Minnesota buffer law could keep lawyers happy

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WORTHINGTON, Minn. — With seemingly more questions than answers, Minnesota’s new buffer law may just be an attorney’s dream come true.

At least that’s what Kurt Deter says. Deter specializes in drainage law in Minnesota, representing nearly 50 watershed districts and providing counsel on drainage and water issues across the state. He was recently hired to help direct the Nobles County Board of Commissioners on drainage issues locally, and was in Worthington earlier this week to present an update on the legislation.

While saying at the forefront of the meeting with commissioners and representatives from watershed districts, the Soil and Water Conservation District and townships, as well as farmers, Deter said he generally favors buffers, but the state’s buffer bill has deficiencies.

“The law is not well written,” he said. “It has so many unknowns in it — it’s a lawyer’s dream.

“When you write a law this haphazardly, you’re going to have consequences.”

One of the greatest deficiencies in the law is that it gives no one rulemaking authority, Deter said.

Soil and Water Conservation Districts (SWCDs) are non-regulatory agencies, and while they are willing to work with landowners to bring them into compliance, they have no legal authority to issue fines if the farmer doesn’t implement the required buffer zones.

“They will notify county or watershed districts of non-compliant sites,” Deter said. “The county or watershed district must provide the landowner with a list of corrective actions and a timeline to meet requirements.

“It’s somewhat of an unfunded mandate to counties and watersheds,” he added. “If the landowner doesn’t comply, the county or watershed district may enforce (the law) under administrative penalty provisions.”
And if the county or watershed district won’t enforce the law, cases will have to be turned over to the state’s Board of Water and Soil Resources (BWSR) for enforcement. At this time, the state agency doesn’t have enough staff to handle enforcement, Deter added.

**What needs a buffer?**

Under the new buffer law, public waters will need a 50-foot average buffer with a 30-foot minimum width buffer. Meanwhile, all public ditches will need a 16.5-foot minimum width, continuous buffer.

“There’s a lot of very good farmland along public water,” Deter said. “There’s those isolated cases where (the law is) really somewhat unfair.”

Deter said the state mapped all public waters in 1981, but those maps only provide a general idea of where the waters are. Through today’s technology of GPS mapping, some counties have more accurate records of water courses, but not all of them.

The Minnesota Department of Natural Resources is in the process of creating maps, and plans to have those ready by July 1, 2016. The SWCD has until July 1, 2017, to get its maps done.

“The (DNR) may have interim maps — first a public waters map, then a map of county ditches,” Deter said. “There will be some issues with county ditch maps (many of which date back to the early 1900s) — those maps may be off. Ditches weren’t even dug where they were marked on the map.

“When this map comes out, every landowner, every county needs to scrutinize this map — make sure it’s accurate,” he added.

Some areas of the state may have more issues with the law than others. Deter said there are no county ditches, but instead scrape ditches in the Red River Valley.

“If they had to buffer those, it would destroy agriculture in the Red River Valley,” he said.

Despite the deficiencies in the law, Deter doesn’t see it being changed while Gov. Mark Dayton is in office. The buffer legislation was Dayton’s idea.

“It may get tougher, but it’s not going the other way,” Deter said of the law.

**Deadlines loom**

Landowners will be required to have the 50-foot buffers in place by Nov. 1, 2017, with buffers on private ditches required by Nov. 1, 2018.

The deadlines present challenges as well.

“There’s not enough grass seed to buffer the state,” Deter said.
Another problem is that landowners will want to complete redetermination of benefits on ditch systems before the buffers are installed. The redetermination will outline who has to pay for the buffers.

“You’re going to see a huge increase in redetermination of benefits— you already are,” Deter said. “In most counties, you can’t find viewers.”