or charge about an employee until there has been a "final disposition of any disciplinary action." Minn. Stat. §§ 13.43, subd. 2(a)(5); subd. 4. During such an investigation, the MGDPA "only authorizes the disclosure of the existence and status of complaints *and nothing more*. The type of complaint is separate and distinct from its existence and status." *Navarre,* 652 N.W.2d at 22 (emphasis added).

IX. CONTRACTING

Although most state contracting laws are contained in Minn. Stat. ch. 16C, there are numerous other statutorily required contract clauses scattered throughout the statutes that must be included in specific contracts. Every state agency must contract in accordance with the state procurement statutes. For purposes of chapter 16C, an agency means any state officer, employee, board, commission, authority, department, entity, or organization of the executive branch of state government. While there are a few specific state organizations such as public corporations that are exempt from the requirements of chapter 16C, most state boards are subject to the requirements.

A. WHO IS RESPONSIBLE FOR WHAT

Minnesota Statutes divide the responsibility for contracting for services primarily with the agency head requesting the contract and the Commissioner of Administration.

1. Agency Head

Unless altered by statute, the agency head has the responsibility to:

1. Identify the need and specifications for a contract and determine who the contractor will be;

2. Draft the contract;

3. Encumber the funds in the Minnesota Accounting and Procurement System (MAPS) before the contract can be valid. Minn. Stat. §§ 16C.05, subd. 2(3) and 16C.08, subd. 2(5); and

4. Ensure that the terms and conditions of the contract and state law are met, that all funds expended under the contract are expended in accordance with the contract and state law, and that the results of the contract (the product delivered or the service provided) meet all the requirements of the contract.

If the contract is for professional or technical services valued in excess of $5,000, the agency head must provide information and certify to the Commissioner of Administration that a specific set of circumstances exist or have been met before the contract will be valid. Minn. Stat.

§ 16C.08, subd. 2. These certifications are listed below in section B.1 "Contracts for Professional or Technical Services."

2. Commissioner of Administration

The Commissioner of Administration approves or disapproves the decision of a state agency to contract for goods or services and its selection of a contractor. Minn. Stat. §§ 15.061, 16C.05, subd. 2(a)(2), and 16C.08, subd. 3. The Department of Administration must sign all certifications for contracts valued over $5,000 (calculated over the entire life of the contract, including any potential extensions).

3. Attorney General

The Attorney General's Office no longer is required to review state contracts for form and execution. Minn. Stat. § 16C.05, subd. 2(2). Even though the Attorney General's Office is no longer legally required to execute contracts for form and execution, the Attorney General's Office will provide legal advice to agencies when requested on contract issues. Upon request, the Attorney General's Office will review revisions to State form contracts and review vendor prepared contracts such as software license agreements and rental agreements in order that those contracts be consistent with State laws.

B. TYPES OF CONTRACTS

1. Contracts For Professional or Technical Services

"Professional or technical services" means services that are intellectual in character, including consultation, analysis, evaluation, prediction, planning, programming, or recommendation, and result in the production of a report or the completion of a task. Professional or technical contracts do not include the provision of supplies or materials except by the approval of the Commissioner of Administration or except as incidental to the provision of professional or technical services. Minn. Stat. § 16C.08.

For all professional or technical services contracts, the Commissioner of Administration must be able to determine that, among other things:

1. The contract will not establish an employment relationship between the state or the agency and any persons performing under the contract;

2. The contractor and agents are not employees of the state;

3. The contracting agency has specified a satisfactory method of evaluating and using the results of the work to be performed; and

4. The term of the contract does not exceed two years. No state contract can have a term longer than two years unless the Commissioner of Administration determines that a longer duration is in the best interest of the state, but in no event may the term of the contract, including any potential amendments, exceed five years unless otherwise provided for by law.

Two statutorily required provisions that must be included in all contracts for professional or technical services are:

1. A professional or technical services contract must by its terms permit the Commissioner of Administration to unilaterally terminate the contract prior to completion with or without cause, upon payment of just compensation. The statute does not specify the length of notice required to invoke the cancellation clause and does not prohibit the agency/board from also having the power to unilaterally terminate the contract prior to completion with or without cause, upon payment of just compensation. It is in the agency/board's discretion whether to allow the contractor to terminate the contract prior to completion of the contract.

2. The terms of a professional or technical services contract must provide that 10% of the amount due under the contract be retained by the state agency/board until it certifies to the Commissioner of Administration that the contractor has satisfactorily fulfilled the terms of the contract, unless specifically excluded in writing by the Commissioner of Administration.[9]

For professional or technical services contracts with a value under $5,000, no advertised solicitation is required. The state agency may choose a contractor, draft the contract, and

[9] Minnesota Statutes section 16C.08, subd. 5(b) also provides that the 10% retainage requirement does not apply to contracts for professional services as defined in Minn. Stat. §§ 326.02 to 326.15, regarding the regulation of architects, engineers, surveyors, landscape architects, geoscientists, and interior designers.

encumber funds. When the agency is satisfied with the contract language, the contractor and the agency head or a designee sign the agreement and send it to the Department of Administration for external review.

For professional or technical services contracts with a value over $5,000, the agency must complete a Contract Certification Form and obtain the Commissioner of Administration's approval before sending out a Request for Proposals, either informal ($5,000 - $50,000) or formal (over $50,000). Informal Requests for Proposals for technical professional services from $5,001 to $50,000 may be published in the State Register or posted on the Department of Administration Material Management Web page, but the responses are not required to be sealed like responses to formal Requests for Proposals. *See* Minn. Stat. § 16C.06, subd. 1.

When submitting this certification form, the agency is making, among other things, the following assurances in addition to the determinations listed above.

1. No current state employee is able and available to perform the services called for by the contract;

2. The normal competitive bidding mechanisms (best value) will not provide for adequate performance of the services;

3. Reasonable efforts were made to publicize the availability of the contract to the public;

4. The agency will develop, and fully intends to implement a written plan for the assignment of specific agency personnel to manage the contract, including a monitoring and providing liaison, periodically reviewing interim reports or other performance indicators, and reviewing ultimate use of the final product of the services; and

5. The agency will not allow the contractor to begin work before the contract is fully executed unless an exception under Minn. Stat. § 16C.05, subd. 2, has been granted by the Commissioner of Administration and funds are fully encumbered and the contract is fully executed.

2. Contracts For Goods Or Non-Professional or Technical Services Contracts

The Materials Management Division of the Department of Administration offers procurement training programs during the year to state personnel. The training covers purchasing policies and procedures. If you are interested in any of the classes, please contact the Materials Management Division's training coordinator at (651) 201-2409.

3. Grants or Loans

Grants and loans are a class of contracts which provide funding to an outside entity to provide services or support to a third party who is not employed by the state. State agencies do not have general or automatic grant or loan making authority. The authority for grants and loans must be specifically stated in the statutes and is generally directly related to the appropriations that fund them.

4. Interagency Agreements/Joint Powers Agreements

Agreements with other governmental units are contracts. They may be for services, grants, or loans, but they should be treated like contracts. The authority of state agencies to enter into agreements with other state agencies is, in most cases, not clearly defined. In fact, most state agencies do not have specific authority, instead their authority is defined in the Joint Powers Act which gives governmental units broad authority to enter into agreements with each other. Minn. Stat. § 471.59. "Governmental unit" is defined as "every city, county, town, school district, other political subdivision of this or another state, another state, and any agency of the state of Minnesota or the United States, and includes any instrumentality of a governmental unit." Interagency agreements are between two or more state agencies, while joint powers agreements are between two or more governmental units. Under the Joint Powers Act, the governing body of any governmental unit may enter into agreements with any other governmental unit to perform on behalf of that unit any service or function which the governmental unit providing the service or function is authorized to provide for itself. A governmental unit participating in a joint enterprise or cooperative activity with another

governmental unit will not be liable for the acts or omissions of the other governmental unit unless it has agreed in writing to be responsible for them. Minn. Stat. § 471.59, subd. 1a (2006).

C. Basic Elements of a State Contract

State agencies are encouraged to use state approved contract forms when possible. The forms contain required statutory language and other contract terms which are generally in the state's best interests. The Department of Administration's publication *Contracts Manual, Including Professional/Technical Services Contracts* is a helpful resource. For sample contract forms, refer generally to the Department of Administration's web site at *http/www.mmd.admin.state.mn.us/mn05000.htm.* Since these forms are generic, there are situations where additional clauses may be necessary. The *Contracts Manual* is helpful for identifying these special situations. Some specific contracting considerations follow.

1. Authority

The state agency must have the statutory authority to enter into the particular contract. The contractor is presumed to have authority to enter into the contract unless it is another public agency.

2. Solicitation Process

Minnesota Statutes sections 16C.06, 16C.08, 16C.09, 16C.095, and 16C.10 govern the requirements for competitive solicitation. Refer to the Department of Administration's publication *Contracts Manual, Including Professional/Technical Services Contracts* for further assistance on requirements for advertising, consideration, and award.

3. Encumbrance of Funds

The state cannot agree to an expense unless the money has been encumbered. "Encumbered" means that the source of the funds to pay the expense have been identified and that the funds will be available when the payment is due. Generally, this also means that the state cannot agree to pay reasonable court costs, attorney's fees, penalties, economic harm caused to contractor, etc., or indemnify. *See* Minn. Const. art. XI, § 1.

4. Non-Appropriations Clause

Contracts that extend beyond the appropriations period should contain language addressing the possibility of non-appropriations. The following statement is recommended: "Continuation of this Agreement beyond June 30 of any year is contingent upon continued legislative appropriation of funds for the purpose of this Agreement. If these funds are not appropriated, the State will immediately notify Contractor in writing and the Agreement will terminate on June 30 of that year. State shall not be assessed any penalty if the agreement is terminated because of the decision of the legislature not to appropriate funds." An agency may only agree to pay a penalty under specified circumstances if the agency first encumbers the money to pay the potential penalty.

5. Advance Payment

Minnesota Statutes section 16A.41, subdivision 1 prohibits a state agency from obligating the state to pay in advance for goods or services. Pursuant to Minn. Stat. § 16A.065, the only advance payments that can be made are for software or software maintenance services, for state-owned or leased computer equipment, sole source maintenance agreements, exhibit booth space or boat slip rental, subscription fees for newspapers and magazines. Prepayments can also be made to the Library of Congress and the Federal Supervisor of Documents.

6. Audit Clause

Minnesota Statutes section 16C.05, subdivision 5 requires the state audit clause to be in all state contracts even when the state is receiving money. The only exception is when the state is selling, leasing or licensing its own software or data to a purchaser.

7. Data Practices Act

If the contractor will have access to the agency's private and confidential data, the contract must address the contractor's responsibility for handling such data in accordance with the agency's responsibilities under the Minnesota Data Practices Act. The agency cannot agree

to keep the contractor's data confidential except in accordance with the Data Practices Act. *See* Minn. Stat. ch. 13.

8. Term

No contract of any type shall exceed two years unless the Commissioner of Administration determines that a longer duration is in the best interests of the state. No contract and any amendments to the contract shall have a combined term longer than five years without specific approval of the Commissioner of Administration pursuant to written standards or unless otherwise provided by law. The term of a contract may be extended for a time longer than the time specified in Minn. Stat. Ch. 16C, up to a total term of ten years, if the Commissioner of Administration, in consultation with the Commissioner of Finance, determines that the contractor will incur upfront costs under the contract that cannot be recovered within a two-year period and that will provide cost savings to the state and that these costs will be amortized over the life of the contract. Minn. Stat. §§ 16C.03, subd. 17, 16C.05, subd. 5, and 16C.09.

9. Intellectual Property Rights

If the contract is for services that will produce intellectual property, the contract should contain language protecting the intellectual property rights.

10. Affirmative Action

For all contracts for goods and services in excess of $100,000 it may be necessary for the contractor to have a certificate of compliance with Minnesota human rights laws or to certify its compliance with federal affirmative actions laws. The agency cannot accept a bid or proposal in excess of $100,000 if the Contractor has more than 40 employees in Minnesota and the Commissioner of Human Rights is not in receipt of the Contractor's business affirmative action plan. *See* Minn. Stat. § 363A.36, subd. 2. All state contracts in excess of $100,000 must contain the language in Minn. R. 5000.3550 regarding affirmative action for disabled individuals.

11. Execution

The state has developed the following routing procedure for examination and execution of contracts: 1) Other party (e.g., contractor, consultant, etc.); 2) State agency (entering into the contract and also encumbering the funds for the contract); and 3) Department of Administration (comprehensive scope, substance and fiscal review - not grants or interagency agreements). Minn. Stat. § 16C.05, subd. 2.

If a subordinate member or agency employee signs the contract, he or she must be lawfully delegated the authority to do so. *See* Minn. Stat. §§ 15.06, subd. 6 and 16C.05, subd. 2(a)(1). The Secretary of State maintains a complete list of state personnel legally authorized to enter into certain agreements for their respective state agencies.[10] For contractors that are corporations, at least one corporate officer must sign the contract. Two corporate officer signatures are preferable. If persons other than corporate officers have signed, you must obtain a corporate board resolution authorizing the subject signatures must be obtained.

12. Amendments

An amendment to a prior agreement must be in writing and it must clearly reference the prior agreement. The amendment is subject to the same signature process as the original contract.

D. Data Practices Act

Minnesota Statutes section 13.05, subdivision 11 provides that when a government entity enters into contracts with private persons to perform any of the entity's functions, the contract must include terms that make clear that data created, collected, received, stored, used, maintained, or disseminated by the private persons in performing those functions is subject to the

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[10] The statutes for certain boards require contracts to be approved by a majority of the members of the board and executed by the chair and the executive director. *See, e.g.,* Minn. Stat. § 3.922, subd. 5 (Indian Affairs Council); Minn. Stat. § 3.9223, subd. 5 (Council on Affairs of Chicano/Latino People); Minn. Stat. § 3.9225, subd. 5 (Council on Black Minnesotans); and Minn. Stat. § 3.9226, subd. 5(a) (Council on Asian-Pacific Minnesotans).

requirements in chapter 13 and that the private persons must comply with those requirements as if they were a government entity. However, the private persons do not have a duty to provide access to public data to the public if the public data are available from the government entity, except as required by the terms of the contract. *See* Minn. Stat. § 13.05, subd. 11.

X. COMPENSATION OF BOARD MEMBERS AND ADVISORY COUNCILS AND COMMITTEES

In general, board members and members of advisory councils and committees are compensated by a per diem set at the rate of $55 for each day spent on board activities, when authorized by the board, plus expenses in the manner and amount as authorized by the Commissioner's Plan. Minn. Stat. §§ 15.0575, subd 3; 15.059, subd. 3; and 214.09, subd. 3.

Key language in the above sections indicates that expenses and per diems can only be paid when authorized by a board, council or committee. However, the board, council or committee may authorize per diems and expenses in various ways so that the work can be accomplished without having to authorize every single request for a per diem or expense. For example, a board may delegate to the executive director and/or the president of the board the authority to approve per diems for board members engaged in disciplinary work or rulemaking. Such a delegation may include establishing a minimum number of hours, such as five or six, which must be accumulated before a per diem can be claimed. The executive director and/or president may also be authorized to set the maximum number of per diems that can be claimed for a single project, such as the review of a contested case record prior to a hearing before the board. Most boards, councils and committees however, reserve the authority to approve per diems and expenses for members traveling to and from conferences and conventions.

In general, a board, council or commission member who is also an employee of the state or a political subdivision of the state may not be compensated by both the board and the employer for time spent on board activities. The statutes discussed below are intended to prevent "double dipping." The statutes are very clear, however, that a state or political subdivision employee shall suffer no loss in compensation or benefits as a result of service on a board, council or commission and shall receive expenses unless the expenses are reimbursed from another source. Generally, child care expenses may only be reimbursed for state and political subdivision employees for time spent on board activities that are outside normal working hours.

Minnesota Statutes Section 15.0575, 15.059 or 214.09

A state or political subdivision employee who is also a member of an administrative board, agency, committee, council, or commission governed by Minn. Stat. §§ 15.0575, subds. 3, 15.059 or 214.09, may not receive the daily payment for activities that occur during working hours for which the person is compensated by the state or political subdivision. However, a state or political subdivision employee may receive a daily payment if the employee uses vacation time for board, agency, committee, council, or commission activities. Each board, agency, committee, council, or commission must adopt internal standards prescribing what constitutes a day spent on official activities for purposes of paying per diem. Those standards may be incorporated in a delegation of authority to the executive director or president to approve daily payments.

Minnesota Statutes Section 129D.02

Specific language independent from the above statutes applies to the State Arts Board. Pursuant to Minn. Stat. § 129D.02, subd. 3, members of the Arts Board are compensated at the rate of $35 per day spent on board activities and are reimbursed for expenses in the same manner and amount as state employees. Members who are also employees of the state or its political subdivisions are not entitled to a per diem.

It is important that state and political subdivision employees understand the specific statute that applies to their board, council or commission when determining whether they are entitled to receive a per diem from the board, council or committee.

It is not always clear whether someone is a full-time state *employee* or *employee* of a political subdivision. For instance, it is sometimes difficult to categorize elected officials. There have been no cases under the four statutes as to whether there is a difference between employees and officers, but a difference between public officials and employees has been recognized in other contexts. It has been held that a public officer or official is distinguished from a public employee in the greater "importance, dignity and independence" of the official's position. *Tillquist v. Dept. of Labor and Indus.*, 216 Minn. 202, 12 N.W.2d 512, 514 (1943). In *Cahill v.*

Beltrami County, 224 Minn. 564, 29 N.W.2d 444 (1947), the court concluded that an elected sheriff was a public officer and as such, rules governing contractual relations in ordinary cases were inapplicable. Certain statutes contain references to employees and to officers or public officials. *See, e.g.,* Minn. Stat. § 15.054. On the other hand, it can sometimes be argued that an elected official is paid about the equivalent amount of money as a full-time salary for some employee positions. Thus, it could be argued that the spirit of the law would preclude payment to a public official. *See, e.g., Jerome v. Burns,* 202 Minn. 485, 279 N.W. 237 (1938) (city clerk not entitled to additional compensation for services rendered as city commissioner of registration). Anyone with questions regarding whether a member is a state or political subdivision employee, should contact the assistant attorney general assigned to the board.

At times an executive director must contact a board member with a question about a request for a per diem or expense reimbursement. When that happens, two things should be kept in mind. First, the executive director is in the uncomfortable position of asking his or her "boss" to explain himself or herself. Second, board member compensation is thoroughly scrutinized by the legislative auditors. The executive director's questions protect the board and its members from embarrassment by clearing up these matters in advance of an audit.

USDA NRCS
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NEWS RELEASE

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FOR IMMEDIATE RELEASE
Date: May 8, 2007

Contact:
Julie MacSwain, State Public Affairs Specialist, (651) 602-7859

White Earth tribe becomes Minnesota's first tribal conservation districts

White Earth, Minn., May 8, 2007—Mark Rey, undersecretary for natural resources and environment for USDA, Washington, DC., announced today that Minnesota's first tribal conservation district has been formed at White Earth, Minnesota. "I am honored to be on Agriculture Secretary Mike Johann's team as he affirms USDA commitment to tribal government as well as USDA's goals for better serving farmers, ranchers, communities and consumers in Indian country," said Mark Rey, Undersecretary of Natural Resources for USDA.

"This is an exciting development for Minnesota," said Assistant State Conservationist, Operations, Ann English of the USDA-Natural Resources Conservation Service (NRCS). "We are happy to see the development of tribal districts to manage and conserve natural resources at the local level."

The Natural Resources Conservation Service has an integral role in helping people conserve, maintain, and improve our natural resources and environment on private and tribal lands. NRCS has a unique partnership with conservation districts which are vital to the locally led approach to conservation that has served American landowners for seven decades.

Today USDA undersecretary Rey signed a mutual agreement with the White Earth tribe. These agreements formally recognize these tribes within USDA's statutory authorities, regulations, and policies for purposes of delivering conservation programs in cooperation with these tribes and conservation districts on tribal lands.

Since the Dust Bowl of the 1930's, NRCS has worked in partnership with local conservation districts and other agencies throughout the U.S. to help landowners, as well as Federal, State, tribal, and local governments and community groups conserve natural resources on private lands.

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Cities of Annandale and Maple lake NPDES/SDS Permit Issuance for the Discharge of Treated Wastewater, and Request for Contested Case Hearing.

Court of Appeals.

When determining whether to defer to a state agency's interpretation of a federal regulation, a court must consider whether the agency is charged with enforcing and administering the regulation such that the regulation can be characterized as the agency's own regulation; and when a state agency is charged with the day-to-day responsibility for enforcing and administering a federal regulation, courts should treat the regulation as the state agency's own regulation.

Among the factors considered when determining whether to give deference to an agency's interpretation of a regulation are whether the agency is legally required to enforce and administer the regulation under review and whether the meaning of the words in the regulation is clear and unambiguous or is unclear and susceptible to different reasonable interpretations.

If a court concludes the meaning of the words of an agency's regulation are clear and unambiguous, the court need not defer to the agency's interpretation and may substitute its own judgment for that of the agency; but if a court concludes that the meaning of the words in an agency's regulation is unclear and susceptible to different reasonable interpretations, the court must then determine whether the agency's interpretation is reasonable, and if the court determines that the agency's interpretation is reasonable, then the court should generally defer to the agency's interpretation.

When determining whether an agency's interpretation of a regulation is reasonable, a court may consider the agency's expertise and special knowledge when making that determination, especially when the construction of the regulation's language is so technical in nature the agency's technical training, education, and experience is necessary to understand the regulation.

The Minnesota Pollution Control Agency (MPCA) is charged with the day-to-day responsibility for enforcing and administering 40 C.F.R. § 122.4(i) (2006) such that the regulation is properly characterized as the MPCA's own regulation.

40 C.F.R. § 122.4(i) is unclear and susceptible to more than one reasonable interpretation and therefore the MPCA's expertise and special knowledge may be considered when determining whether the MPCA's interpretation of 40 C.F.R. § 122.4(i) is reasonable.

The MPCA's interpretation of 40 C.F.R. § 122.4(i) as allowing offsets from another source in determining whether a new source will cause or contribute to the violation of water quality standards is reasonable; therefore, deference should be given to the MPCA's interpretation and the agency's interpretation should be upheld.

Reversed. Justice Paul H. Anderson.

Took no part, Chief Justice Russell A. Anderson.

Dissenting, Justices Alan C. Page and Helen M. Meyer.

STATE OF MINNESOTA

IN SUPREME COURT

A04-2033

Court of Appeals

Anderson, Paul H., J.
Took no part, Anderson, Russell A., C.J.
Dissenting, Page and Meyer, JJ.

In the Matter of the Cities of Annandale and Maple Lake NPDES/SDS Permit Issuance for the Discharge of Treated Wastewater, and Request for Contested Case Hearing

Filed: May 17, 2007
Office of Appellate Courts

SYLLABUS

When determining whether to defer to a state agency's interpretation of a federal regulation, a court must consider whether the agency is charged with enforcing and administering the regulation such that the regulation can be characterized as the agency's own regulation; and when a state agency is charged with the day-to-day responsibility for enforcing and administering a federal regulation, courts should treat the regulation as the state agency's own regulation.

Among the factors considered when determining whether to give deference to an agency's interpretation of a regulation are whether the agency is legally required to enforce and administer the regulation under review and whether the meaning of the words in the regulation is clear and unambiguous or is unclear and susceptible to different reasonable interpretations.

If a court concludes the meaning of the words of an agency's regulation is clear and unambiguous, the court need not defer to the agency's interpretation and may substitute its own judgment for that of the agency; but if a court concludes that the meaning of the words in an agency's regulation is unclear and susceptible to different reasonable interpretations, the court must then determine whether the agency's interpretation is reasonable, and if the court

determines that the agency's interpretation is reasonable, then the court should generally defer to the agency's interpretation.

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The Minnesota Pollution Control Agency (MPCA) is charged with the day-to-day responsibility for enforcing and administering 40 C.F.R. § 122.4(i) (2006) such that the regulation is properly characterized as the MPCA's own regulation.

40 C.F.R. § 122.4(i) is unclear and susceptible to more than one reasonable interpretation and therefore the MPCA's expertise and special knowledge may be considered when determining whether the MPCA's interpretation of 40 C.F.R. § 122.4(i) is reasonable.

The MPCA's interpretation of 40 C.F.R. § 122.4(i) as allowing offsets from another source in determining whether a new source will cause or contribute to the violation of water quality standards is reasonable; therefore, deference should be given to the MPCA's interpretation and the agency's interpretation should be upheld.

Reversed.

Heard, considered, and decided by the court en banc.

O P I N I O N

ANDERSON, Paul H., Justice.

This appeal results from the issuance of a National Pollutant Discharge Elimination System (NPDES) permit by the Minnesota Pollution Control Agency (MPCA) for a wastewater treatment plant jointly proposed by the City of Annandale and the City of Maple Lake (the Cities). The MPCA found that the proposed plant—when operating at capacity—would increase phosphorus discharge to the North Fork of the Crow River by approximately 2,200

pounds per year over that which is discharged by the Cities' existing facilities, but the MPCA concluded that, under 40 C.F.R. § 122.4(i) (2006), this increase would not contribute to the violation of water quality standards in the Lake Pepin watershed. The MPCA reached this conclusion and issued a permit on the basis that the increased discharge would be offset by an approximate 53,500-pound annual reduction in phosphorus discharge due to an upgrade of a wastewater treatment plant in nearby Litchfield.

A divided Minnesota Court of Appeals reversed the MPCA, concluding that the phosphorus discharge from the proposed facility would violate water quality standards, and therefore issuing a permit violated 40 C.F.R. § 122.4(i). The Cities and the MPCA petitioned for review of the following issues: (1) whether a state agency's interpretation of a federal regulation that the agency is charged with enforcing and administering is entitled to deference by the courts; and (2) whether the MPCA may consider offsets from another source in determining whether a discharge causes or contributes to the violation of water quality standards under 40 C.F.R. § 122.4(i). We reverse.

The cities of Annandale and Maple Lake (the Cities) are located in Wright County, Minnesota, approximately 125 miles northwest of Lake Pepin. Annandale and Maple Lake experienced population increases of 27 percent and 44 percent respectively between 1980 and 2000. Wright County as a whole is projecting a 54 percent population increase between 2000 and 2030.

Maple Lake currently utilizes a mechanical plant for its wastewater treatment, which plant is nearing capacity. The plant discharges approximately 1,400 pounds of phosphorus annually into Mud Lake, which flows into the North Fork of the Crow River (North Fork), then into the Mississippi River, and ultimately into Lake Pepin. Lake Pepin is a naturally-occurring lake on the Mississippi River and has been identified by the Minnesota Pollution Control Agency (MPCA)[1] as impaired under the Clean Water Act. *See* 33 U.S.C. §§ 1251-1387 (2000). For its wastewater treatment, Annandale utilizes a pond system with spray irrigation;

this system does not discharge into the North Fork or any other surface water. The existing Annandale facility is operating at capacity. The Cities' current wastewater treatment facilities are both over 40 years old. Annandale's last National Pollutant Discharge Elimination System (NPDES) permit expired on March 31, 2004. Maple Lake's last NPDES permit expired on August 31, 2005.

In late 2002, the Cities jointly developed plans for a new wastewater treatment plant. In 2003, the Cities applied to the MPCA for an NPDES permit for a single joint plant that would discharge into an unnamed tributary of the North Fork. Based on a condition imposed by the Wright County Planning Commission, which required discharge directly into the North Fork rather than the unnamed tributary, the Cities submitted an amendment to their permit application in March 2004.

The MPCA placed a draft proposed permit "on public notice" on May 10, 2004, and held a public hearing on May 27, 2004. The draft permit placed specific limits on the proposed plant's discharge, including a maximum concentration level of 1 mg/L for phosphorus and a minimum level of 6 mg/L for dissolved oxygen, as well as limits on carbonaceous biochemical oxygen demand, ammonia nitrogen, mercury, fecal coliform, pH, and suspended solids. With these limits in place, the proposed plant would discharge 3,600 pounds of phosphorus annually when it reached capacity by the year 2024. The MPCA received comments from respondent Minnesota Center for Environmental Advocacy (MCEA) and others, and responded in writing to the comments. On September 28, 2004, the MPCA held a meeting at which MPCA staff members, MCEA representatives, and members of the public discussed the draft proposed permit and the MPCA's proposed findings of fact, conclusions of law, and order.

One focus of the discussion at the MPCA meeting was the MCEA's concern that issuance of the NPDES permit would violate 40 C.F.R. § 122.4(i), which provides in part that a state may not issue an NPDES permit "[t]o a new source or a new discharger, if the discharge from its construction or operation will cause or contribute to the violation of water quality standards."

The MCEA asserted that the proposed plant's increase of phosphorus discharge would necessarily cause or contribute to the violation of water quality standards in Lake Pepin. The MCEA also expressed concern that the discharge from the proposed plant would negatively affect dissolved oxygen levels in the North Fork in violation of water quality standards.[2]

The MPCA recommended approval of the draft NPDES permit and issued findings, including a finding that, when operated at capacity, the proposed plant would increase phosphorus discharge to the North Fork by approximately 2,200 pounds annually over that which is discharged by Maple Lake's existing plant. But the MPCA found that this increase in phosphorus discharge would be offset by an approximate 53,500-pound reduction in phosphorus discharge to the North Fork due to upgrades to the Litchfield wastewater treatment plant. Accordingly, the MPCA concluded that "[b]ecause of the net reduction in the watershed, the proposed joint Annandale/Maple Lake facility will not contribute to water quality standards violations in Lake Pepin."

Additionally, the MPCA concluded that the dissolved oxygen effect from the proposed plant would not contribute to the violation of water quality standards in the North Fork. The MPCA reached this conclusion because the section of the North Fork that is impaired for dissolved oxygen is 17.9 miles downstream from the discharge point of the proposed plant and the impairment to dissolved oxygen in a shallow river is greatest one to three miles downstream from a discharge point. On September 30, 2004, the MPCA issued the NPDES permit to the Cities.

By writ of certiorari to the court of appeals, the MCEA challenged the MPCA's decision to issue the NPDES permit. The MCEA argued to the court of appeals that (1) no deference should be given to the MPCA's interpretation of 40 C.F.R. § 122.4(i); (2) 40 C.F.R. § 122.4(i) prohibits the issuance of a NPDES permit before a total maximum daily load (TMDL)[3] is established; (3) the MPCA's conclusion that the proposed plant would not contribute to violation of water quality standards in Lake Pepin was erroneous; and (4) the MPCA's finding

that increased carbonaceous biochemical oxygen demand and phosphorus from the proposed plant would not contribute to the North Fork's dissolved oxygen impairment is not supported by substantial evidence.

A divided court of appeals reversed in a published opinion. *In re Cities of Annandale & Maple Lake NPDES/SDS Permit Issuance (Cities of Annandale & Maple Lake)*, 702 N.W.2d 768, 770 (Minn. App. 2005). The court concluded that no deference is given to a state agency's interpretation of a federal regulation because the interpretation of a federal regulation is a question of law that is reviewed de novo. *Id.* at 771. The court then rejected the MCEA's argument that 40 C.F.R. § 122.4(i) precludes issuance of an NPDES permit before a TMDL is completed, concluding that the absence of a TMDL does not necessarily prevent the issuance of a permit even though a TMDL has not been established.[4] 702 N.W.2d at 773. The court further concluded that the MPCA "was not barred as a matter of law from issuing a permit because of the impact of the Cities' proposed plant on dissolved-oxygen levels in the North Fork." *Id.* at 773-74. But the court of appeals held that "[b]ecause the discharge from the Cities' proposed plant would contribute to the impairment of Section 303(d) waters," the MPCA "erred by issuing a permit in violation of 40 C.F.R. § 122.4(i)." 702 N.W.2d at 776. In reaching its holding, the court apparently used "the impairment of Section 303(d) waters" interchangeably with "violation of water quality standards." It also appears that the court concluded that the proposed 2,200-pound increase in phosphorus discharge over what is currently discharged by the Maple Lake plant would necessarily "contribute to the impairment of" impaired waters, regardless of significant reductions in phosphorus discharge elsewhere in the watershed.[5]

The court of appeals' dissent concluded that "when reviewed with the deference properly accorded agency actions on review by this court, the [M]PCA's interpretation of the regulation and its decision to grant the permit were reasonable and consistent with the purposes and principles of the [Clean Water Act]." 702 N.W.2d at 776 (Schumacher, J., dissenting). The

dissent concluded that "judicial deference, rooted in the separation of powers doctrine, is extended to an agency decision-maker in the interpretation of statutes that the agency is charged with administering and enforcing." *Id.* at 777 (citations omitted). The dissent further concluded that a "reasonableness" standard should be applied by a court reviewing the MPCA's decision to issue an NPDES permit, and that the MPCA's decision was reasonable and should have been affirmed. *Id.* at 777-79.

None of the parties sought review of the dissolved oxygen issue; but, in the context of the phosphorous discharge, the Cities and the MPCA sought review of the court of appeals' rulings on (1) whether a state agency's interpretation of a federal regulation that the agency is charged with enforcing and administering is entitled to deference by the courts, and (2) whether the MPCA may consider offsets from other sources in determining whether a new discharge causes or contributes to the violation of water quality standards under 40 C.F.R. § 122.4(i). Additionally, the Metropolitan Council, Trout Unlimited, Minnesota Lakes Association, Environmental Law and Policy Center of the Midwest, Natural Resources Defense Council, Midwest Environmental Advocates, American Rivers, Clean Up the River Environment, Coalition for a Clean Minnesota River, New Ulm Area Sportsfishermen, Friends of the Minnesota Valley, Builders Association of the Twin Cities, Coalition of Greater Minnesota Cities, Minnesota Environmental Science & Economic Review Board, National Association of Clean Water Agencies, League of Minnesota Cities, and Wright County Mayors Association requested leave to participate as amici curiae. We granted both petitions for review and all 17 amicus requests.

I.

Before specifically addressing the two issues raised by the parties, a general overview of the Clean Water Act (CWA) as applicable to the facts of this case is helpful. The CWA is the cornerstone of surface water protection in the United States. Its purpose "is to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. §

1251(a) (2000).

> It is the policy of the Congress to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution, to plan the development and use (including restoration, preservation, and enhancement) of land and water resources, and to consult with the Administrator in the exercise of his authority under this chapter.

33 U.S.C. § 1251(b) (2000).

The CWA provides for two types of water quality measures: "effluent limitations" and "water quality standards." *Arkansas v. Oklahoma*, 503 U.S. 91, 101 (1992). Effluent limitations promulgated by the Environmental Protection Agency (EPA) "restrict the quantities, rates, and concentrations of specified substances which are discharged from point sources." *Id.* Under state and federal law, the MPCA is the Minnesota state agency charged with enforcing and administering the CWA and its attendant regulations. Minn. Stat. § 115.03, subds. 1, 5 (2006); 40 C.F.R. § 123.25(a) (2006). The regulation subject to interpretation by the MPCA in this case is 40 C.F.R. 122.4(i), which is a regulation promulgated by the EPA under the CWA.

Water quality standards, which are promulgated by the states, generally establish the desired condition of a body of water. The CWA requires states to establish water quality standards sufficient to "protect the public health or welfare, enhance the quality of water and serve the purposes of this chapter." 33 U.S.C. § 1313(c)(2)(A) (2000). A state's water quality standards must be established "taking into consideration [each body of water's] use and value for public water supplies, propagation of fish and wildlife, recreational purposes, and agricultural, industrial, and other purposes, and also taking into consideration their use and value for navigation." *Id.* Water quality standards are "aimed at translating the broad goals of the CWA into waterbody-specific objectives." U.S. Envtl. Prot. Agency, *Introduction to the Clean Water Act*, http://www.epa.gov/watertrain/cwa/cwa2.htm (last visited Apr. 27, 2007).

None of the parties in this case specifically identifies the relevant water quality standards, but it appears that if a body of water is identified as impaired under section 303(d) of the CWA,

it is necessarily in violation of one or more of the relevant water quality standards. *See* 33 U.S.C. § 1313(d)(1)(A) (codifying CWA § 303(d) and stating: "Each State shall identify [as impaired] those waters within its boundaries for which the effluent limitations * * * are not stringent enough to implement any water quality standard applicable to such waters."). In 2002 the MPCA listed Lake Pepin as impaired under section 303(d) because of excessive phosphorus levels.[6] Minn. Pollution Control Agency, MPCA 2002 303(d) List (Jan. 22, 2003), *available at* http://www.pca.state.mn.us/publications/reports/tmdl-2002list.pdf. Additionally, the MPCA has recently identified one section of the North Fork as impaired because of insufficient dissolved oxygen levels. Minn. Pollution Control Agency, 2006 Final TMDL List, *available at* http://www.pca.state.mn.us/publications/wq-iw1-03.xls (last visited Apr. 27, 2007) Accordingly, it appears that the MPCA has determined that Lake Pepin is presently in violation of water quality standards for phosphorus and one section of the North Fork is presently in violation of water quality standards for dissolved oxygen.

In addition to requiring states to identify impaired waters, section 303(d) of the CWA also mandates that states establish a TMDL for each pollutant that causes a body of water to fail to meet water quality standards. 33 U.S.C. § 1313(d)(1)(C) (2000). As previously noted, a TMDL is the sum of pollutants a body of water can absorb from all point and nonpoint sources, plus a margin of safety, and still meet water quality standards for its designated uses. The MPCA has not established TMDLs for Lake Pepin or the North Fork. The MPCA estimates that the TMDLs will not be established before late 2008 for Lake Pepin and 2012 for the North Fork.

If a TMDL has been established for a body of water identified as impaired under section 303(d), an NPDES permit may not be issued unless the permitting authority finds that the new source or discharge will not cause or contribute to the violation of water quality standards and will not violate the TMDL. *See* 40 C.F.R. § 122.4(i). MCEA argues that a plain reading of 40 C.F.R. § 122.4(i) indicates that the MPCA may not issue any NPDES permits before a TMDL is

established. The court of appeals rejected this argument, concluding that:

> When a TMDL has not been established, a new source is not required to demonstrate compliance with the TMDL. Rather, the opening sentence of 40 C.F.R. § 122.4(i) provides that a permit may be issued provided that the new source does not "cause or contribute to the violation of water quality standards." The remainder of section 122.4(i) addresses the criteria for issuing a permit when a TMDL has been established.

Cities of Annandale & Maple Lake, 702 N.W.2d at 773. No party sought review of the court's ruling that an NPDES permit may be issued before establishment of a TMDL, and we conclude that it is neither necessary nor prudent for us to address this issue at this time.

With the foregoing general background on the CWA, we now address the first issue raised by the parties—whether a state agency's interpretation of a federal regulation that the agency is charged with enforcing and administering is entitled to deference by the courts. The MCEA argues that no deference should be given to the MPCA's decision on how to interpret 40 C.F.R. § 122.4(i). The MCEA also asserts that the MPCA's issuance of the NPDES permit was "affected by error of law," *see* Minn. Stat. § 14.69(d) (2006),[7] because the permit was issued "contrary to the plain language of federal regulation" and, therefore, this appeal presents a question of law that is to be reviewed de novo.

The court of appeals' majority apparently agreed with the MCEA's argument that the MPCA's decision to grant the permit was affected by an error of law, and did not give deference to the MPCA's interpretation of 40 C.F.R. 122.4(i). *See Cities of Annandale & Maple Lake*, 702 N.W.2d at 772. More particularly, the court of appeals noted that "[t]he decision of an agency is presumed to be correct, and we ordinarily accord deference to an agency in its field of expertise." *Id.* at 771 (citing *Reserve Mining Co. v. Herbst*, 256 N.W.2d 808, 824 (Minn. 1977)). But the court went on to conclude that "[b]ecause the interpretation of a federal regulation is a question of law, we need not defer to a state agency's interpretation." *Id.* In essence, the court held that because the MPCA was interpreting a federal regulation—not a regulation promulgated by the MPCA—the MPCA's interpretation is not entitled to deference

by the courts. We disagree with this result because the court of appeals has too narrowly construed the deference courts are to give to a state agency's interpretation of a regulation that the agency is charged with enforcing and administering.

While we have been asked on several occasions to determine whether and how much deference courts should give to administrative agency interpretations of regulations, we have not yet addressed the precise question presented here—whether courts should defer to a state agency's interpretation of a federal regulation when the state agency is charged with enforcing and administering the federal regulation. Nevertheless, in some of our earlier cases, we have articulated certain criteria for how we are to determine whether to grant deference to a state agency's interpretation of its own regulation. More particularly, 12 years after deciding *Reserve Mining*, we rendered a decision in *St. Otto's Home v. Minnesota Department of Human Services* that provides us with guidance for deciding the issue before us. 437 N.W.2d 35 (Minn. 1989).

St. Otto's Home addressed a state agency's interpretation of a regulation promulgated by that agency. 437 N.W.2d at 40. We stated in *St. Otto's Home* that we give considerable deference to a state agency's construction of its "own regulation." *Id.* But, unlike the case before us, in *St. Otto's Home* we were not required to decide whether an agency's "own regulation" is limited to regulations promulgated by that agency or also includes regulations coming from another source that the agency is legally required to enforce and administer. Yet, a United States Supreme Court case cited in *St. Otto's Home* provides us with a reference point on this issue. *Id.* (citing *Udall v. Tallman*, 380 U.S. 1, 16 (1965)). In *Udall*, the Supreme Court reasoned that deference to an agency's interpretation of a statute is appropriate, particularly "when the administrative practice at stake 'involves a contemporaneous construction of a statute by the [people] charged with the responsibility of setting its machinery in motion; of making the parts work efficiently and smoothly while they are yet untried and new.'" 380 U.S. at 16 (quoting *Power Reactor Dev. Co. v. Int'l Union of Elec., Radio & Mach. Workers*, 367 U.S. 396, 408 (1960)). We agree with the Supreme Court's reasoning in *Udall* and conclude that an

agency's "own regulation" may include a regulation that the agency is legally required to enforce and administer, even if the regulation was not promulgated by the agency.

This broader definition of an agency's "own regulation" is supported by our recent decision in *In re Excess Surplus Status of Blue Cross & Blue Shield of Minn.* (*BCBSM*), 624 N.W.2d 264 (Minn. 2001), in which we gave deference to the Minnesota Department of Commerce's determination that Blue Cross and Blue Shield's proposal to bring its excess surplus into compliance with the law did not satisfy the requirements of Minn. Stat. § 62C.09 (2000). 624 N.W.2d at 283-84. We concluded in *BCBSM* that

> [t]he agency decision-maker is presumed to have the expertise necessary to decide technical matters within the scope of the agency's authority, and judicial deference, rooted in the separation of powers doctrine, is extended to an agency decision-maker in the interpretation of statutes *that the agency is charged with administering and enforcing*.

Id. at 278 (emphasis added) (citation and footnote omitted). Not only is our decision in *BCBSM* consistent with the Supreme Court's holding in *Udall*, our conclusion in *BCBSM* goes beyond *Udall* because we state that when judicial deference—which is rooted in the separation of powers doctrine—is appropriate, it goes beyond deference to agency-created regulations and also includes statutes administered by the agency that the agency is charged with enforcing and administering.

Based on the foregoing case law, we conclude that when addressing whether to defer to an agency's interpretation of a federal regulation, an initial factor courts must consider is whether the agency is charged with enforcing and administering the regulation such that the regulation can be characterized as the agency's own regulation. Further, we conclude that when a state agency is charged with the day-to-day responsibility for enforcing and administering a federal regulation, courts should give deference to the agency's interpretation of that regulation when giving such deference meets the other criteria we have established for determining when it is appropriate for courts to defer to an agency's interpretation of its own regulation.

II.

Having concluded that we treat a federal regulation as a state agency's own regulation if the state agency is legally charged with the day-to-day enforcement and administration of the regulation, we now proceed to determine our standard for reviewing an agency's interpretation of its own regulation. In particular, we must identify what factors we should consider when determining whether courts should give deference to the agency's interpretation. We stated in *Reserve Mining Co.* that "decisions of administrative agencies enjoy a presumption of correctness, and deference should be shown by courts to the agencies' expertise and their special knowledge in the field of their technical training, education, and experience." 256 N.W.2d at 824. We concluded that the rationale for deference to administrative agency decisions is rooted in the separation of powers doctrine and the agency's training and expertise in the subject matter. *See id.* The legislature codified some aspects of this deferential review of agency decisions arising out of contested case proceedings in the Minnesota Administrative Procedures Act (MAPA).[8] *See Minn. Ctr. for Envtl. Advocacy v. Minn. Pollution Control Agency* (*MCEA v. MPCA)*, 644 N.W.2d 457, 463 (Minn. 2002). Thus, while it is evident that under certain circumstances we have a policy of deferring to an agency's interpretation, it is not clear what criteria and limits guide this policy. Therefore, it will be helpful to review when and why we have given deference in the past.

We have previously indicated that we will not defer to an agency's interpretation of its own regulation when the regulation's language is clear and capable of understanding. *Resident v. Noot*, 305 N.W.2d 311, 312 (Minn. 1981). This approach comports with the approach articulated by the Supreme Court. *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842-43 (1984) ("If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress."); *see also United States v. LaBonte*, 520 U.S. 751, 762 n.6 (1997) (concluding that a

statute was unambiguous and therefore concluding that there was no need to decide whether an agency's interpretation was owed deference). But we have indicated we will defer to the agency's interpretation when the language is ambiguous and when the agency's interpretation is one of long standing. *In re Estate of Abbott*, 213 Minn. 289, 295, 6 N.W.2d 466, 469 (1942). In *St. Otto's Home*, we said we will give "considerable deference" "when the relevant language is unclear or susceptible to different interpretations." 437 N.W.2d at 40.

It also appears that if we conclude that the language of a regulation is unclear or susceptible to different interpretations, another factor influences whether we defer to an agency's interpretation. We have said that we defer to an agency's interpretation of its own regulations when the language of the regulation is subject to a construction that is so technical in nature that only a specialized agency has the experience and expertise needed to understand the regulation. *See BCBSM*, 624 N.W.2d at 278; *Reserve Mining Co.*, 256 N.W.2d 824. Soon after *BCBSM*, we reached a similar result in *MCEA v. MPCA*, in which we concluded that the MPCA's interpretation and application of a state statute was entitled to deference on the basis that the interpretation of the statute required an application of the agency's training and expertise. 644 N.W.2d at 464. Specifically, we concluded that

> the statute requires an EIS if Boise Cascade's project will result in "significant environmental effects." A determination whether significant environmental effects result from this project is primarily factual and necessarily requires application of the agency's technical knowledge and expertise to the facts presented. Accordingly, it is appropriate to defer to the agency's interpretation of whether the statutory standard is met.

Id. (citation omitted). In *MCEA v. MPCA*, we did not expressly conclude that the phrase "significant environmental effects" was ambiguous, but we concluded that the MPCA's training and expertise were necessary to interpret and *apply* the statute. *See id.* Our language in *MCEA v. MPCA* echoes in part the language we used in *Reserve Mining Co.* where we said that "decisions of administrative agencies enjoy a presumption of correctness, and deference should be shown by courts to the agencies' expertise and their special knowledge in the field of their

technical training, education, and experience." 256 N.W.2d at 824.

In 1989, we attempted to summarize our approach to interpreting an agency's regulation in *St. Otto's Home*, where we said:

> When a decision turns on the meaning of words in a statute or regulation, a legal question is presented. In considering such questions of law, reviewing courts are not bound by the decision of the agency and need not defer to agency expertise. When the agency's construction of *its own regulation* is at issue, however, considerable deference is given to the agency interpretation, especially when the relevant language is unclear or susceptible to different interpretations. If a regulation is ambiguous, agency interpretation will generally be upheld if it is reasonable. No deference is given to the agency interpretation if the language of the regulation is clear and capable of understanding; therefore, the court may substitute its own judgment.

437 N.W.2d at 39-40 (citations omitted). Several key conclusions appear to emerge from our decisions in *St. Otto's Home* and other relevant cases. First, when a decision turns on the meaning of words in an agency's own regulation, it is a question of law that we review de novo. Second, when the language of the regulation is clear and capable of understanding, we give no deference to the agency's interpretation and we may substitute our own judgment for that of the agency. Third, when the relevant language of the regulation is unclear or susceptible to different reasonable interpretations, i.e., ambiguous, we will give deference to the agency's interpretation and will generally uphold that interpretation if it is reasonable.

What is not immediately apparent from our holding in *St. Otto's Home* and from our other decisions is when and why we are to consider an agency's expertise and special knowledge when determining whether to give deference to the agency's interpretation. As noted above, we have on several occasions stated that we will defer to an agency when that agency has expertise and special knowledge in its field of technical training, education, and expertise. *See MCEA v. MPCA*, 644 N.W.2d at 464; *BCBSM*, 624 N.W.2d at 278; *Reserve Mining Co.*, 256 N.W.2d at 824. It is only after we read our prior case law closely that a pattern emerges for when and why we would consider an agency's expertise and special knowledge in the context of the case before us. Based on this case law, we have deferred to an agency's expertise and

special knowledge when (1) the agency is interpreting a regulation that is unclear and susceptible to more than one interpretation; and (2) the agency's interpretation is reasonable. [9] Therefore, we conclude that when determining whether to defer to an agency, we will consider that agency's expertise and special knowledge.

In asserting its position that no deference should be given to the MPCA's interpretation of 40 C.F.R. § 122.4(i), the MCEA relies on *In re Denial of Eller Media Company's Applications for Outdoor Advertising Device Permits* (*Eller Media*), 664 N.W.2d 1, 7 (Minn. 2003), where we noted that we have "the authority to review de novo errors of law which arise when an agency decision is based upon the meaning of words in a statute." In *Eller Media*, we did not explicitly discuss any of the factors discussed above; but on review of *Eller Media*, it becomes apparent that consideration of these factors is implicit in our analysis and decision. In that case, it appears that we first addressed whether the Minnesota Department of Transportation (MnDOT), the state agency at issue, was charged with enforcing and administering the law under review—Minnesota's Outdoor Advertising Act. 664 N.W.2d at 7 (discussing Minn. Stat. ch. 173 (2002)). It also appears from our analysis that MnDOT was charged with administering this act. *Id.* (citing Minn. Stat. § 173.185 (2002)). But we apparently found no indication that the Outdoor Advertising Act was ambiguous or that MnDOT's training and expertise were required for its interpretation and application. *Eller Media*, 664 N.W.2d. at 6-7. Thus, under the factors established by our prior case law in *Reserve Mining Co.*, *St. Otto's Home*, *BCBSM*, and *MCEA v. MPCA*, we were not required to defer to MnDOT's interpretation of the Outdoor Advertising Act. [10] Accordingly, our decision not to defer to the agency's interpretation in *Eller Media* did not overrule or modify the analytical framework we previously established for determining when we defer to an agency's interpretation of its own regulation.

In summary, we glean from our case law that review of an agency's interpretation of its own regulations is a question of law that courts review de novo. When answering this question, there are several factors courts need to consider when determining whether to give deference to

an agency's interpretation. These factors include whether the agency is legally required to enforce and administer the regulation under review and whether the meaning of the words in the regulation is clear and unambiguous or is unclear and susceptible to different reasonable interpretations—ambiguous. If a court concludes the meaning of the words in the regulation is clear and unambiguous, it need not defer to the agency's interpretation and may substitute its own judgment for that of the agency. If a court concludes that the meaning of the words in an agency's regulation is unclear and susceptible to different reasonable interpretations, the court must then determine whether the agency's interpretation is reasonable. When determining whether an agency's interpretation is reasonable, courts may consider the agency's expertise and special knowledge, especially when the construction of the regulation's language is so technical in nature that the agency's field of technical training, education, and experience is necessary to understand the regulation. When a court concludes that the language of the agency's regulation is unclear and susceptible to different reasonable interpretations and that the agency's interpretation of the regulation is reasonable, then the court will generally defer to the agency's interpretation.

III.

The next step in our analysis is to consider the foregoing factors in the context of the case before us. The first factor we address is whether the MPCA is legally required to enforce and administer 40 C.F.R. § 122.4(i). As noted above, the MPCA is charged by state and federal law with the day-to-day responsibility for enforcing and administering 40 C.F.R. § 122.4(i) in Minnesota. This point is undisputed by the parties. Therefore, we conclude that 40 C.F.R. § 122.4(i) is properly characterized as and qualifies as the MPCA's own regulation. *See* Minn. Stat. § 115.03, subds. 1, 5; 40 C.F.R. § 123.25(a); Minn. R. 7050.0210, subp. 6(c) (2005).

IV.

Next, we must determine whether 40 C.F.R. § 122.4(i) is unclear and susceptible to different reasonable interpretations. When interpreting a statute or regulation, we first look to

see whether the statute or regulation is clear or ambiguous on its face. *See Am. Family Ins. Group v. Schroedl*, 616 N.W.2d 273, 277 (Minn. 2000) (interpreting a statute). If the words of the regulation are clear and free from ambiguity, "the letter of the law [regulation] shall not be disregarded under the pretext of pursuing the spirit." *See* Minn. Stat. § 645.16 (2006). As noted earlier, a regulation is ambiguous if it is unclear or reasonably susceptible to more than one reasonable interpretation. *See St. Otto's Home*, 437 N.W.2d at 40. But the fact that a word has more than one meaning does not necessarily mean it is ambiguous. *Board of Regents v. Royal Ins. Co. of Am.*, 517 N.W.2d 888, 892 (Minn. 1994). We have said that the meaning of a word depends on how it is being used. *Id.* Importantly, our determination of whether words or phrases are ambiguous does not depend on a reading of those words or phrases in isolation, but relies on the meaning assigned to the words or phrases in accordance with the apparent purpose of the regulation as a whole. *See Metro Office Parks Co. v. Control Data Co.*, 295 Minn. 348, 352, 205 N.W.2d 121, 124 (1973) (interpreting a contract provision). *See also Chiodo v. Bd. of Educ.*, 298 Minn. 380, 382, 215 N.W.2d 806, 808 (1974) ("[W]ords of a statute are to be viewed in their setting, not isolated from their context.").

To determine if 40 C.F.R. § 122.4(i) is ambiguous in the context of the CWA, we must begin with the language of the regulation itself. 40 C.F.R. § 122.4(i) provides that "[n]o permit may be issued"

> [t]o a new source or a new discharger, if the discharge from its construction or operation will *cause or contribute to the violation of water quality standards*. The owner or operator of a new source or new discharger proposing to discharge into a water segment which does not meet applicable water quality standards or is not expected to meet those standards even after the application of the effluent limitations required by sections 301(b)(1)(A) and 301(b)(1)(B) of CWA, and for which the State or interstate agency has performed a pollutants load allocation for the pollutant to be discharged, must demonstrate, before the close of the public comment period, that:
>
> (1) There are sufficient remaining pollutant load allocations to allow for the discharge; and
>
> (2) The existing dischargers into that segment are subject to compliance schedules designed to bring the segment into compliance with applicable water quality standards.

(Emphasis added.) It is the phrase "cause or contribute to the violation of water quality standards" that is the source of most of the disagreement about the interpretation of 40 C.F.R. § 122.4(i).[11] In essence, the regulation precludes the issuance of a permit to a new discharge if issuance of the permit will "cause or contribute" to a water quality impairment. Unfortunately, the regulation does not define, elaborate on, or further explain the general term "cause or contribute." The MPCA maintains that because this part of the regulation is couched in these general terms, the duty falls to it, the regulating agency, to determine precisely what will fulfill the regulatory requirements the MPCA is charged with implementing under the CWA.

The MPCA concluded that "[t]he proposed increase in phosphorus load * * * is significantly less than the reduction in phosphorus load in the watershed from the upgrade of the Litchfield wastewater treatment facility. Because of the net reduction in the watershed, the proposed * * * facility will *not contribute* to water quality standards violations in Lake Pepin." (Emphasis added.) The court of appeals reversed, concluding that "[a] plain reading of the phrase 'cause or contribute to the violation of water quality standards' indicates that, so long as some level of discharge may be causally attributed to the impairment of [impaired] waters, a permit shall not be issued." *Cities of Annandale & Maple Lake*, 702 N.W.2d at 775. The court further concluded that

> the record demonstrates that, notwithstanding the reduction in phosphorus resulting from other sources, the waters at issue remain impaired. And the amount of phosphorus discharged into the North Fork from the proposed wastewater-treatment plant, which is more than double the current phosphorus level of 1,400 pounds per year, will contribute to impaired nutrient levels in Lake Pepin.

Id. The dissent in essence agrees with the court of appeals' plain reading analysis that places a very narrow interpretation on 40 C.F.R. § 122.4(i) and thus would affirm the court of appeals.

It appears that the difference between the MPCA's interpretation of the regulation and the court of appeals' interpretation centers on whether *any* discharge to an "impaired water" necessarily "causes or contributes to a violation of water quality standards" or, alternatively, if

net improvements to an "impaired water" can be considered in determining whether a new source or discharger "causes or contributes" to the violation of water quality standards. Specifically, the MPCA and the court of appeals ascribe different meanings to "cause or contribute" and "water quality standards" as used in the context of the CWA and as applied to the facts of this case.

The court of appeals' majority did not find any ambiguity in the regulation's language and held that under a "plain reading of the phrase 'cause or contribute to the violation of water quality standards,'" an NPDES permit may not be issued "so long as some level of discharge may be causally attributed to the impairment of Section 303(d) waters." *Cities of Annandale & Maple Lake*, 702 N.W.2d at 775. Because phosphorus "does not break down into smaller components," the court of appeals essentially concluded that any increase in phosphorus discharge from the proposed plant will affect the Lake Pepin watershed. *Id.* at 774.

In essence, the court of appeals' majority viewed the phrase "cause or contribute to the violation of water quality standards" in black-and-white terms. But both the Supreme Court and our court have said that "the meaning of statutory language, plain or not, depends on context." *King v. St. Vincent's Hosp.*, 502 U.S. 215, 221 (1991); *see also State v. Donaldson*, 41 Minn. 74, 80, 42 N.W. 781, 782 (1889) (noting that even when "the words are plain," ambiguity "may be created by the context"). Therefore, we must view the words of the regulation "in their setting, not isolated from their context." *Chiodo v. Bd. of Educ.*, 298 Minn. at 382, 215 N.W.2d at 808. *See also Metro Office Parks Co.*, 295 Minn. at 352, 205 N.W.2d at 124. Here, the regulation must be interpreted within the context of the language of the CWA. Such an approach is consistent with the approach taken by other courts, which have "favored a 'whole act' approach to the Clean Water Act." 3B Norman J. Singer, *Statutes and Statutory Construction* § 77:4 (6th ed. 2003).

The MPCA found that the proposed plant, when operating at capacity, would increase phosphorus discharge into the North Fork by approximately 2,200 pounds annually over that

which is currently discharged by the Maple Lake plant. But the MPCA found that this increase in phosphorus discharge would be offset by an approximate 53,500-pound reduction in phosphorus discharge into the North Fork due to the upgrade of a wastewater treatment plant in nearby Litchfield. Based on this offset, the MPCA concluded that the proposed plant would not contribute to water quality standards violations in the Lake Pepin watershed and therefore granted the permit.

The court of appeals' majority in reversing the MPCA concluded that there is no "indication that a discretionary system of offsets is authorized" under 40 C.F.R. § 122.4(i). 702 N.W.2d at 774-75. Nevertheless, the court of appeals concluded that its decision to reverse the MPCA did not represent a complete ban on discharge [12] that would reach waters already in violation of existing water quality standards, which type of ban was proscribed by the holding of the United States Supreme Court in *Arkansas v. Oklahoma*. 702 N.W.2d at 775-76 (citing 503 U.S. at 108). But on appeal the MPCA contends that the court of appeals' interpretation is contrary to the Supreme Court's holding in *Arkansas* and will effectively mean that no new permits can be issued to wastewater treatment plants where the phosphorous discharge will flow into impaired waters, at least not before TMDLs are established. [13]

Given the Supreme Court's holding in *Arkansas*, we conclude that the court of appeals' narrow reading of the regulation in essence imposes a complete ban on new facilities like the one proposed here and that such an interpretation is unreasonable. In *Arkansas*, the owners of a new wastewater treatment plant in the state of Arkansas applied for a permit to discharge up to 6.1 million gallons of effluent per day into an unnamed stream. 503 U.S. at 95. The stream ultimately flowed into the Illinois River in Oklahoma. *Id.* Oklahoma asserted the discharge into a tributary of the Illinois River would violate its water quality standards which provide that no degradation of water quality shall be allowed in the upper Illinois River. *Id.* An administrative law judge "found that there would be no detectable violation of [Oklahoma's water quality standards]" from the proposed plant and approved the permit. *Id.* at 97. On appeal, the Tenth

Circuit Court of Appeals reversed the issuance of the permit, holding that "the Clean Water Act prohibits granting an NPDES permit * * * where applicable water quality standards have already been violated." *State v. Okla. v. Envtl. Prot. Agency,* 908 F.2d 595, 616 (10th Cir. 1990).

The Supreme Court granted certiorari and reversed, concluding that the Tenth Circuit "construed the Clean Water Act to prohibit any discharge of effluent that would reach waters already in violation of existing water quality standards. We find nothing in the Act to support this reading." *Arkansas*, 503 U.S. at 107 (footnote omitted). "Thus, rather than establishing the categorical ban announced by the [Tenth Circuit]—which might frustrate the construction of new plants that would improve existing conditions—the Clean Water Act vests in the EPA and the States broad authority to develop long-range, area-wide programs to alleviate and eliminate existing pollution." 503 U.S. at 108. The dissent also notes and refers to the latter clause from *Arkansas*; but it is also important to note that the language that precedes this clause, which language explicitly rejected the Tenth Circuit's narrow interpretation of the CWA, rejected a categorical ban that might frustrate the construction of new plants that would improve existing conditions.

The Supreme Court in *Arkansas* did not address the use of offsets in determining whether a new discharge would cause or contribute to the violation of water quality standards, but the Environmental Appeals Board (EAB), which is the final EPA decisionmaker on administrative appeals under the CWA, has applied the principles underlying *Arkansas* to a situation similar to the case before us. *Carlota Copper Co.*, 11 Envtl. Admin. Decisions 692 (Sept. 30, 2004) (order denying review). In *Carlota Copper Co.*, several environmental groups challenged the issuance of an NPDES permit to the Carlota Copper Company for a new open-pit copper mine project that would discharge effluent into an impaired body of water. *Id.* at 702-06. The permit required Carlota to partially remediate, as an offset against Carlota's proposed new copper discharge, another of its copper mines, which was located upstream from the proposed

mine. *Id.* at 705. In its order denying review of the permit, the EAB stated:

> There is nothing in * * * 40 C.F.R. section 122.4(i) providing that an impaired water segment needs to be restored prior to allowing new source discharges into the water body. The Board declines to endorse Petitioners' interpretation because to do so would perpetrate the very outcome the Supreme Court in *Arkansas v. Oklahoma* sought to avoid (*adoption of a rigid approach that might frustrate the construction of new facilities that would improve existing conditions*). The Board finds no clear error in the Region's determination that Carlota's discharges will not "cause or contribute" to a violation of water quality standards, but rather, Carlota will improve existing conditions because the reductions that will result from its activities are greater than the projected discharges. In addition, the Region did not clearly err in determining that "there are sufficient remaining pollutant load allocations to allow for Carlota's discharges."

11 Envtl. Admin. Decisions at 695 (syllabus) (emphasis added) (citation omitted).

The MCEA argues that *Carlota* is distinguishable because (1) the permit in *Carlota* was issued post-TMDL; and (2) the offset was required to be made by the same discharger that was applying for the new permit. Although it is correct that the Carlota permit was issued after a TMDL had been established for the impaired body of water, the first sentence of 40 C.F.R. § 122.4(i) applies regardless of whether a TMDL has been completed. *See Carlota*, 11 Envtl. Admin. Decisions at 706; 40 C.F.R. § 122.4(i). Even when a TMDL has been established, a permitting authority must still determine that the new discharge will not cause or contribute to the violation of water quality standards. Therefore, the fact that the Carlota permit was issued post-TMDL does not mean that the EAB's reasoning is not helpful and important when we analyze the issuance of a pre-TMDL permit.

Moreover, while MCEA argues that *Carlota* is distinguishable because it dealt with an offset made by the same discharger, the propriety of considering offsets from another discharger when determining whether a new source or discharge causes or contributes to the violation of water quality standards is supported by the EPA's interpretation of 40 C.F.R. § 122.4(i). The interpretation is documented in an EPA memorandum in *Sierra Club v. Clifford*, No. Civ.A. 96-0527, 1999 WL 33494861 (E.D. La. 1999). In its memorandum in *Clifford*, the EPA stated:

> To date, EPA has not formally interpreted 40 C.F.R. § 122.4(i) with respect to

> what conditions, if present, would allow for permit issuance to new sources or new dischargers proposing to discharge their effluent into impaired waters. * * * In practice, permitting has occurred in at least three situations that EPA believes are consistent with current regulations.

Defendants' Response Memorandum in Support of Schedule for Preparation of Total Maximum Daily Loads at 52, *Clifford*, 1999 WL 33494861. The EPA went on to identify three situations in which, by EPA practice, an NPDES permit may be issued to a new source or new discharger proposing to discharge effluent into impaired waters before completion of a TMDL. *Id.* at 52-53. The third situation identified by the EPA is

> where it is demonstrated that other pollutant source reductions (such as nonpoint source reductions implemented by the discharger) will offset the discharge in a manner consistent with [water quality standards]. The ultimate result of this type of "offset" or "trade" may be a net decrease in the loadings of the pollutant of concern in the CWA § 303(d) listed water, and therefore, EPA, by practice, has considered a discharge which has been offset in accordance with permit requirements not to "cause or contribute to a violation of water quality standards."

Id. at 53.

The court of appeals' majority concluded that the EPA's brief in *Clifford* could not be relied upon as documentation of the EPA's interpretation of 40 C.F.R. § 122.4(i) because the brief was drafted in the course of litigation and "the EPA's brief does not reference any preexisting ruling or practice with respect to 40 C.F.R. § 122.4(i)." *Cities of Annandale & Maple Lake*, 702 N.W.2d at 774 n.4. The Supreme Court has concluded that a federal agency's interpretation of a law expressed in the course of litigation is not entitled to deference if it is "wholly unsupported by regulations, rulings, or administrative practice." *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 212 (1988). But contrary to the court of appeals' assertion, the EPA's brief in *Clifford* expressly identifies the EPA's existing "administrative practice" that reflects its interpretation of 40 C.F.R. § 122.4(i). Thus, we conclude that *Bowen* does not preclude the MPCA from relying on the EPA's brief in *Clifford* in its interpretation of 40 C.F.R. 122.4(i). Moreover, the position advanced by the EPA is compelling evidence that 40 C.F.R.

122.4(i) is susceptible to different reasonable interpretations.

Finally, we note that the MPCA's interpretation of 40 C.F.R. 122.4(i) also finds support in the policy considerations behind the EPA's Final Water Quality Trading Policy, which was promulgated on January 13, 2003. This policy supports "pre-TMDL trading in impaired waters to achieve progress towards or the attainment of water quality standards." Envtl. Prot. Agency, Water Quality Trading Policy, 68 Fed. Reg. 1610 (Jan. 13, 2003), *available at* http://www.epa.gov/owow/watershed/trading/finalpolicy2003.html. The EPA, in addressing the grounds for its water quality trading policy and why it believes this policy provides greater flexibility and has the potential to achieve greater water quality and environmental benefits, stated:

> Finding solutions to these complex water quality problems requires innovative approaches that are aligned with core water programs. Water quality trading is an approach that offers greater efficiency in achieving water quality goals on a watershed basis. It allows one source to meet its regulatory obligations by using pollutant reductions created by another source that has lower pollution control costs. Trading capitalizes on economies of scale and the control cost differentials among and between sources.

68 Fed. Reg. at 1609. While we are not dealing with a market-based program in the case before us, we conclude that much of the EPA's rationale on trading applies to the MPCA's consideration of offsets in enforcing and administering water quality regulations with respect to these two state subdivisions—the Cities.

The foregoing analysis demonstrates that the interpretation of 40 C.F.R. 122.4(i) is not a clear-cut issue where we can just give effect to an unambiguously expressed intent and therefore substitute our judgment for that of the MPCA. Rather, our analysis reveals the differing interpretations that have been applied to this regulation. Therefore, we conclude that 40 C.F.R. 122.4(i) is unclear and susceptible to different reasonable interpretations. Accordingly, we must next proceed to determine if the MPCA's interpretation is reasonable and to what extent we are to consider the MPCA's expertise and special knowledge when making this determination.

V.

We next address whether, under 40 C.F.R. § 122.4(i), it is reasonable for the MPCA to consider offsets from another source within the watershed in determining whether a new discharge source causes or contributes to the violation of water quality standards. As an initial matter, we note that the focus of our inquiry is whether the MPCA's interpretation of 40 C.F.R. § 122.4(i) is reasonable under the circumstances of *this* case—that is, a case involving pollution offsets that are both contemporaneous and located in the same watershed. Further, the determination of whether the proposed joint wastewater treatment plant will "cause or contribute to the violation of water quality standards" requires some factual inquiry. Here, we note that the interpretation of "cause or contribute to the violation of water quality standards" is not unlike the question of whether "significant environmental effects" will result from a project, which we held in *MCEA v. MPCA* "necessarily requires application of the agency's technical knowledge and expertise to the facts presented." 644 N.W.2d at 464. Therefore, we will also address whether our interpretation of 40 C.F.R. § 122.4(i) requires the MPCA's training and expertise for its interpretation and application.

The MPCA's strategy for addressing phosphorus in NPDES permitting demonstrates that the question of whether a particular source is contributing to the violation of water quality standards is not as simple as determining whether there is any net increase in phosphorus discharge from a particular source. The MPCA uses "basin/watershed management approaches as the main policy context for addressing phosphorus." *See* Minn. Pollution Control Agency, *Strategy for Addressing Phosphorus in National Pollutant Discharge Elimination System (NPDES) Permitting* (March 2000), *available at* http://www.pca.state.mn.us/water/pubs/phos-npdesstrategy.pdf (noting that because "[i]nformation and knowledge about nutrient management issues are changing rapidly," the strategy should be viewed as "transitional"). Under this strategy, the MPCA establishes an ambient water quality goal for the watershed for phosphorus. Minn. Pollution Control Agency, *MPCA Phosphorus (P) Stragegy: NPDES*

Permits at 2 (March 2000), http://www.pca.state.mn.us/water/pubs/phos-npdes.pdf (hereinafter *NPDES Permits*). This goal can be numeric (such as a percentage reduction) or narrative (such as "no net increase"), depending on the specific site and water resource.

The MPCA considers a number of variables in assessing how a particular discharge of phosphorus "affects" the watershed. *See NPDES Permits* at 2. The MPCA's assessment model "includes using standard lake/reservoir eutrophication models, data assessment, scientific research, and other information relating to the lake/reservoir and its tributaries, watershed, and cumulative point and nonpoint source phosphorus loads." *Id.* Using this assessment model, the MPCA determines whether "the individual contribution of the discharge" causes any adverse changes in terms of actual or predicted increases in chlorophyll-*a* concentration, increased frequency of nuisance algae blooms, reduced transparency, reduced dissolved oxygen concentrations, or related adverse responses to phosphorus. *Id.* This determination is typically made over a range in flow conditions after MPCA scientists review data and apply their "best professional judgment." *Id.* Further, the MPCA has adopted the concept of "de minimus phosphorus loadings"—municipal facilities with a phosphorus load of 1,800 pounds per year or less. *Id.* at 3. In the MPCA's experience, these "small discharges" generally do not have "a measurable impact on the environment." *Id.*

In making its determination, the MPCA must also deal with difficult policy issues related to accommodating population growth in a state with significant surface waters, many of which are considered impaired. *See NPDES Permits* at 4. As previously noted, these are issues on which the CWA does not provide clear guidance. Because the MPCA's application of 40 C.F.R. § 122.4(i) requires a careful balancing of competing policies and interests across the state, the agency must necessarily draw on its expertise and special knowledge. *See Arkansas*, 503 U.S. at 106 (stating that in the CWA, Congress struck a careful balance among competing policies and interests). Here, we believe that any necessary policy determinations in interpreting the regulation are more properly left to the MPCA, the agency responsible for interpreting its

regulation. *Cf. Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 1002-03 (2005) (supporting deference to administrative agencies, particularly where the questions "involve a 'subject matter [that] is technical, complex, and dynamic,'" as well as difficult policy judgments (*quoting Nat'l Cable & Telecomms. Ass'n, Inc. v. Gulf Power Co.*, 534 U.S. 327, 339 (2002)). Therefore, for all the foregoing reasons, we conclude that the MPCA's technical expertise and training is necessary to interpret and apply 40 C.F.R. § 122.4 (i).

Based on the foregoing, we conclude that when viewed in its setting and not isolated from its context, the broad nature of the phrase "cause or contribute to the violation of water quality standards" leaves leeway for the MPCA to make a range of policy judgments based on the MPCA's scientific and technical knowledge. *Cf. Natural Res. Def. Council vs. Costle*, 568 F.2d 1369, 1382 (D.C. Cir. 1977) ("conced[ing] necessary flexibility in the shaping of [NPDES] permits that is not inconsistent with the clear terms" of the CWA). Nothing in the language of the regulation or the structure of the CWA prohibits the MPCA from considering offsets in this situation. In light of the multitude of variables and possible approaches in determining whether a specific discharge of phosphorus will "cause or contribute to the violation of water quality standards"—not the least of which is whether the MPCA should consider the discharge in isolation or in the context of other reductions in the watershed as a whole—it appears that the MPCA's interpretation of 40 C.F.R. § 122.4(i) is reasonable.

Our analysis also shows that the MPCA's interpretation of 40 C.F.R. § 122.4(i) as allowing offsets in determining whether a new source will cause or contribute to the violation of water quality standards is supported by the reasoning of the Supreme Court in *Arkansas*, the EAB's decision in *Carlota*, the EPA's memorandum in *Clifford,* and the rationale behind the EPA's water quality trading policy. Moreover, we conclude that, when dealing with a situation like the one presented in this case—two aging wastewater treatment facilities with expired NPDES permits, which are at or near capacity in a region of the state that is experiencing

significant growth—it was not unreasonable for the MPCA to allow a 2,200-pound per year (at capacity) increase in phosphorus discharge from a new wastewater treatment facility to be offset by a contemporaneous 53,500-pound per year decrease in a nearby facility that is located in the same watershed. Given the flexibility and broad authority delegated to states to develop "long-range, area-wide programs" for water quality and the lack of any express prohibition on offsets, we will not, under these circumstances, second-guess the reasonableness of the MPCA's decision that the Cities' new joint wastewater treatment facility will not "contribute to the violation of water quality standards." *See Arkansas*, 503 U.S. at 108, 114 (stating that "[i]t is not our role, or that of the Court of Appeals, to decide which policy choice is the better one").

Accordingly, we conclude that the MPCA's interpretation of 40 C.F.R. § 122.4(i) as allowing offsets from another source in determining whether a new source will cause or contribute to the violation of water quality standards is reasonable and is consistent with the purposes and principles of the CWA.

VI.

In summary, we conclude that the MPCA is legally required to enforce and administer 40 C.F.R. § 122.4(i) as its own regulation, that 40 C.F.R. § 122.4(i) is ambiguous, and that consideration of the MPCA's training and expertise is necessary when we make a determination of whether the MPCA's interpretation of 40 C.F.R. § 122.4(i) to allow offsets from another source in determining whether a new source will cause or contribute to the violation of water quality standards is reasonable. *Cf. Arkansas*, 503 U.S. at 110 (recognizing that the system of federally-approved state standards as applied in the interstate context constitutes federal law and the EPA's interpretation of the state's standard is entitled to deference). Further, we conclude that when we give the appropriate deference to the MPCA's interpretation of 40 C.F.R. § 122.4 (i), we must uphold the MPCA's interpretation of the regulation because we have concluded that the agency's interpretation is reasonable and consistent with the purposes and principles of the

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CWA. *See St. Otto's Home*, 437 N.W.2d at 40. We also conclude that, at best, the narrow interpretation of 40 C.F.R. 122.4(i) adopted by the court of appeals' majority and the dissent demonstrates that the interpretation of the regulation's language is unclear and that it is—and has been—susceptible to different interpretations. At worst, such an interpretation is wrong and will perpetuate the very outcome the Supreme Court sought to avoid with its decision in *Arkansas v. Oklahoma*—namely, the adoption of such a rigid approach that construction of new facilities that would improve existing conditions would be thwarted.

Finally, a few additional observations on the dissent are in order. At the core of our difference of opinion with the dissent is the dissent's conclusion that 40 C.F.R. § 122.4(i) unambiguously articulates an absolute prohibition that denies the MPCA the ability to issue a permit to the Cities for their proposed joint wastewater treatment facility. While we reach the opposite conclusion—that the regulation is ambiguous—and as a result consider the dissent's adoption of MCEA's absolute prohibition argument to be too narrow an interpretation and too restrictive, we nevertheless have acknowledged that 40 C.F.R. § 122.4(i) is potentially susceptible to different interpretations. What we find problematic is the dissent's comment that "no rationale for deference is present in this case." This is not so. What we have done is to first apply the "own regulation" factor to determine if a deference analysis is appropriate. Then, after having answered the "own regulation" question in the affirmative, we have proceeded to thoroughly implement our standard deference analysis, which includes such factors as ambiguity, expertise, and reasonableness.

With respect to our standard deference analysis, we are in apparent agreement with the dissent that we should decide whether to accord deference on a case-by-case basis. And that is precisely what we have done here. Specifically, we have concluded that deference is warranted only after thoroughly considering multiple factors, not the single factor to which the dissent would reduce our analysis. Judicial deference to an agency's interpretation of its own regulation is rooted in the separation of powers doctrine. In the spirit of this doctrine, we acknowledge that

an agency's training and expertise are helpful and frequently necessary to properly interpret and apply a regulation that is unclear and susceptible to more than one reasonable interpretation. Further, we disagree with the dissent's conclusion that, based on this opinion, the MPCA can use discharge reductions from the "distant past" or "unknown future" or "geographically distant locales" to "largely circumvent" its mandate. Given our conclusion that, under our standard deference analysis, reasonableness is necessarily determined using a case-by-case inquiry, our opinion does not authorize, much less invite, the MPCA to interpret 40 C.F.R. § 122.4(i) to allow discharge permits in cases involving offsets that are remote in either time or place.

For all the foregoing reasons, we hold that the court of appeals erred when it reversed the MPCA's decision to issue the NPDES permit for the Cities' proposed wastewater treatment plant.

Reversed.

ANDERSON, Russell A., C.J., took no part in the consideration or decision of this matter.

DISSENT

PAGE, Justice (dissenting).

I.

I respectfully dissent. While I agree that under some circumstances deference to a state agency's interpretation of a federal regulation may be appropriate, deference is not appropriate in this case. Judicial deference to an agency's interpretation of a regulation is inappropriate if the language of the regulation is unambiguous, as an agency is not permitted to contravene the plain meaning of the language used in the regulation. *See St. Otto's Home v. Minn. Dep't of Human Servs.*, 437 N.W.2d 35, 40 (Minn. 1989). While context may help us ascertain its plain meaning, *see King v. St. Vincent's Hosp.*, 502 U.S. 215, 221 (1991), an examination of the actual language that comprises the text is *always* necessary to reach conclusions about meaning. In this case, the court concludes that 40 C.F.R. § 122.4(i) (2006) is ambiguous without any analysis of the regulation's actual language and without explanation as to what in the language is unclear. Instead, the court lists various interpretations of 40 C.F.R. § 122.4(i) that have been offered in the course of other litigation. The fact that multiple interpretations have been suggested does not establish ambiguity, *see Bank Midwest, Minnesota, Iowa, N.A. v. Lipetzky*, 674 N.W.2d 176, 179 (Minn. 2004), yet the court concludes that the regulation is ambiguous simply because of "differing interpretations that have been applied to this regulation." Analyzing 40 C.F.R. § 122.4(i)'s actual language, I conclude that deference to the MPCA's interpretation of 40 C.F.R. § 122.4(i) is not warranted because the regulation is not ambiguous.

II.

Under 40 C.F.R. § 122.4(i), the Minnesota Pollution Control Agency (MPCA) may not issue a National Pollutant Discharge Elimination System (NPDES) permit "[t]o a new source or [15] a new discharger, if the discharge from its construction or operation will cause or contribute to the violation of water quality standards." 40 C.F.R. § 122.4(i) (footnote added). The

language of the regulation is clear. No permit may be issued to a new source or discharger if it will cause a violation of water quality standards, e.g., if the addition of phosphorus discharged from the source seeking the permit would elevate phosphorus levels in a body of water above the level that constitutes a violation. Nor may a permit be issued to a new source or discharger if it will contribute to a violation of water quality standards, e.g., if the new source would discharge phosphorus into a body of water previously determined to have phosphorus levels in excess of permissible levels. In determining whether a discharge will cause or contribute to a violation, the MPCA may take into consideration pollution from sources other than the source seeking a permit, but *only* so far as is necessary to determine whether a violation exists before or will exist after issuance of the permit.

It is undisputed that phosphorus levels in the Lake Pepin Watershed currently exceed water quality standards and, as determined by the MPCA, are in violation of those standards. Minn. Pollution Control Agency, *MPCA 2002 303(d) List* (Jan. 22, 2003), *available at* http://www.pca.state.mn.us/publications/reports/tmdl-2002list.pdf. The MPCA has also determined that the proposed Maple Lake/Annandale facility will increase the cities' discharge of phosphorus into that watershed from approximately 1,400 pounds of phosphorus annually to about 3,600 pounds annually. Thus, while the proposed facility will not cause a violation of the standards, it is clear that an increase of 2,200 pounds of phosphorus per year will "help bring about," that is, contribute to, a water quality standards violation in the Lake Pepin Watershed. It is also clear that the violation will occur irrespective of any action taken by the City of Litchfield to reduce the amount of phosphorus it discharges into the watershed. By granting the NPDES permit to the cities of Maple Lake and Annandale, the MPCA ignores the unambiguous language of 40 C.F.R. § 122.4(i). Therefore, the MPCA's issuance of the NPDES permit should be reversed.

III.

Even if the plain meaning of the regulation's language is ignored and it is assumed that

the regulation is ambiguous, I would still conclude that deference is inappropriate because none of the traditional rationales for deferring to an agency's interpretation of a regulation are present in this case.

Under our case law, one rationale for giving deference to an agency's reasonable interpretation of an ambiguous regulation is rooted in the separation of powers doctrine. *Reserve Mining Co. v. Herbst*, 256 N.W.2d 808, 824 (Minn. 1977). More specifically, deference is warranted to prevent the judiciary from exercising excessive or potentially unconstitutional discretion over policy matters. *Id.* at 825. Such matters are properly the domain of the legislative and executive branches, which have both greater fact-finding abilities and greater political accountability than the judiciary. *See id.* However, when judicial review of an agency's interpretation of a regulation does not involve second-guessing policy decisions, the separation of powers doctrine is not a reason to defer to an agency's interpretation. To the contrary, the separation of powers doctrine compels the judiciary to ensure that other governmental bodies execute laws faithfully.

Another rationale for deferring to an agency's interpretation of a regulation arises when, unlike the judiciary, the agency has "the expertise necessary to decide technical matters." *In re Excess Surplus Status of Blue Cross & Blue Shield of Minn.*, 624 N.W.2d 264, 278 (Minn. 2001). Accordingly, if the regulation refers to an open-ended technical or scientific matter—for example, a requirement that the agency determine whether certain effluents cause or contribute to a public health hazard, *see Minn. Ctr. for Envtl. Advocacy v. Minn. Pollution Control Agency*, 644 N.W.2d 457, 464 (Minn. 2002) (interpreting "significant environmental effects")—then it would be appropriate to defer to the agency's interpretation, provided that interpretation is reasonable. However, when interpretation of the regulation does not implicate any special scientific or technical expertise, there is no reason to defer. In fact, when the regulation requires only a straightforward reading, it is the judiciary that possesses the special expertise.

Deference may also be appropriate "when the administrative practice at stake involves a

contemporaneous construction of a statute [or regulation] by the [people] charged with the responsibility of setting its machinery in motion, of making the parts work efficiently and smoothly while they are yet untried and new." *Udall v. Tallman*, 380 U.S. 1, 16 (1965) (internal quotation marks omitted); *see also Resident v. Noot*, 305 N.W.2d 311, 312 (Minn. 1981) (noting deference is appropriate "when the agency interpretation is one of long standing"); *In re Estate of Abbot*, 213 Minn. 289, 296, 6 N.W.2d 466, 469 (1942) ("That great weight should be given departmental construction of taxation statutes is dependent upon such construction's having been long continued and uniform * * *." (Citations omitted.)). In such a case, deference may be justified because longstanding and consistent interpretations may have encouraged reliance by the public and because the failure of a delegating authority to correct the interpretation implies either that the interpretation is correct or that the authority has willingly acquiesced to the agency's interpretation. *See Udall*, 380 U.S. at 17-18; *In re Estate of Abbot*, 213 Minn. at 296, 6 N.W.2d at 470. However, in cases in which the agency interpretation is recent, any reliance interest is diminished, and changed or new interpretations may be the product of political opportunism rather than good-faith efforts at interpretation.

As noted previously, no rationale for deference is present in this case. The MPCA is tasked with determining whether "construction or operation" of a new facility "will cause or contribute to the violation of water quality standards." 40 C.F.R. § 122.4(i). Water quality standards have been set and are not in dispute. *See* 33 U.S.C. § 1313 (2000). Therefore, on its face, that determination is simply a matter of measuring a known quantity—pollutants discharged—against an established standard—the water quality standards. Thus, a court's review of that determination does not require judicial second-guessing of either legislative or executive policy decisions. The only question presented is whether the policy decision made is being properly carried out. Nor does this case involve a scientific evaluation of technical or scientific matters beyond the comprehension of judges; it requires only a basic understanding of the English language and elementary number usage. Further, 40 C.F.R. § 122.4(i) was

promulgated in the mid-1980s, so the regulation cannot be considered "untried and new." Moreover, an interpretation first offered by the MPCA in 2004—or by the EPA in litigation in 1999—cannot be considered "contemporaneous."

In comparison, if we were reviewing water quality standards set by the MPCA, deference would be warranted because that decision requires the evaluation of the effects of discharged substances on wildlife and public safety, which implicates special technical and scientific competence. *See Minn. Ctr. for Envtl. Advocacy*, 644 N.W.2d at 465. It would also be warranted because selecting such standards requires policy judgments involving the analysis of costs and benefits of the different options and consideration of competing interests. For example, if it were concerned with population growth, the MPCA could have presumably indexed water quality standards to population. Thus, if we were being asked to review the actual standards selected by the MPCA, considerations related to the separation of powers doctrine would make deference entirely appropriate. Similarly, if we were being asked to review the MPCA's methods for measuring contaminants existing in a body of water or in effluent from a discharger, the agency's decisions would also merit deference, as those decisions would clearly require application of the agency's special scientific and technical knowledge. However, once water quality standards have been established and the appropriate measurements have been taken, neither expertise nor separation of powers should permit the MPCA latitude to redefine "cause or contribute" in order to ignore those standards.

In determining that we should defer to the MPCA's interpretation of 40 C.F.R. § 122.4(i), the court conflates the deference that might properly be accorded the MPCA in setting water quality standards with a reason to defer to the agency's interpretation of all other aspects of the regulatory scheme. In doing so, the court blurs the line between setting the standards and determining whether an action will cause or contribute to the violation of those standards, and on that basis claims that the issue before the court is both a matter of policy and a matter implicating special expertise. It is neither.

IV.

Even if it is assumed that the regulation is ambiguous and that some or all of the traditional reasons for deferring to the agency's interpretation of the regulation are present, before deference is appropriate, the agency's interpretation must be reasonable, as a court should not allow an agency to impose a meaning on a legal authority that its text will not bear. *See St. Otto's Home*, 437 N.W.2d at 40. Here, the court determines that the MPCA's interpretation of 40 C.F.R. § 122.4(i) is reasonable without ever connecting that interpretation to the language of the regulation. Instead, the court describes the complicated analysis chosen by the MPCA to address phosphorus discharge in the NPDES permitting system and announces that these matters are within the MPCA's discretion.[16] However, if the MPCA's chosen interpretation is incompatible with the text of 40 C.F.R. § 122.4(i), the complexity of or the care taken in applying that interpretation is not helpful. Because the language of the regulation, as informed by any relevant agency expertise, is a necessary touchstone for determining the reasonableness of the interpretation, the court's failure to discuss whether and how the MPCA's interpretation is supported by the language of 40 C.F.R. § 122.4(i) undermines its reasonableness conclusion. When examined in light of the regulation's language, the interpretation of 40 C.F.R. § 122.4(i) offered by the MPCA is not reasonable.

As an initial matter, the court is mistaken when it suggests that the U.S. Supreme Court's decision in *Arkansas v. Oklahoma*, 503 U.S. 91 (1992), establishes the reasonableness of the MPCA's interpretation. First, *Arkansas v. Oklahoma* does not stand for the proposition that it is unreasonable to interpret 40 C.F.R. § 122.4(i) as prohibiting issuance of all NPDES permits in connection with waters in violation of water quality standards. *Arkansas v. Oklahoma* involved interpretation of the Clean Water Act itself, 40 C.F.R. § 122.4(d), and Oklahoma state standards requiring "no degradation of water quality." 503 U.S. at 95, 107. It did not involve interpretation of 40 C.F.R. § 122.4(i) and the phrase "cause or contribute." While the court in *Arkansas v. Oklahoma* did hold that nothing in the Clean Water Act established a categorical

ban on "any discharge of effluent that would reach waters already in violation of existing water quality standards," *id.* at 107, the Court did not hold that the EPA was without authority to promulgate a regulation establishing a categorical ban on issuance of NPDES permits for bodies of water in violation of water quality standards. To the contrary, the court stated that the Act "vests in the EPA and the States broad authority to develop long-range, area-wide programs to alleviate and eliminate existing pollution."[17] *Id.* at 108. The EPA used that broad authority in promulgating 40 C.F.R. § 122.4(i). Second, it does not follow from a fair reading of *Arkansas v. Oklahoma* that the pollution offset proposed for the Lake Pepin Watershed District, as advocated by the MPCA here, is reasonable.

Moreover, there is nothing in the text of 40 C.F.R. § 122.4(i) that suggests that one discharger may be allowed to increase its allowable discharge simply because another discharger has taken steps to reduce its discharge. In addition, the MPCA's interpretation appears to be in conflict with the goals of both the NPDES permitting scheme and the Clean Water Act, under which the NPDES permit system operates. I presume that elimination of pollutant discharge is a goal of the National *Pollutant Discharge Elimination* System, and the purpose of the Clean Water Act "is to *restore* and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a) (2000) (emphasis added); *see also* 33 U.S.C. § 1251(b) (2000) ("It is the policy of the Congress to recognize, preserve, and protect the primary responsibilities and rights of States to *prevent, reduce, and eliminate* pollution, to plan the development and use (including restoration, preservation, and enhancement) of land and water resources, and to consult with the Administrator in the exercise of his authority under this chapter." (Emphasis added.)). In contrast, the MPCA's interpretation of 40 C.F.R. § 122.4(i), which permits discharge offsets, is not limited in either time or place. Under this interpretation, presumably the MPCA may consider offsets based on discharge reductions from the distant past and unknown future as well as from geographically distant locales, which would largely circumvent any mandate to improve water quality and reduce pollution. To hold that the

MPCA's interpretation is reasonable is to hold that reading the "cause or contribute" language out of 40 C.F.R. § 122.4(i) is also reasonable. It is also to hold that the MPCA has unfettered discretion to issue permits allowing polluters to cause or contribute to violations of water quality standards. But none of these holdings are reasonable. Thus, I conclude that the MPCA's interpretation of 40 C.F.R. § 122.4(i) in this case is not reasonable.

V.

In summary, 40 C.F.R. § 122.4(i) is not ambiguous, there are no factors present in this case that would indicate that deference to the MPCA's interpretation of the regulation is appropriate, and the MPCA's interpretation of the regulation is not reasonable. Accordingly, I would affirm the court of appeals' reversal of the MPCA's decision to issue the NPDES permit.

MEYER, Justice (dissenting).

I join in the dissent of Justice Page.

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[1]

The MPCA, which has a commissioner and a nine-member Citizens' Board with the commissioner serving as chair of the board, administers the laws relating to preservation of the environment and protection of the public health consistent with the economic welfare of the state. Minn. Stat. ch. 116 (2006).

[2]

There was also a discussion of whether a contested case hearing was required. The MPCA concluded that a contested case hearing was not required because the first and third standards for granting a contested case hearing under Minn. R. 7000.1900, subp. 1 (2005), had not been satisfied. This conclusion by the MPCA has not been challenged on appeal.

[3]

A total maximum daily load (TMDL) is the sum of pollutants a body of water can absorb from all point and nonpoint sources, plus a margin of safety, and still meet water quality standards for its designated uses. Claudia Copeland, Congressional Research Serv. Report for Congress, *Clean Water Act and TMDLs* (Sept. 11, 1997), *available at* http://wwwncsonline.org/nle/crsreports/water/h20-24.cfm (last visited Apr. 27, 2007). "According to the EPA [Environmental Protection Agency], a TMDL provides a holistic view of

a watershed measuring the effect of each pollution source on the entire system. It also provides a framework for identifying specific actions needed to reach water quality standards." *Id.*

[4]

The MCEA did not initially seek review of this issue nor did it conditionally seek review of the issue in its response to the Cities' and MPCA's petitions for review.

[5]

The court of appeals also stated that "the [M]PCA concedes that this phosphorus will affect the Lake Pepin watershed." *Cities of Annandale & Maple Lake*, 702 N.W.2d at 774. It is not clear from the record whether the MPCA made such a concession.

[6]

Phosphorus is an essential nutrient for the plants and animals that make up the aquatic food web. U.S. Envtl. Prot. Agency, *Monitoring and Assessing Water Quality, 5.6 Phosphorus,* http://www.epa.gov/owow/monitoring/volunteer/stream/vms56.html (last visited Apr. 27, 2007). But excess phosphorus contributes to the degradation of water quality because it feeds algae blooms and affects water clarity, oxygen levels, and aquatic vegetation. *Id.*

[7]

See infra note 8.

[8]

In *Minn. Ctr. for Envtl. Advocacy v. Minn. Pollution Control Agency,* we expanded the application of the MAPA beyond decisions arising out of contested case proceedings and held that the MAPA also applies to "an area such as environmental review, uniquely involving application of an agency's expertise, technical training, and experience" even if the decision was not the result of a contested case proceeding. 644 N.W.2d, 457, 463-64 (Minn. 2002). This case falls within the area of environmental review, and therefore application of the MAPA standards is appropriate. *See* Minn. Stat. ch. 14 (2006). The MAPA provides that a court may reverse or modify an agency's decision

> if the substantial rights of the petitioners may have been prejudiced because the administrative finding, inferences, conclusion, or decisions are:
> (a) in violation of constitutional provisions; or
> (b) in excess of the statutory authority or jurisdiction of the agency; or
> (c) made upon unlawful procedure; or
> (d) a*ffected by other error of law*; or
> (e) unsupported by substantial evidence in view of the entire record as submitted; or
> (f) arbitrary or capricious.

Minn. Stat. ch. 14.69 (2006) (emphasis added).

[9]

Our case law also indicates that we will consider the agency's expertise and special knowledge when reviewing an agency's application of a regulation when application of the regulation is "primarily factual and necessarily requires application of the agency's technical knowledge and expertise to the facts presented." *MCEA v. MPCA*, 644 N.W.2d at 464. But this is not the situation that confronts us in this case.

[10]

We note that despite declining to defer to MnDOT's interpretation of "business area," we nevertheless upheld MnDOT's interpretation and reversed the court of appeals. *Eller Media*, 664 N.W.2d at 10.

[11]

The parties and amici also disagree whether an NPDES permit may be issued before a TMDL has been completed. As previously noted, the court of appeals held that 40 C.F.R. § 122.4(i) does not bar issuance of an NPDES permit before a TMDL has been completed, but no party sought review of this issue. Accordingly, we do not consider it.

[12]

While the court of appeals stated that its decision did not amount to a complete or categorical ban of discharge, amici League of Minnesota Cities and Wright County Mayors Association note that, following the court's decision, "[a]t least 15 of the League's member cities have already been notified by the MPCA that they will not be eligible for new facility permits as a result of the court of appeals' decision."

13]

We have held that a statute (or regulation) is ambiguous if it is susceptible to more than one reasonable interpretation. *See Weinberger v. Maplewood Review*, 668 N.W.2d 667, 672 (Minn. 2003). Therefore, the differing interpretations by the MPCA and the court of appeals might, standing alone, support an argument that reasonable minds may differ on the plain and ordinary meaning of "cause or contribute to a violation of water quality standards" and therefore the phrase is ambiguous. But such disagreement is not our standard for determining ambiguity. In the context of interpreting contract language, we have said, "the mere fact that a court has disagreed on the interpretation of contract language is not determinative that the contract language is ambiguous." *Bank Midwest, Minnesota, Iowa, N.A. v. Lipetzky*, 674 N.W.2d 176, 179 (Minn. 2004) (citing *Republic Nat'l Life Ins. Co. v. Lorraine Realty Corp.*, 279 N.W.2d 349, 354 (Minn. 1979)).

[14]

We note that the deferential approach we take with respect to the MPCA is similar to that taken by the Supreme Court in *Arkansas* where the Court gave deference to the EPA's interpretation of a similar standard. 503 U.S. at 112.

[15]

"To cause" means "[t]o bring about" or "[to produce] an effect, result, or consequence." *American Heritage Dictionary* 305 (3rd ed. 1996). "Contribute" means "[t]o give or supply in common with others" and "[t]o help bring about a result [or to] act as a factor." *Id.* at 410.

[16]

Significantly, the MPCA's analysis for addressing phosphorus discharge in the NPDES permitting process for bodies of water in violation of water quality standards for phosphorus is not as complicated as the court implies. Further, the court misrepresents the MPCA's policy by neglecting to mention that such bodies of water appear to be exempted from the normal NPDES permitting analysis. *See* Minn. Pollution Control Agency, *MPCA Phosphorus (P) Strategy: NPDES Permits* at 1 (March 2000), *available at* http://www.pca.state.mn.us/water/pubs/phos-npdes.pdf ("For water quality segments that are impaired or threatened for phosphorus or phosphorus-related conditions as listed on the 303(d) list [i.e., in violation of water quality standards], the MPCA shall use its authority to limit point-

source discharges, including existing discharges, by including phosphorus limits where appropriate in NPDES permits as part of a TDML allocation of point and/or nonpoint discharges.").

[17]

I note that the MPCA's interpretation of 40 C.F.R. § 122.4(i) does nothing to "alleviate and eliminate existing pollution." To the contrary, because there is no indication that the reduction in phosphorus discharge from the Litchfield facility is contingent on approval of the permit for the Annandale/Maple Lake facility, the MPCA's interpretation will result in increased pollution. Moreover, while the Court in *Arkansas v. Oklahoma* expresses concern about "frustrat[ing] the construction of new plants that would improve existing conditions," *see* 503 U.S. at 108, denial of a NPDES permit in this case will do nothing to prevent construction of facilities that, unlike the proposed Annandale/Maple Lake facility, will actually improve water quality.

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