Buffer Program Implementation Update

Date: February 3, 2017
To: County Board Chairs and Watershed District Chairs
From: John Jaschke, Executive Director
Board of Water and Soil Resources

The Board of Water and Soil Resources (BWSR) has developed policies and guidance to support implementation of the Buffer Program by counties, watershed districts and soil and water conservation districts. We have done this by actively seeking the input of local governments, farmers and the public.

The key to making the Buffer Program work best for affected landowners is for counties, watershed districts and soil and water conservation districts to fully implement it. We encourage deliberate assessment and coordination of potential options and will make BWSR staff available to help provide information upon request. Conversations with other local government(s) that overlap some or part of your jurisdiction are encouraged to ensure a coordinated approach.

This message includes information on several topics to support your deliberations and local consultations.

1. Election of Jurisdiction. The BWSR Board adopted Policy 8: Election of Jurisdiction (available on the BWSR website: http://bwsr.state.mn.us/buffers/) on January 25 to provide consistency for county and watershed district decision-making regarding Buffer Program enforcement. Consistent with the state statute, this policy:

   - Makes a distinction between public waters and public drainage systems as shown on the Buffer Protection Map;
   - Defines an orderly approach to determining local Buffer Program enforcement jurisdiction based on primacy within each entity's jurisdictional boundary and a right of first refusal associated with existing local responsibilities for shoreland management and public drainage systems;
   - Requires counties and watershed districts to submit the official controls they intend to use to carry out the compliance provisions of the Buffer Law for BWSR review and establishes that this review will be completed within 60 days; and
   - Addresses the option of a county or watershed district to change a previous election of jurisdiction.

2. March 31, 2017 - Election of Jurisdiction timing. Statute provides that counties and watershed districts are to "affirm their jurisdiction and identify the ordinance, rule or other official control" and provide notice to BWSR by March 31, 2017. The law allows a subsequent jurisdiction decision to be made that includes providing a 60 day notice to BWSR.

The purpose behind this date was to allow time for counties and watershed districts to adopt their ordinance or rule and for BWSR to have time to develop adequate capacity to manage any potential enforcement workload. However, the March 31, 2017 date is soft, in that counties and watershed districts can change a jurisdiction election by providing notice to BWSR.
With this in mind and the potential near-term consideration of funding provisions this legislative session, counties and watershed districts should not feel compelled to make a decision on buffer enforcement jurisdiction by March 31, 2017. This is especially the case if a legislative appropriation would affect a county or watershed decision. It also bears mention that Governor Dayton has proposed $10 million per year in Riparian Aid to counties and watershed districts for Buffer Program implementation and enforcement.

Finally, if you have not done so already, you are encouraged to start your decision making process, including discussing implementation and enforcement options with the soil and water conservation district and watershed districts.

3. Enforcement Mechanism Options. Counties and watershed districts can enforce the buffer requirements through existing authorities or through administrative penalty orders (APO). BWSR, when a county or watershed district has chosen not to elect jurisdiction, can only use APOs.

County, watershed districts and BWSR staff are collaboratively working on several documents that can be resources to counties and watershed districts as they are considering their options for buffer program enforcement. These include the following:

- A model county ordinance – Developed by the Department of Natural Resources and BWSR in consultation with the Association of Minnesota Counties and Minnesota Association of County Planning and Zoning Administrators;
- A model watershed district rule – Developed by the Smith Partners Law Firm under the direction of the Red River Watershed Management Board and the Minnesota Association of Watershed Districts; and
- An upcoming BWSR policy for the review of county and watershed district official controls, enforcement procedures, and administrative penalty orders. These items are expected to be available for public review and comment in April on the BWSR website.

As counties and watershed districts have more enforcement options than BWSR, landowners would likely be better served with counties and watershed districts assuming enforcement jurisdiction.

4. Public Drainage Law Authorities and Buffer Establishment. The Public Drainage Law (Minnesota Statutes Chapter 103E) can be an important tool for enabling landowners to achieve compliance with the Buffer Law, which includes a provision for public drainage system acquisition and compensation of buffer strips or alternative practices in accordance with Drainage Law. Minnesota Statutes Section 103E.021, Subd. 1 (soil banks must be spread and permanent vegetation established) and Subd. 6 (incremental implementation of vegetated ditch buffer strips and side inlet controls) are two of the provisions that may be useful when counties and watershed districts are acting as drainage authorities.

BWSR will be developing information that can help drainage authorities use these pre-existing mechanisms to acquire and establish the 16.5 foot buffer strips as part of public ditch system management that will support landowner compliance with the Buffer Law. Watch for more details on this information in the coming months.

We believe that this program will be successfully implemented, and landowners best served, through local collaboration - counties, watershed districts and soil and water conservation districts working together. These local relationships will be most effective through communicating early and often.

If you or your staff have any questions please contact your BWSR Board Conservationist or Buffer Program Coordinator Tom Gile at 507-206-2894, or at tom.gile@state.mn.us.
State Ag Buffer Law Leaves Open Questions for County Board

Commissioners Look and Schulte Offer Different Approaches

The state’s new agriculture buffer law was a topic of discussion at the Anoka County Board meeting held the afternoon of Tuesday, January 24th. Although only some commissioner districts have agriculture, the entire county may be affected by the policy and financial implications.

In 2015 the Minnesota Legislature adopted a law which mandated a buffer area between agriculture use land and public waters and drainages. It was passed with significant controversy which resulted in an amended version being passed in 2016.

The law requires that a fifty foot average buffer, with a 30 foot minimum, be set aside by the property owner if their land is used for row crop agriculture or other agriculture uses such as feed lots. Currently sod fields and grass are not affected by the law.

The law is intended to improve water quality. A buffer will prevent phosphorus, nitrogen, and other pollution from directly flowing into waterways. It will also reduce erosion and soil runoff into lakes and waterways.

Starting November 1st, the enforcement agency is authorized to fine landowners who are not in compliance with the buffer requirements for public waters. One year later on November 1, 2018, that authority extends to buffers with public drainages. Enforcement can only occur after a landowner has been provided with an official notice at least eleven months prior.

A Web of Government Responsibility

The law places this process into the hands of several different layers of local and state governments. The Minnesota Department of Natural Resources (MN DNR) is responsible for drawing the maps that identify the public waters and drainages. The Soil and Water Conservation District (SWCD) has the responsibility to identify those parcels of land that are not in compliance with the law. They are also responsible for sending out the notice that begins the eleven month time line for enforcement. They are responsible for notifying the enforcement authority of compliance issues. The Minnesota Board of Water and Soil Resources (BWSR), a state agency, is responsible for enforcement. Certain local governments have the power to preempt BWSR’s enforcement authority.

Local Enforcement Option
The law was written in a way to give other local governments the ability to step in and take enforcement authority away from BWSR. Watershed districts, counties, and some cities, have been given the ability to preempt BWSR’s enforcement authority and assume those responsibilities.

These local governments, which includes Anoka County, must decide by March 31st if they wish to preempt BWSR and become the enforcement authority for this law. Doing so would require the enactment of an ordinance in compliance with state standards prior to this date. After March 31st, the law allows for these local governments to opt in or out of this enforcement responsibility at anytime with a 60 day notice.

**County Officials Speak**

Several concerns were raised by County Administrator Jerry Soma about the county becoming the enforcement authority. He highlighted passages from the law which stated, “If a county elects jurisdiction... it must include all public waters within its boundary AND all public drainage ditches for which it is the drainage authority.” Mr. Soma was concerned about the use of the word “all” and what the implications could be for the county. As he read the law, the county could become burdened with the responsibility of enforcing the law throughout the entire county. He stated that he believed the watershed districts would be best positioned to manage this responsibility.

Commissioner Rhonda Sivarajah raised concerns about this being another unfunded mandate from the state. Mr. Soma stated that the work would fall to the highway department, and that county taxpayers would have to pay for it. He did not have an estimate of what the overall cost would be.

Commissioner Scott Schulte’s position was that the county should take no action at present time. He cited the 60 day provision which would allow the county to step in if it needed to. He also believed that the current Legislature would change the law again. He also stated that the Legislature needs to determine if this is a priority, and if so then fund it.

Speaking of rural counties, Mr. Schulte stated that Anoka County was fortunate in that they are not in a position where the commissioners themselves are farmers, who are now being asked to enforce these laws on their fellow neighbors and farmers.

Commissioner Matt Look stated that a significant number of people were “caught in the crossfire” due to the passage of this law. He said, “Without question this is a land grab” and “unconstitutional.” He saw the law as allowing government to take land without compensation from property owners. He also raised concerns that none of the other parties who could assume enforcement authority under the law were elected officials. Watershed districts are appointed officials who do not answer directly to the public. The BWSR primarily consists of appointed members and state government employees who are answerable to no one in Anoka County.

Mr. Look stated that he would be comfortable having the county assume the enforcement responsibility. In response to Ms Sivarajah’s concern that this would impact the tax levy, Mr. Look stated that he would not consider this to be a hired position.” In response to Mr. Schulte’s question about the county’s responsibility, Mr. Soma again stated that the county would need to assume responsibility for all public waters.
Commissioner Jim Kordiak stated that he believed that the county would provide a kinder hand at enforcement, and that the state would be the heavy hand. Both Mr. Kordiak and Commissioner Mike Gamache indicated that they would defer to the opinions of their fellow commissioners on this issue. Both noted that they did not have agriculture land in their commissioner districts that is being targeted by this law.

**Parcels Affected**

At present time, it is believed that Anoka County, Rice Creek Watershed District, and Coon Creek Watershed District have between 9 and 26 landowners who own between 17 and 45 parcels of land that are on public waters requiring compliance with the law in 2017. In 2018, the public ditch enforcement portion of the law will affect 3 to 10 landowners who own between 5 and 13 parcels of land.

According to maps provided by Jared Wagner (Jared.Wagner@AnokaSWCD.org) of the Anoka Conservation District, the majority of lands which are out of compliance with the law are located in Ham Lake, Lino Lakes, Nowthen, and Oak Grove.

**Future Action**

It is unknown what action if any the county board will take on this issue. If no action is taken by the county or watershed districts, BWSR will become the enforcement authority on April 1st by default. Property owners will be subject to fines or other enforcement actions starting sometime after November 1st.
Dark areas represent ditches, creeks, rivers, and basins in Anoka County affected by the new law.