COON CREEK WATERSHED DISTRICT
Request for Board Action

MEETING DATE: November 23, 2015
AGENDA NUMBER: 12
ITEM: Update on T&E Species Proposal

POLICY IMPACT: Discussion
FISCAL IMPACT: Non-Budgeted

REQUEST

BACKGROUND
The MAWD Board and the Rice Creek Watershed District have asked for additional details on our resolution:
- MAWDs request has more to do with examples and perhaps a boiled down version of what we are trying to do.
- Rice Creek’s request has to do with sorting through some of the details and consequences and liabilities of pursuing what is recommended.

In addition, DNR has commented on and provided an update to the items discussed at our October 16 meeting to review the issue.

These three items are discussed below

ISSUES/CONCERNS
1. **Summary for MAWD**: This resolution addresses six issues and suggests potential remedies.

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<th>Issue</th>
<th>Proposed Remedy</th>
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<td>1. Consistent feedback</td>
<td>Conformance with same timetable as LGUs. (M.S. 15.99)</td>
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<td>Consistency in mitigation cost per species ($500/plant(^1) vs $2,000/plant(^2))</td>
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<td>1. Permits with mitigation 10/5/15</td>
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<td>2. Proposed mitigation for Rubus stipulates X CSAH 14, Blaine</td>
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<td>2. Apparent waiver of need to avoid</td>
<td>Require sequencing analysis that is in “Good Faith” similar to WCA</td>
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<td>3. Salvage and loss of plants already</td>
<td>Allow salvage and transplantation of plants</td>
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<td>Issue</td>
<td>Proposed Remedy</td>
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<td>permitted for ‘taking’</td>
<td>to similar/approved habitats when Takings permit has been approved.</td>
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<td>4. Legal authority to accept cash mitigation</td>
<td>Seek specific legislative authority to accept cash mitigation based on the economic value of the species being taken.</td>
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<td>5. Economic valuation method used for cash mitigation</td>
<td>Direct a public process and review of method(s) – adopt as either rule or easily publicly available explanation of method and worksheets.</td>
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| 6. Additional tools needed for T&E management | Provide for:  
1. Timely confirmation of species presence  
2. Assessing potential effects on species through systematic analysis  
3. Determining the prudence and feasibility of a proposed project and taking through sequencing analysis  
4. Requirement of a Habitat Management plan when species are to be avoided. |

2. **Rice Creek Request for Clarifications:** The RCWD Board of Managers, in their review of the proposed CCWD MAWD resolution, has directed that staff request additional details related to:  
   1. How are these procedural steps (T/E inventory on site, sequencing steps, and development of habitat management plan) going to be efficiently incorporated into the local decision making process and the required MS 15.99 timelines?  
      a. The T/E Assessment (inventory) can be handled two ways:  
         i. As part of a “complete application” – Please note that some of the T/E species are hydrophytic. In those cases WCA indicates that the LGU is to deny the application  
         ii. Turned over to DNR since they are the permitting authority unless the species in question is wetland dependent then the LGU is also a permitting authority and is directed to deny the application  
      b. Sequencing: The Minnesota Endangered Species Act does not explicitly require sequencing prior to the DNR issuing a ‘Takings permit’. However, the Mn ESA does require consideration of alternatives.  
         The Mn DNR has also noted that the Minnesota Environmental Policy Act requires sequencing and have stated that they do require/conduct an alternatives/sequencing analysis during permit review prior to issuing any
‘Taking Permit’. Coon Creek WD’s concern is that DNR needs to be both more transparent and more rigorous in documenting applicant’s sequencing efforts and the reason’s and findings as why avoidance was found to be not feasible or prudent.

c. Habitat Management Plan: The District has required habitat management plans since 1997. Development of the plans are the responsibility of the applicant and vary in complexity depending on the circumstances and the needs of the species. We view them in a similar manner as wetland mitigation plans

2. Does this resolution shift any administrative burden to the District? Not really, other than maybe giving the land owner or applicant notice or a heads up that according to the NHIS there may be a T?E species on their property and that they may want to contact DNR wildlife.

3. How does the T/E program and the above-mentioned proposed process recognize locally developed watershed plans or local wetland management plans? There is no change. Administration of the Endangered Species Act by the MDNR remains independent of any plans or plan approval

3. **DNR Response and Progress**

1. Rich and I met with Randall Doneen (Environmental Review Unit Supervisor) and Lisa Joyal to discuss your concerns about the relationship between the timing of NHIS reviews and the CCWD’s permit time frame. They recommended that CCWD require applicants to submit the NHIS request at the start of the application process and only consider the application complete when the NHIS review has been completed. Also, since CCWD has a NHIS license, the watershed district could conduct the initial NHIS review and then only require an applicant with a “hit” to submit a NHIS review request to DNR. Lisa said she would be happy to work with you if questions on interpretation of information come up.

   **Response:** Thank you for your recommendation and offer of assistance.

   The District since the mid-1990’s has been voluntarily implementing the above actions you recommend through the District’s permitting process, and more recently as provided in the District’s Endangered and Threatened Species Policy and Procedure Manual, adopted by the District’s Board of Managers in June 2015.

2. We also discussed with Randall and Lisa a possible review process for draft endangered species permits with mitigation, so that the Endangered Species Coordinator can be better informed of interest in, or efforts on a particular project, whether from other DNR staff or local government units and other external
stakeholders. It was proposed that draft endangered species permits with mitigation be sent to the Regional Environmental Assessment Ecologists to forward to anyone they are aware of who may be interested in the draft permit. Comments on the permit would be sent directly to the Endangered Species Coordinator. This process was approved by the director and implementation is being discussed with regional managers.

**Response:** Excellent and certainly a step in the right direction in addressing one of our concerns. Is there any way to put a timeline on that process?

The local permit review process can be broken up into two phases:

1. Pre-Application
2. Application

The Application process is bound by M.S. 15.99 which, once the application is complete, allows the local governmental unit 60 days to make an approve or deny decision. Certainly there are variations on this, but most local units of government strive to take action on an application within the first 30 days, allowing the remaining 30 days for the applicant to address and clarify issues related to the proposal. Late fall and winter wetland delineations and the seasonal nature of documented plant species or plant communities are an obvious exception to this timetable when verification is constrained by weather, temperature or access to the site.

3. Rich is working on developing an application form for endangered species permits. Several good examples from other states and programs have been identified which include information on alternatives considered and how the applicant plans to avoid or minimize impacts to the resource. If there are no realistic alternatives and avoidance and minimization is not possible, then a description of the mitigation the applicant proposed is required. We hope to have the application form available in early 2016.

**Response:** Excellent.

I would suggest the following: Instead of “no realistic alternatives; and avoidance and minimization is not possible” I would encourage you to consider:

1. Are the alternatives “good faith” (or are they just messing with you)
2. Are the alternatives Feasible and Prudent” versus “realistic and possible”. Both feasible and prudent have existing definitions in state rule.

   a. Feasible means the proposal can be done given the current state of the art and science.
   b. Prudent means it is wise after considering the goals, values and priorities of the statute, program mission, species needs.
Feasible and prudent are also consistent with both the Wetland Conservation Act and the Environmental Policy Act

In addition, we would hope that the “assessment of significant adverse impacts on T&E species” would consider the following factors:

i. The amount of vegetation/habitat removal and/or alteration within the development site.

ii. The amount of habitat of similar type and quality within the development site that remains contiguous.

iii. The existing and proposed amount of lot coverage.

iv. The existence of contiguous habitat of similar type and quality on adjoining land.

v. Mitigation efforts that directly address the negative effects of the proposed land use on wildlife habitat.

4. The issuance of Endangered Species permits currently does include a sequencing process, however we are moving to formalize and document that process by developing the above mentioned application, and a “Findings of Fact” document for each permit. Part of the “Findings of Fact” could be included in the permit letter.

Response: That would be excellent.

For wetlands we use the following guidance

1. The applicant suggests that avoidance is not feasible or prudent because there is no alternative. No alternative exists because:

   A. The basic purpose of the project cannot reasonably be accomplished at an alternative site, alternative sites are not available, alternative sites are not practical/prudent;

   B. The basic purpose of the project can be accomplished by further design modification which would avoid wetland impacts; and

   C. The applicant has made a good faith attempt in pursuing alternatives;

   D. The applicant has demonstrated that the activity will minimize wetland impacts through:

      1) modifying the size, scope, configuration, and density of the project,

      2) attempted to remove or accommodate site constraints including zoning, infrastructure, access, or natural features, and

      3) otherwise minimize wetland impacts.
2. The applicant suggests that avoidance is not reasonable because:
   A. The site where the wetland to be impacted has been degraded to the point where replacement of it would result in a certain gain in function and public value.
   B. The site of the impacted wetland, should it be preserved, would result in an inability to function or provide values because of surrounding land uses and could not be reasonably maintained through other land use controls or mechanisms.
   C. Alternatives are demonstrably cost prohibitive such that the only available alternatives would make the projected cost substantially greater than the costs normally associated with similar projects.
   D. The only feasible and prudent upland site available for replacement has greater ecosystem function and value than the wetland; it may be appropriate if the project sponsor:
      1) demonstrates impact minimization to the wetland
      2) agrees to perpetually preserve upland site, and
      3) completely replaces the impacted wetland’s functions and public values.
   E. The wetland is a site where human health and safety is a factor.
   F. The applicant suggests that avoidance is not reasonable because there is a compelling public need/interest. There is a compelling public need/interest because: (potential options)
      1) The proposal provides an essential public health and safety need;
      2) The impact is minimized and proposed to be mitigated;
      3) The proposed mitigation is certain to provide equal or greater functions and public values to the District than the wetland to be impacted; and
      4) The public need for the proposal is essential to the public welfare of the general area.

5. We have done some initial research on codifying mitigation values and have found few examples in state or federal endangered species programs, except when official “mitigation banks” have been established. Similar to Minnesota, most programs indicate that mitigation is developed in one of several ways based on the particular situation. As we mentioned at the meeting, we are not confident that codifying mitigation values would result in the best outcome for protecting rare resources.

   Response: Agreed.
   It was not my intent to imply that monetary values be codified. They are too subject to change regionally and temporally to be codified and maintain any kind of accurate measure of value.
However, the accepted approach(es) should be well documented so that individuals/applicants can budget for assessment/avoidance or mitigation.

6. The issue of transplantation of listed plants is included in your notes and is something we hope to address in the coming year, but as you are aware there are a number of concerns with transplantation which Rich presented in his email of June 25, 2015 to Chris Lord on which you were copied.

Response: Excellent, this is an issue whose situational nature needs to be addressed. I understand the points you made to Chris Lord in your June 25 email. I also appreciate Chris’s response and have to say that I don’t understand and didn’t see any biology or plant ecology or genetics expressed in those concerns as to why transplanting an ill-fated plant or seed bed is bad policy.

7. In your notes you imply inconsistency in mitigation values DNR is using. As Rich explained at the meeting, the $2000 and $500 values are based on whether the species is endangered or threatened and come from restitution values for endangered and threatened animals. So if a permit involved an endangered species the value used was $2000/individual, if it involved a threatened species the value used was $500/individual.

Response: I did not understand that those values were ‘hard’ numbers, or dependent on classification. If that is the case, how these numbers were arrived at is information that the District would like and need to know.

8. In your notes you also mention that you feel DNR uses an inaccurate average land value for mitigation. An initial review indicates some land values under and some over the value DNR used. We will continue to look for a source of valuation that could be used for permits across the state.

Response: Isn’t that the nature with numerical averages. The BWSR uses and publishes average land values by County statewide and is available on their website.

RECOMMENDATION
Discuss the need and nature to refine the District’s position on the six issue discussed in the resolution.