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Comment: Minnesota Wetland Conservation Act of 1991: "Did Minnesota Miss the Boat to Protect Artificially Created Wetlands?"

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Minnesota Wetland Conservation Act of 1991: "Did Minnesota Miss the Boat to Protect Artificially Created Wetlands?"

I. INTRODUCTION

With the federal wetlands protection program in disarray, producing confusion over which wetlands should come under federal protection, the Minnesota Legislature recently made an important move to cut off uncertainty within the state. With the passage of the Wetland Conservation Act of 1991 (WCA), Minnesota has formalized a "no net loss" policy with regard to wetlands that the federal government seems incapable of legislating.[1] Unfortunately, the new Act collides with old Minnesota case law, leaving artificial wetlands unprotected.[2]

The pledge by President Bush that there would be "no net loss" of the nation's wetlands is a catch-phrase embodying the concept of stopping the further depletion, drainage, or degradation of wetland areas.[3] The no net loss policy, in theory, would mean that for every acre of wetlands destroyed due to development or agricultural activities, another acre of wetlands would be created.[4] Thus, the further net depletion of total wetland areas would come to a halt.[5] A no net loss policy is desirable because wetlands operate as nature's water filter, retain floodwater, and reduce the likelihood of devastating floods.[6] They are also a natural breeding ground for fish, birds, and animals, and provide a recreational resource.[7]

The President's policy has failed to get underway mainly because of the design of the federal wetland protection program, otherwise

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1. Ch. 354, 1991 Minn. Laws 1925 (codified in scattered sections). "No net loss" as it is used in wetland policy dialogue is the concept that any loss of wetland acreage in the nation should be replaced by an equal acreage thus making the "net" loss to wetlands zero. For example, if all of the some 100 million acres of wetlands in the United States were drained today but another 100 million acres of wetlands were "created" tomorrow (by letting drained land revert to wetland status), 100 million acres of wetlands would technically be destroyed but the bottom of the "wetland balance sheet" would not change. Thus, there would be no *net* loss of wetlands in the United States.

2. *See infra* text accompanying notes 161-181.

3. *See supra* note 1 (definition of "no net loss").

4. *Id.*

5. *Id.*

6. James Gerstenzang, *Bush Offers New Wetlands Policy; Critics Assail It*, LOS ANGELES TIMES, Aug. 10, 1991, at A1.

7. *Id.*

known as the section 404 permitting program.[8] The 404 program was originally designed to guard against the dumping and fouling of navigable waters.[9] It has since been expanded to protect wetlands via a patchwork of Army Corps of Engineer rule promulgations and federal judicial interpretations.[10]

The main problem with the program on the federal level is the actual definition of wetlands. The definition gives rise to the federal protection.[11] The President is caught between wetland protection interests and economic growth interests. The definition of wetlands can, by itself, cause enormous anxiety to land developers eager to proceed without governmental interference.[12] As a result, the Bush Administration is currently trying to promulgate rules to provide for a nation-wide definition of protected wetlands, while keeping pro-development interests in mind. The product of this interest balancing has been promulgation of a very complicated revised definition of wetlands.

In stark contrast to the federal conflict is Minnesota and its passage of the 1991 WCA. The WCA takes an affirmative step towards wetlands protection at a state level by duplicating the federal program and definitions. Minnesota is essentially taking the helm of wetlands protection from the federal government. The WCA sets the policy for Minnesota that President Bush has claimed he is trying to set for the nation.

The WCA falls short, however, of assuming the full extent of federal jurisdiction over wetlands due to a divergence in the case law in-

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8. *See infra* text accompanying notes 20-59. Section 404 refers to the Clean Water Act of 1977 § 404 which has been codified as 33 U.S.C. § 1344 (1988). The Clean Water Act of 1977 amended the Federal Water Pollution Control Act and provided that the entire act can be referred to as the Clean Water Act. Act of Dec. 27, 1977, Pub. L. No. 95-217, 91 Stat. 1566 (1977). The Clean Water Act charges the Secretary of the Army acting through the Chief of Engineers of the Army Corps of Engineers with dispensing permits for activities affecting wetlands. 91 Stat. 1566, 1600, 33 U.S.C. § 1344(a), (d). The permit is thus termed a "Section 404" permit.

9. 33 U.S.C. § 1344 (1988).

10. *See infra* text accompanying notes 20-59.

11. If a parcel of land can technically be defined as "wetland" under statutory and administrative definitions, it clears the first hurdle to protection. *See generally infra* note 19.

12. Land developers tend to avoid any land that can arguably be classified as wetlands. That is because the developer will have to apply for federal, state, and sometimes even local permits to begin work in the wetland. Permits are generally granted only if a developer can show mitigating factors or replaces the wetland in another area or both. If land meets the definition of wetland, a developer can look forward to increased costs thus reducing the value of the parcel. As Ben Wopat, Chief of the Regulatory Branch of the St. Paul District of the U.S. Army Corps of Engineers advises attorneys questioning the status of land—if there is even a doubt as to its status, don't chance it. Telephone interview with Ben A. Wopat, Chief, Regulatory Branch, St. Paul District, U.S. Army Corps of Engineers (Feb. 7, 1992).

terpreting the definition of wetlands at the state and federal level. Federal courts have interpreted "wetlands" to include artificially created wetlands.[13] Minnesota case law, however, has interpreted its protected waters statutes to apply only to "natural" waters.[14] The WCA arguably falls under this old case law.[15] The WCA also does not expressly overrule the case law; as a result, the artificial versus natural distinction has become a gulf separating the state and federal approaches.[16]

Artificial wetlands have been included under federal protection for much the same reasons natural wetlands have been included. The federal courts faced with the issue have noted that the artificial wetlands in question possess the characteristics of natural wetlands and, as such, are an equally valuable resource.[17] Subsequently, the federal case law has consistently held that Congress intended to include artificial wetlands in the section 404 permit program.[18]

This comment will explain how the WCA fits in with the old water protection scheme in Minnesota and why the WCA does not overrule the artificial versus natural distinction in the case law. This comment will also discuss governmental jurisdiction over wetlands and the gap in state law that has left artificial wetlands unprotected.[19]

II. The Basis For Wetland Protection Under State and Federal Schemes

A. The Federal "404" Permitting Program

Federal protection of wetlands is based on the Clean Water Act of 1972.[20] The Clean Water Act amended the Federal Water Pollution

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13. *See infra* text accompanying notes 102-160.
14. *See infra* text accompanying notes 161-170.
15. *See infra* text accompanying notes 171-181.
16. *Id.*
17. *See infra* text accompanying notes 102-160.
18. *Id.*
19. For a comprehensive analysis and discussion of wetland activities that provide state jurisdiction, *see* Linda Fisher, *Minnesota Water Management Law and Section 404 Permits: A Practitioner's Prospective*, 7 Hamline L. Rev. 249 (1984); Mark Hanson, *Damming Agricultural Drainage: The Effect of Wetland Preservation and Federal Regulation on Agricultural Drainage in Minnesota*, 13 Wm. Mitchell L. Rev. 135 (1987). For a governmental agency to intervene and prohibit land owners from taking action towards their wetlands, two jurisdictional hurdles must be met. First, the wetland must meet the statutory definition of a wetland before geographical jurisdiction is satisfied. Second, the activity itself must be prohibited by statute and no exemptions apply. This article will necessarily focus on geographical jurisdiction where the artificial wetlands gap in coverage occurs. It will not address the second jurisdictional hurdle for governmental intervention, activities within wetlands.
20. 33 U.S.C. §§ 1251-1387 (1988).

Control Act and provided the United States Army Corps of Engineers with the authority to regulate dredging and filling operations within the waters of the United States.[21] The program is administered by the Corps of Engineers by permit. The Environmental Protection Agency is authorized to promulgate environmental guidelines for the issuance of permits and is given veto authority over any permits issued by the Corps.[22] Jurisdiction over wetlands can be based either on activity jurisdiction or geographical jurisdiction.

Jurisdiction over activities in wetlands is acquired by the Corps when any person wishes to dredge or fill in a wetland.[23] A permit must be acquired before any dredging or filling can occur.[24] "Dredging" and "filling" have been interpreted broadly, therefore most activities in wetlands would require a permit.[25]

Federal geographical jurisdiction over wetlands, on the other hand, is based on the term "navigable waters" in the Clean Water Act and is exercised within the states under the Commerce Clause of the United States Constitution.[26] The Clean Water Act authorizes the Secretary of the Army to issue permits for the discharge of dredged or fill materials into "navigable waters."[27] The Clean Water Act defines "navigable waters" to mean "the waters of the United States. . . ."[28] Determining the meaning of "waters of the United States" was the task of the Army Corps of Engineers.

The Army Corps of Engineers historically had interpreted this lan-

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21. 33 U.S.C. § 1344 (1988). *See infra* text accompanying notes 22-59 (history of the Clean Water Act).

22. 33 U.S.C. § 1344(b),(c) (1988).

23. *Id.*

24. *Id.*

25. *See* Avoyelles Sportman's League, Inc. v. Marsh, 715 F.2d 897 (5th Cir. 1983) and United States v. Huebner, 752 F.2d 1235 (7th Cir. 1985). For a discussion of how these cases affect activities giving rise to jurisdiction, *see* Steven L. Dickerson, *The Evolving Federal Wetland Program*, 44 SW. L.J. 1473, 1480-82 (1991). Broad interpretation of the dredging and filling language under the Clean Water Act means that courts have found "dredging and filling" to apply to activities that are not expressly prohibited in the statute such as land clearing and draining. *Id.*

26. U.S. CONST. art. I, § 8, cl. 3. "The Congress shall have power . . . to regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes. . . ." The Clean Water Act, as well as its precursor, the Rivers and Harbors Act, operates to protect waters that are somehow connected to even interstate commerce. This started out to be only navigable rivers and has since been expanded to include separate waters that have been visited by migratory birds. *See generally* Dickerson, *supra* note 25, at 1479-80; in Natural Defense Council, Inc. v. Callaway, 392 F. Supp. 685 (D.D.C. 1975) a federal district court found proper the assertion of jurisdiction by the Corps over nonnavigable mosquito canals and intertidal mangrove wetlands above the mean high water line. *See also* Fisher, *supra* note 19, at 297-98.

27. 33 U.S.C. § 1344(a) (1988).

28. 33 U.S.C. § 1362(7) (1988).

guage to extend its jurisdiction only up to the high water mark of water bodies.[29] It did so by relying on judicial decisions under the Corps' prior permitting authority, the Rivers and Harbors Act of 1899.[30] The Rivers and Harbors Act protects navigable waters but makes no express inclusion of wetlands.[31] As a result, the Corps extended its jurisdiction only to the high water mark of water bodies, excluding most wetlands.[32]

Litigation brought by the Environmental Protection Agency and public interest groups resulted in several federal courts concluding that section 404 required expanded coverage of wetlands.[33] Accordingly, the Corps promulgated a more expansive definition of wetlands which was agreed to by the Environmental Protection Agency in 1977.[34] The new definition of "waters of the United States" stated: "All waters which are currently used, or were used in the past, or may be susceptible to use in interstate or foreign commerce. . . ."[35] This definition included: "All other waters such as intrastate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, *wetlands*, sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds, the use, degradation or destruction of which could affect interstate or foreign commerce. . . ."[36] "Wetlands" contained within the above definition of "waters of the United States" was defined as:

> [T]hose areas that are inundated or saturated by surface or ground water at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs, and similar areas.[37]

This definition of wetlands was used only by two of the four agencies administering programs requiring a definition of wetlands.[38] The

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29. Dickerson, *supra* note 25, at 1478.

30. 33 U.S.C. § 403 (1988).

31. Dickerson, *supra* note 25, at 1477-78.

32. *Id.*

33. *Id.* The cases that brought the change in the coverage of wetlands were Natural Defense Council, Inc. v. Callaway, 392 F. Supp. 685 (D.D.C. 1975) and United States v. Holland, 373 F. Supp. 665 (M.D. Fla. 1974). *See generally* Fisher, *supra* note 19, at 297-98.

34. Dickerson, *supra* note 25, at 1479.

35. 33 C.F.R. § 328.3(a)(1) (1991).

36. 33 C.F.R. § 328.3(a)(3) (1991) (emphasis added).

37. 33 C.F.R. § 328.3(b) (1991).

38. The four agencies administering programs which involve an interpretation of "wetlands" are U.S. Army Corps of Engineers, U.S. Environmental Protection Agency, U.S. Fish and Wildlife Service, and U.S.D.A. Soil Conservation Service. The two agencies agreeing to the 1977 definition were the U.S. Army Corps of Engineers and the U.S. Environmental Protection Agency.

lack of consistency prompted the four agencies to issue a joint manual containing a systematic method for identifying wetlands.[39] The result was the "Federal Wetlands Manual"— a highly technical document which greatly expanded the jurisdiction of the 404 program simply by an expanded definition of what constitutes a wetland.[40]

The Federal Wetlands Manual of 1989 expanded the definition of wetlands to include any soil that was wet as far as eighteen inches below the surface for seven days in the growing season.[41] Under the Federal Wetlands Manual, the jurisdictional reach of the federal government has been estimated to have increased from the previous 105 million acres to between 200 and 300 million acres.[42] This increase in wetlands under the federal government's jurisdiction created considerable discontent among land owners and developers.[43] Such discontent spurred the Bush Administration to propose revisions to the 1989 Manual, under which approximately 10 to 20 million acres of America's wetlands would be excluded from the definition of wetlands and exposed to development.[44]

The proposed 1991 revisions to the Federal Manual did not slip by unnoticed. Criticism has been voiced by environmental groups, individual states, and even agencies under the current administration. Environmental groups such as the National Wildlife Federation and the National Audubon Society have expressed discouragement at the administration's seemingly greater concentration on political criteria than scientific criteria.[45]

The states have voiced their concerns as well. Pennsylvania has estimated that a loss of 150,000 to 200,000 acres of the state's 500,000 acres of wetlands would result from the new definition.[46] Massachusetts claims that 197,000 acres or 41% of the state's wetlands would no longer qualify for federal protection.[47] Washington state officials have

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Dickerson, *supra* note 25, at 1479.

39. U.S. ARMY CORPS OF ENGINEERS, U.S. ENVTL. PROTECTION AGENCY, U.S. FISH AND WILDLIFE SERV., U.S.D.A. SOIL CONSERVATION SERV., FEDERAL MANUAL FOR IDENTIFYING AND DELINEATING JURISDICTIONAL WETLANDS 77 (1989) (hereinafter Federal Wetlands Manual).

40. *Id.*

41. Warren Brookes, *The Wetlands Coup That Failed*, THE WASH. TIMES, Aug. 28, 1991, at G1.

42. *Id.*

43. *Id.*

44. Gerstenzang, *supra* note 6.

45. *Id.*

46. Hugh Bronstein, *Casey: Bush's Wetlands Plan is All Wet*, UPI, Sept. 16, 1991, *available in* LEXIS, Nexis Library UPI file.

47. Dianne Dumanoski, *Massachusetts Official Hits Wetlands Rules; Environment Secre-*

estimated a 60% to 80% loss in federal protection of wetlands in that state.[48]

Wisconsin has also estimated that an almost 80% decrease in federal protection of its wetlands would result under the revised manual.[49] The state asserts that it can bypass the federal guidelines and apply its own guidelines to approximately half the state's five million acres of wetlands.[50]

In contrast, New Jersey cannot easily bypass the federal government's manual revisions. New Jersey's Freshwater Wetlands Protection Act of 1987 ties the state's definition of wetlands to the Federal Wetlands Manual and any subsequent amendments to the Federal Wetlands Manual.[51] Consequently, New Jersey legislators are working to amend their Wetlands Act by severing their dependence upon the federal definition.[52]

Even federal agency experts have noted the massive rollback in protection the revised manual would present. Four federal agencies, the Environmental Protection Agency, the U.S. Army Corps of Engineers, the U.S. Fish and Wildlife Service, and the U.S. Soil Conservation Service, sent teams into the field to evaluate the proposed revisions.[53] According to their assessments, Connecticut would lose 256,000 acres of wetlands and Maine 1.6 million acres.[54] The Corps of Engineers' Missouri River Division could be reduced from nine million to six million acres of wetlands.[55] Field teams in West Virginia concluded that none of the eighteen sites visited would qualify for protection under the revised manual.[56]

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tary Says Revisions by the Bush Administration Go Too Far, THE BOSTON GLOBE, Dec. 14, 1991, at metro/region, 31.

48. *State Calls Proposed Federal Wetlands Manual Flawed and Unusable*, PR NEWSWIRE, Dec. 16, 1991, *available in* LEXIS, Nexis Library, PR file. Using the proposed revisions, the Washington officials found that only four of twenty-two known state wetland sites could be confirmed as such. *Id.* That is, by applying the new definition of wetlands proposed by the administration, Washington's twenty-two wetlands which the state readily defines as wetlands were defined by the federal revisions as non-wetlands.

49. Dunstan McNichol, *Wisconsin to Reject Proposed Wetlands Standards*, STATES NEWS SERV., Nov. 12, 1991, *available in* LEXIS, Nexis Library, States News Serv. File..

50. *Id.*

51. Richard Pliskin, *Whose Wetlands Are They, Anyway?; Bush Proposal Irks New Jersey Environmentalists*, N.J. L.J. Aug. 22, 1991, at 1.

52. *Id.*

53. Rudy Abramson, *Experts Assail Proposed Rules for Wetlands*, L. A. TIMES, Nov. 22, 1991, at A1.

54. *Id.*

55. *Id.*

56. *Id.*

The entire controversy has prompted a panel of scientists testifying before a United States Senate subcommittee to suggest abandoning the effort of trying to identify wetlands on a national scale.[57] Due to the diversity of hydrology[58] of wetlands throughout the nation, establishing feasible criteria that would encompass all wetlands may well be impossible.[59]

Minnesota has managed to avoid this federal tangle by enacting its own wetlands protection scheme. The Minnesota scheme is independent of the federal program and can avoid most of the problems other states will encounter by relying on federal wetlands protection.

B. The Minnesota Wetland Protection Scheme Prior to 1991

The Minnesota scheme for wetlands protection, unlike the federal program, evolved out of legislation specifically designed to protect wetlands within the state. The Water Management Law, as amended, provided protection to all areas designated as "public waters."[60] Under the Water Management Law, any areas designated as "public waters" could not be drained without replacement.[61]

While the public waters protection scheme was intended to protect water basins and courses, it also provided protection for certain wetlands. Wetlands included under the definition of public waters were defined as "all types 3, 4, and 5 wetlands, as defined in United States Fish and Wildlife Service Circular No. 39 (1971 ed.), not included within the definition of public waters, that are ten or more acres in size in unincorporated areas or 2-½ or more acres in incorporated areas."[62] Type 3, 4, and 5 wetlands, as found in "Circular 39,"[63] are those areas usually waterlogged during the growing season and covered with water from six inches to ten feet.[64] The public waters statute protected wet-

57. *Scientists Say Hydrology Criteria Should be Dropped From Wetlands Manual*, DAILY REP. FOR EXECUTIVES, Nov. 25, 1991, at A-8.

58. "Hydrology" is the science dealing with the waters of the earth, their distribution on the surface and underground, and the cycle involving evaporation, precipitation, flow to the seas, etc. WEBSTER'S NEW WORLD DICTIONARY 688 (2d College ed. 1984).

59. DAILY REP. FOR EXECUTIVES, *supra* note 57.

60. MINN. STAT. § 103G.005 (1990).

61. MINN. Stat. § 103G.211 (1990). The statute provides that drainage of public waters is prohibited unless replaced by public waters of equal or greater public value except as provided in §§ 103G.221 to 103G.235 (these sections cover most of language exempting certain lands and activities from this general prohibition). *Id.*

62. MINN. STAT. § 103G.005(18)(1990).

63. SAMUEL P. SHAW & C. GORDON FREDINE, U.S. FISH AND WILDLIFE SERV. CIRCULAR 39, WETLANDS OF THE UNITED STATES (1971 ed.).

64. *Id.* Circular 39 defines type 3, 4, and 5 wetlands as follows. Type 3 wetlands are termed

land areas that are readily identifiable as wetlands because they are mostly covered with water.[65]

The Water Management Law did not cover type 1 or 2 wetlands, however.[66] Type 1 wetlands are seasonally flooded basins which can usually be cultivated during the growing season.[67] Type 2 wetlands are inland fresh meadows.[68] These meadows are usually without standing water during most of the growing season but are waterlogged within a

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"inland shallow fresh meadows":

> The soil is usually waterlogged during the growing season; often it is covered with as much as 6 inches or more of water. Vegetation includes grasses, bulrushes, spikerushes, and various other marsh plants such as cattails, arrowheads, pickerelweed, and smartweeds. . . . These marshes may nearly fill shallow lake basins or sloughs, or they may border deep marshes on the landward side. They are also common as seep areas on irrigated lands.

Id. at 21.

Type 4 wetlands are termed "inland deep fresh meadows":

> The soil is covered with 6 inches to 3 feet or more of water during the growing season. Vegetation includes cattails, reeds, bulrushes, spikerushes, and wild rice. . . . These deep marshes may almost completely fill shallow lake basins, potholes, limestone sinks, and sloughs, or they may border open water in such depressions.

Id. at 21.

Type 5 wetlands are termed "inland open fresh water":

> Shallow ponds and reservoirs are included in this type. Water is usually less than 10 feet deep and is fringed by a border of emergent vegetation. Vegetation (mainly at water depths of less than 6 feet) includes pondweeds, naiads, wildcelery, coontail, watermilfoils, muskgrasses, waterlillies, spatterdocks. . . .

Id. at 21-2.

65. "Type 3" wetlands are the threshold for coverage under the Water Management Law with its requirement of waterlogged soil during the growing season and up to six inches of standing water. *Id.* In other words, this meets the "seat of the pants" test—if you cannot sit down without getting your pants wet, most people would readily identify the area as "wetlands."

66. The types of wetlands protected by the new act are types 1 and 2 under the Fish and Wildlife Circular 39 classifications. Those wetlands are defined as follows.

Type 1 wetlands are termed "seasonally flooded basins or flats":

> The soil is covered with water, or is waterlogged, during variable seasonal periods but is usually well drained during the growing season. Vegetation varies greatly according to season and duration of flooding: includes bottomland hardwoods as well as some herbaceous growths. Typical bottomland hardwoods include cottonwood, silver maple, box elder and American elm.

Id. at 20-1.

Type 2 wetlands are termed "inland fresh meadows":

> The soil is usually without standing water during most of the growing season but is waterlogged within at least a few inches of its surface. Vegetation includes grasses, sedges, rushes, and various broad-leaved plants. . . . Meadows may fill shallow lake basins, sloughs, or farmland sags, or these meadows may border shallow marshes on the landward side. Wild hay oftentimes is cut from such areas.

Id. at 21.

67. *Id.* at 20.

68. *Id.* at 21.

few inches of the surface.[69] Type 2 wetlands are also known as "sloughs" or farmland depressions, just wet enough to make cultivation impossible without drainage.[70]

Therefore, prior to 1991, Minnesota's jurisdiction over wetlands extended only as far as type 3, 4, or 5 wetlands. The Minnesota Department of Natural Resources (DNR) was charged with administering the public waters protection program and in 1976, by legislative order, began to prepare a public waters inventory map which would delineate all waters and wetlands protected by the statute.[71] In 1979, the legislature amended and expanded the definition of public waters and redefined "wetlands" as type 3, 4, and 5 wetlands as defined by Circular 39.[72]

Subsequently, the DNR promulgated rules providing criteria on designation of wetland areas as public waters.[73] The wetland definition set forth by the DNR was identical to the public waters definition.[74]

The DNR has since mapped all the wetlands in each county of the state meeting the 1979 Water Management Law definition. The mapping procedure was done under a notice and comment procedure as specified by the 1979 Water Management Law.[75] The Commissioner notified each county with wetlands being considered and gave the counties time to respond. If the DNR and the counties or any person were in disagreement with the proposed map, the law provided for an appeal procedure to a hearings unit.[76] The hearings unit was made up of one person from the affected county board, one person appointed by the Commissioner, and one board member of the local soil and water conservation district.[77] After the hearing unit's decision and final disposition of any appeals, the wetlands were identified as such on the Public

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69. *Id.*

70. *Id.* "Slough" is generally pronounced as "slew" and phonetically spelled "slou." WEBSTER'S NEW WORLD DICTIONARY 563 (1979). Type 2 wetlands are the target for protection of the WCA as they are disappearing the fastest within the Minnesota. SESSION WEEKLY, (Minn. House of Reps.), May 17, 1991 at 12.

71. Act of March 25, 1976, ch. 83, § 8, 1976 Minn. Laws 209, 212-15 (codified as MINN. STAT. § 105.391 (1982), subsequently recodified as MINN. STAT. 103G.201 (1991)).

72. Act of May 25, 1979, ch. 199, §§ 1-17, 1979 Minn. Laws 334, 334-40 (amending MINN. STAT. §§ 105.37-.392, .42 (1978), presently codified in scattered sections of 103A-G). This act is also known as the 1979 Minnesota Water Management Law.

73. MINN. R. 6115.1000-1150 (1991).

74. MINN. R. 6115.1050 (1991).

75. MINN. STAT. § 105.391 subd. 1 (1980) (recodified as MINN. STAT. § 103G.201).

76. *Id.*

77. *Id.*

Waters Inventory map.[78] Wetlands identified on the Public Waters Inventory map are protected as "public waters."[79] Accordingly, the map is a jurisdictional tool.[80]

III. The 1991 Increase in State Jurisdiction Over Wetlands Protection

A. The New Definition

The 1991 Wetlands Conservation Act (WCA) has expanded the state's jurisdiction over wetlands by adopting federal definitions. Article 6 of the WCA, Regulation of Wetland Activities, amends the previous definition of wetlands under the public waters permit statutes from "wetlands" to "*public waters* wetlands."[81] By doing so, the WCA makes the distinction between the wetlands previously protected by the public waters statute and wetlands protected by the new no net loss language of the WCA.[82] The wetlands protected by the new language are defined as follows:

> (a) "Wetlands" means lands transitional between terrestrial and aquatic systems where the water table is usually at or near the surface or the land is covered by shallow water. For purposes of this definition, wetlands must have the following three attributes:
>
> (1) have a predominance of hydric soils;
>
> (2) are inundated or saturated by surface or ground water at a frequency and duration sufficient to support a prevalence of hydrophytic vegetation typically adapted for life in saturated soil conditions; and
>
> (3) under normal circumstances support a prevalence of such vegetation.
>
> (b) Wetlands does not include public waters wetlands . . . .[83]

This definition excludes "public waters wetlands" under clause (b).

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78. *Id.*

79. *Id.*

80. Ronald P. Peterson, *Wetland Permitting in Minnesota: Navigating Through the Archipelago*, New Issues in Wetland Development and Regulation, MINN. STATE BAR ASS'N. CONT. LEGAL EDUC., June 1990.

81. MINN. STAT. § 103G.005, subd. 18 (1991).

82. MINN. STAT. § 103G.222 (1991).

83. MINN. STAT. § 103G.005, subd. 19 (1991). "Hydrophytic vegetation" describes plants growing in water or very wet earth. WEBSTER'S NEW WORLD DICTIONARY 688 (2d College ed. 1984).

Therefore, the new definition applies only to wetlands not already identified as public waters wetlands by the Public Waters Inventory map. Public waters wetlands remain protected under the 1979 Water Management Law.

B. Source of the Definition

The new wetlands definition is derived from the Federal Food Security Act of 1985,[84] as amended, and the 1989 Federal Manual.[85] The new definition mirrors two federal definitions of wetlands. The first clause referring to "lands transitional between terrestrial and aquatic systems" appears in the U.S. Fish and Wildlife Services' 1979 classification system.[86] The second clause, referring to hydric soils, ground water, and vegetation, is identical to language in the 1989 Federal Wetlands Manual and the Food Security Act of 1985.

By using the above language, the new definition embodies the basic concept of wetlands that has given the 1989 Federal Wetlands Manual definition such a vast reach, encompassing hydric soils, hydrology, and hydrophytic vegetation. The use of this definition leaves no doubt that Minnesota's jurisdiction over wetlands will be defined by the most expansive language ever devised for wetland delineation.

Support for the proposition that the WCA intends to adopt the expansive 1989 Federal Wetlands Manual definition comes from examining the rest of the WCA. The provisions for "interim wetland activities" taking place before July 1, 1993 stipulate that any wetland identification or delineation must proceed by using the 1989 Federal Wetlands Manual.[87]

In addition, under the evaluation subdivision of the wetland replacement plan section,[88] the technical evaluation panel charged with approving all plans for replacement of wetlands is to resolve all questions as to location, size, or type of a wetland by referring to the 1989 Federal Wetlands Manual.[89] A replacement plan approved by the local government unit is required to alter wetlands under the WCA.[90] Any

84. 16 U.S.C. § 3801(a)(16) (1988).

85. Telephone interview with John Helland, Legislative Analyst, Minnesota House of Representatives Research Department (Jan. 16, 1992).

86. Lewis M. Cowardin et al., CLASSIFICATION OF WETLANDS AND DEEPWATER HABITATS OF THE UNITED STATES (1979). This publication is designed to supersede the Circular 39 approach. *Id.*

87. MINN. STAT. § 103G.2369, subd. 1 (1991).

88. MINN. STAT. § 103G.2242, subd. 2 (1991).

89. *Id.*

90. MINN. STAT. § 103G.2242, subd. 1(b) (1991).

questions of a technical nature must be resolved by the technical evaluation panel using the 1989 Federal Wetlands Manual. Therefore, the WCA by its own terms sets out the 1989 Federal Wetlands Manual as the definitive approach to determining which wetlands will be geographically protected by the WCA.[91]

C. *The Definition's Meaning*

The Minnesota legislature has made an apparent effort to short circuit all the federal machinations on wetlands protection by enunciating a no net loss policy that takes over jurisdiction precisely where the federal program left off. By using the 1989 Federal Wetlands Manual definition of wetlands, Minnesota's geographical jurisdiction to regulate wetland activities will be as expansive as the federal 404 program under 1989 definitions. In fact, the WCA provides for the Commissioner of the Minnesota Department of Natural Resources to adopt rules to regulate dredge and fill activities as necessary to obtain approval from the Environmental Protection Agency to assume the federal 404 permitting program.[92]

The rules adopted by the Department of Natural Resources cannot be more restrictive than the 404 program or state law, whichever is the most restrictive.[93] Therefore, the Commissioner cannot extend jurisdiction geographically by definition any further than that laid down by state law or federal program. Since both the federal 404 definition and state statutory definitions of wetlands are identical, it would appear that the Commissioner basically will be making rules that follow the 404 program prior to the 1989 Federal Wetlands Manual's revision.

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91. While the WCA sets up the Federal Wetlands Manual as the definitive definition, it also sets out exemptions under the Circular 39 approach. Two exemptions to the replacement regulation are type 1 wetlands of any size on agricultural land and type 2 wetlands two acres or less on agricultural land. MINN. STAT. § 103G.2242, subd. 1(b) (1991). The WCA implies that types 1 through 3 wetlands are wetlands that can also be readily identified as such under the federal and new state definition. This reference back to Circular 39 is questionable in terms of uniformity but may serve other purposes such as referring to old wetland inventories done under that scheme.

92. MINN. STAT. § 103G.127 (1991). "Assumption" of the federal section 404 permitting program is available under 33 U.S.C. § 1344(g). Under this section of the Clean Water Act, a state can apply to administer the section 404 program and thus consolidate and streamline the permitting process. To gain approval, the state program must be at least as protective as the federal program. 33 U.S.C. § 1344(h)(1)(A)(i). Arguably, Minnesota would be unable to comply with that provision and properly administer the 404 program because Minnesota's program is unable to attain jurisdiction over artificial wetlands.

93. *Id.*

But problems may arise in the "assumption" process[94] as well as in the DNR's rule making process. Any attempt to mimic the federal application of the 1989 Federal Wetlands Manual will reveal the inconsistency between the foundation underlying the Federal 404 Program and Minnesota's Wetlands Conservation Act (WCA).

The federal approach has been based on the assumption that Congress wants to protect all the wetlands it can, including artificial wetlands.[95] The Minnesota approach by the DNR and case law has been to exclude artificial wetlands under the Public Waters Inventory and former Chapter 105.[96] These approaches are irreconcilable and must be resolved by the express overruling of precedent by either the legislature or Minnesota's appellate courts.[97] Without such action, assumption would be difficult.[98]

IV. THE ARTIFICIAL VERSUS NATURAL WETLANDS DISTINCTION

A. Artificial Wetlands Fall Through the Cracks

Artificial wetlands are a significant resource that have been overlooked by the legislature. The legislature failed to expressly overrule a line of cases excluding artificial wetlands from public waters status.[99] The precedent set by these cases arguably still applies, thus excluding the artificial wetlands resource from coverage.

Federal case law has taken the 1989 Federal Wetlands Manual definition to the limit. The only constraint on the federal government asserting jurisdiction over wetlands is the concept that the administering agency cannot exercise authority over artificial wetlands which it created on private land.[100] The federal definition of wetlands included, by judicial interpretation, all wetlands regardless of their origin—natural as well as artificial.[101] Thus, the federal interpretation and accordingly, protection, of "wetlands" is significantly broader than the interpretation Minnesota has employed.

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94. *See supra* note 92.
95. *See infra* text accompanying notes 102-60.
96. *See infra* text accompanying notes 161-70.
97. *See infra* text accompanying notes 181-86.
98. *See supra* note 92.
99. *See infra* text accompanying notes 171-81.
100. *See infra* text accompanying notes 102-60.
101. *See infra* text accompanying notes 102-60.

B. *Federal Interpretation of "Wetlands" Includes Artificial Wetlands*

The federal approach to interpreting the jurisdictional reach of the definition of wetlands has to this day been one of expansiveness.[102] One of the first cases to consider the issue was *United States v. Ciampitti*.[103] In *Ciampitti*, the court determined that the fact that part of the area may have become wetlands because of a manmade connection between the site and tidal waterways was not dispositive of the Corps' jurisdiction.[104] The court stated that federal jurisdiction is determined by whether the site is presently a wetland and not by how it became a wetland.[105] Also, because Congress intended to exercise its Clean Water Act jurisdiction to the greatest extent possible in order to protect the environment, the court had no reason to believe that Congress did not intend to reach wetlands which support wildlife and vegetative habitats simply because at some point in time those environments were enhanced by human actions.[106] The *Ciampitti* court simply held that no matter how the wetland was created, Congress intended to regulate it if it could be shown to have the characteristics of a natural wetland in supporting wildlife and recreation.[107] This holding would create the required nexus with the interstate commerce clause.[108]

A limiting interpretation of the wetlands definition was handed down soon after *Ciampitti*. In *United States v. City of Ft. Pierre*,[109] the Eighth Circuit decided that the Corps could not exercise jurisdiction over wetlands that were created as the result of Corps river mainte-

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102. Under the authority of the Commerce Clause of the Federal Constitution, the federal 404 program regulates activities within the states. Congress, in effect, is employing a police type power to protect by regulation the nation's wetlands. This action by the national legislature is currently acceptable due to the nexus between the nation's wetlands and interstate commerce, albeit minimal at points. *See* 33 C.F.R. 328.3(a)(3) and Fisher, *supra* note 19, at 298. Because the 404 program was forced to rely on some kind of relationship to interstate commerce, Army Corps of Engineers determinations of jurisdiction were necessarily ad hoc in nature. A connection to interstate commerce had to be found. Indeed, the Corps made the comment that they reserve the right to determine on a case by case basis if a particular body of water is a water of the United States. 51 Fed. Reg. 41,217 (1988). Also, *see generally* Fisher, *supra* note 19. By adopting the program, Minnesota will have the legitimate authority to exercise this police power and avoid this wrinkle in the process.

103. 583 F. Supp 483 (D.N.J. 1984), later proceeding 615 F. Supp. 116 (D.N.J. 1984), *aff'd without op.*, 772 F.2d 893 (3d Cir. 1985), *cert. denied*, 475 U.S. 1014 (1986).

104. *Id.* at 494.

105. *Id.*

106. *Id.*

107. 583 F.2d at 494.

108. *Id.*

109. 747 F.2d 464 (8th Cir. 1984).

nance.[110] In *Ft. Pierre*, the wetland was private land which was originally a side channel of the Missouri River but had since been separated and eventually dried out.[111] The wetland became a river bottom ecosystem which was predominately dry and water easily drained back to the Missouri River.[112] Subsequently, the Corps filled the draining end of the wetland with dredge material from the river and as a result, the wetland was unable to drain and a stagnant slough developed.[113]

When the City of Ft. Pierre built two unfinished roads across this wetland, the Corps claimed jurisdiction and brought suit for violating the Clean Water Act by failing to obtain a permit prior to building the roads.[114] After trial, the federal district court found in favor of the Corps.[115]

The Eighth Circuit reversed, reasoning that the Clean Water Act does not authorize the Corps to assert jurisdiction over privately owned land which is by definition a wetland only due to the Corps' incidental and unrelated activities at the nearby river.[116] The court believed the Corp's argument would extend jurisdiction beyond the scope that Congress intended.[117] The court also surmised that to find jurisdiction would be antithetical to the goals of the Clean Water Act: namely, to protect wetlands for wildlife, fish, fowl, recreation, and other use by the public.[118] Because the slough was stagnant and polluted, it was not within the Corps' jurisdiction.[119]

The *Ft. Pierre* court did, however, state that its holding regarding artificial wetlands was limited to the facts of the case.[120] The holding did not challenge Corps jurisdiction with regard to any other artificially created wetlands environment.[121]

Ft. Pierre was distinguished in a subsequent case arising in the United States District Court for the District of Minnesota. In *Track 12, Inc. v. U.S. Army Corps of Engineers* a parcel of private land was converted to a wetland because of state and local highway and storm

110. *Id.* at 467.
111. *Id.* at 466.
112. *Id.*
113. 747 F.2d at 466.
114. *Id.* at 464.
115. United States v. City of Ft. Pierre, 580 F. Supp. 1036 (C.D.S.D. 1983).
116. *Ft. Pierre*, 747 F.2d at 464.
117. *Id.*
118. *Id.*
119. *Id.*
120. 747 F.2d at 467.
121. *Id.*

sewer construction.[122] The owners began to fill the wetland in preparation for commercial development.[123] The owner did not dispute the tract was wetland at the time, but insisted state and local officials had previously made assurances a permit would be unnecessary.[124] The Corps subsequently informed the owner that the filling was illegal and a permit would be required.[125] The owner's application process to the Corps was interrupted when the Minnesota DNR asserted jurisdiction under a new 1979 statute.[126] The DNR denied a permit but was overturned on appeal as the state court found no state jurisdiction due to the wetland's artificial genesis.[127]

The owner subsequently reapplied to the Corps for a permit in 1984 which was denied due to the importance of the wetland as wildlife habitat, flood water storage, and a source of water quality benefits.[128] The land owner challenged the Corps' assertion of jurisdiction. The owner argued that because the wetland was not natural, it could not support the "prevalence of vegetation" "under normal circumstances" required by the Corps' definition of wetlands.[129]

The *Track 12, Inc.* court found this argument contrary to legislative and judicial authority.[130] The court cited *Ciampitti* along with other cases as the appropriate interpretation of the definition.[131] The court disposed of *Ft. Pierre* by relying on the language from the Circuit Court that its holding was limited to the facts of that case.[132] Because the tract in question showed evidence of wildlife and had been created by entities other than the Corps, jurisdiction was proper.[133] The *Track 12, Inc.* court stated, "*Ft. Pierre* can therefore be read to support the Corps' jurisdiction over artificially created wetlands unless the Corps itself was the creator."[134]

A subsequent Ninth Circuit District Court decision ignored any limitations on Corps jurisdiction over artificial wetlands. In *Bailey v.*

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122. 618 F. Supp. 448 (D. Minn. 1985).
123. *Id.* at 449.
124. *Id.*
125. *Id.*
126. 618 F. Supp. at 449.
127. *Id.*
128. *Id.* at 449-50.
129. *Id.* at 450 (citing Navigation & Navigable Waters, 33 C.F.R. § 323.2(c) (1984)).
130. 618 F. Supp. 1t 449.
131. *Id.*
132. *Id.*
133. *Id.*
134. 618 F. Supp. at 451

United States,[135] the United States District Court for the District of Idaho followed *Ciampitti* and disposed of an argument that the Corps could not exercise jurisdiction over the private wetlands in question because they were artificially created by the construction of a dam by the Corps.[136]

The *Bailey* court first cited *Swanson v. United States*[137] as controlling. In *Swanson*, the Corps' exercise of jurisdiction was proper over the perimeter of lake waters that were created due to the construction of a dam.[138] The *Swanson* court held that varying banks and beds do not affect the federal power to regulate waters.[139] The *Bailey* court then went on to cite *Ciampitti* as the adaptation of *Swanson* to a wetlands situation.[140]

Ft. Pierre was narrowed once again in *United States v. Southern Investment Co.*.[141] In *Southern Investment*, the Eighth Circuit was again faced with a wetland arguably artificially created by construction of a Corps dam project.[142] A privately owned side channel to the Arkansas river was dammed off by consent of the Corps to prevent flooding after the Corps installed a dam on the river.[143] The private dam washed away and the channel was in a wetland state when the owner began to dump fill in the channel in order to commence development of an industrial park.[144]

The land owner claimed that the Corps lacked jurisdiction to order a halt in the filling of the channel because the Corps created the wetland.[145] The *Southern Investment* court discarded this argument by citing *Ciampitti*, *Bailey*, and *Track 12, Inc.* with approval.[146] The court stated that even if the site was a wetland created by the Corps (which evidence proved to the contrary), it would not be exempt from jurisdiction under *Ft. Pierre* because the construction of a dam project cannot be classified as "ordinary river maintenance"—the pivotal fact in *Ft. Pierre* on which the jurisdictional question turned.[147]

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135. 647 F. Supp. 44 (D. Idaho 1986).
136. *Id.* at 48.
137. 600 F. Supp. 802 (D. Idaho 1985).
138. *Id.*
139. *Id.* at 808.
140. *Bailey*, 647 F. Supp. at 48.
141. 876 F.2d 606 (8th Cir. 1989).
142. *Id.* at 609.
143. *Id.*
144. *Id.*
145. 876 F.2d. at 612.
146. *Id.*
147. *Id.*

Consequently, the Eighth Circuit limited *Ft. Pierre* to exclude artificial wetlands from Corps jurisdiction only if the Corps creates them because of "ordinary river maintenance." The specific facts of *Ft. Pierre* define wetlands created due to "ordinary river maintenance" as those wetlands created as a part of river dredging activities.[148]

Ft. Pierre did not gain acceptance among other circuit courts, most notably, the Ninth Circuit Court of Appeals which decided *Leslie Salt Co. v. United States*.[149] In *Leslie*, human activity created artificial wetlands that fostered natural, ecological developments.[150] The artificial wetlands were the result of a salt company excavating pits and basins for salt production and construction of sewer lines and public roads on the property, and the Fish and Wildlife Service's breach of a levee on an adjacent refuge.[151] These artificial changes over 100 years turned the property into viable wetlands. The district court held that the government could not expand its jurisdiction by its own activities.[152]

The Ninth Circuit Court of Appeals reversed, finding that the fact that third parties, including the government, were responsible for flooding Leslie's land was irrelevant—Corps jurisdiction does not depend on how the property became a water of the United States.[153] The court also addressed the comments by the Corps to the final regulations of the Clean Water Act setting out general exemptions for artificial water bodies.[154] The comment states:

> [W]e generally do not consider the following waters to be "waters of the United States." However, the Corps reserves the right on a case by case basis to determine that a particular body of water within these categories of waters is a water of the United States.
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> * * *
>
> (c) Artificial lakes or ponds created by excavating and/or diking dry land to collect and retain water and which were used exclusively for such purposes as stock watering, irrigation, settling basins, or rice growing.
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> * * *
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> (e) Waterfilled depressions created in dry land incidental to construction activity and pits excavated in dry land for the pur-

148. *Id.*
149. 896 F.2d 354 (9th Cir. 1989).
150. *Id.* at 356.
151. *Id.* at 355-56, 358.
152. *Id.* at 356.
153. *Id.* at 358 (citing with approval *Swanson*, 600 F. Supp. 802 (D. Idaho 1985), and *Track 12, Inc.*, 618 F. Supp. 448 (D. Minn. 1985)).
154. *Id.* at 359-60.

> pose of obtaining fill, sand or gravel unless and until the construction or excavation operation is abandoned and the resulting body of water meets the definitions of waters of the United States (see 33 C.F.R. 328.3(a)).[155]

The *Leslie* court determined that these comments show that the Corps intended to exempt artificially created waters which are *currently* being used for commercial purposes; however, even those waters are subject to jurisdiction on a case by case basis of review.[156] This limited exemption did not apply because the salt pits had not been used for commercial purposes in decades.[157]

The court concluded in a survey of cases on the subject that no distinction has been made between natural and artificial waters under the Clean Water Act.[158] The court seemed to split the issues of governmentally created wetlands and other artificial wetlands, but in any case found neither to be determinative.

The federal cases make it clear that artificial wetlands are, for the most part, within the scope of the Corps' jurisdiction and protected. For wetlands located in Minnesota, federal protection is controlled by *Ft. Pierre*, *Track 12, Inc.*, and *Southern Investment*. While *Ft. Pierre* exempts from the Corps' jurisdiction artificial wetlands created solely as a result of the Corps' unrelated ordinary river maintenance, *Track 12, Inc.* and *Southern Investment* have narrowed this exemption.[159] *Track 12, Inc.* instructs that federal jurisdiction can still be asserted if the Corps is not the sole creator of the wetland.[160] *Southern Investment* narrowly construes "ordinary maintenance" to exclude the construction of a dam by the Corps.[161] Therefore, artificial wetlands in Minnesota will fall outside of federal jurisdiction only if they are created solely by the Corps engaging in "ordinary river maintenance." If other entities participate in the creation of the wetland or the Corps' activity creating the wetland is anything but river dredging type river maintenance, then the *Ft. Pierre* exemption for artificial wetlands evaporates and federal jurisdiction is appropriate.

Thus, the federal cases lend support for the proposition that the federal definition of wetlands was meant to extend the Corps' jurisdic-

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155. *Id.* (quoting 51 Fed. Reg. 41206, 41217 (1986)).
156. *Leslie*, 896 F.2d at 360.
157. *Id.*
158. *Id.*
159. *Southern Investment*, 876 F.2d 606, 612 (8th Cir. 1989).
160. *Track 12, Inc.*, 618 F. Supp. 448, 450 (D. Minn. 1985).
161. *Southern Investment*, 876 F.2d at 612.

tion as far as possible. Artificial wetlands are considered valuable and worthy of federal protection. Minnesota, on the other hand, has adopted an exactly opposite approach to the protection of artificial wetlands. Minnesota's approach was born of administrative necessity which is quickly proving to be myopic.

C. *Minnesota's Interpretation of "Wetlands" Excludes Artificial Wetlands*

The artificial versus natural distinction between wetlands in Minnesota case law first became apparent when two cases arose involving a dispute between landowners and the state during the 1979 Water Management Law's wetlands mapping process. The crux of these disputes involved land owners claiming that wetlands on their properties should not have been included in the mapping effort because the wetlands were artificial.[162] Because the DNR did not include artificial wetlands in their surveys, the claim of "artificial origin or enlargement" was a valid defense to official designation as a protected waters wetland.

In the first case to recognize the distinction, *Department of Natural Resources v. Todd County Hearings Unit*, the DNR appealed a decision of the Todd County Protected Waters and Wetlands Hearing Unit.[163] The hearing unit rejected the designation of five sites as wetlands because it found that each of the sites was either less than ten acres in area or had been artificially created or enlarged.[164] The Minnesota Court of Appeals reversed on two of the sites.[165] The court of appeals stated that to be classified as protected wetlands under the public waters statute, the sites had to fit the definition of Circular 39 and be over ten acres in size in their natural state.[166] Wetlands artificially created or artificially enlarged to over ten acres would not count as public waters wetlands.[167]

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162. The "mapping effort" refers to the Public Waters Inventory map created by the DNR to identify statutorily protected wetlands under the 1979 Water Management Law. *See supra* text accompanying notes 71-80.

163. 356 N.W.2d 703 (Minn. Ct. App. 1984).

164. *Id.* at 705.

165. *Id.* at 708-10.

166. *Id.* at 705.

167. *Id.* The language in *Todd* was, "The DNR concedes that artificially-created water basins are not to be included in the inventory, and that artificial enlargement of natural wetlands should not be included in the acreage measurement." *Todd*, 356 N.W.2d at 705. The reason for this concession is not clear. According to the brief of the Respondent, Todd County Hearing Unit, "Gary Johnson, a DNR witness, readily acknowledged in the proceedings that [the] DNR was not interested in designating artificially created or man-made wetlands, and had removed some 15 preliminary wetland designations on this basis. *Tr. Vol. III* at p. 419." Brief of Respondent at 32-

A subsequent case, *Department of Natural Resources v. Mahnomen County Hearings Unit*,[168] followed the *Todd* distinction between artificial and natural wetlands in its own holding. *Mahnomen* was another appeal from a 1979 Water Management Law Hearing Unit's decision in which the acreage of wetlands was in dispute.[169] The Minnesota Court of Appeals cited *Todd* as controlling on the acreage issue.[170] The court stated that "[w]etlands that exceed 10 acres as a result of unnatural factors are not subject to Chapter 105" (public waters statute).[171]

These are the only two cases dealing with the artificial versus natural distinction under the 1979 Water Management Law's mapping process. Their holdings are unequivocal that wetlands artificially created receive no protection under the public waters statutes. The state, therefore, can claim no jurisdiction over artificial wetlands under the Water Management Law.

D. The Artificial Versus Natural Distinction is Not Disposed of by the WCA

The new definition of wetlands under the WCA does not resolve the distinction made by *Todd* that the DNR has no jurisdiction over artificially created wetlands. As *Mahnomen* makes clear, "[a]rtificial conditions should not be considered in determining status under chapter 105."[172]

33, Dept. of Natural Resources v. Todd Co. Hearings Unit, 356 N.W.2d 703 (Minn. Ct. App. 1984) (No. C6-83-2009).

This almost trivial concession by the DNR on its interpretation of its mission turned out to be precedent setting in *Mahnomen*. Andrew Tourville, Jr., counsel for the Attorney General, did not know why the DNR made this concession. Presumably, it was because the DNR did not want to get involved in protecting collection ponds created by farmers and the like. Telephone Interview with Andrew Tourville, Jr., Special Assistant Attorney General (Feb. 3, 1992). Gregory Fontaine, co-counsel for the Mahnomen County Hearings Unit in *Mahnomen*, maintains that the DNR conceded because there was no express language in the statute that it was meant to apply to man-made water basins. Telephone Interview with Gregory Fontaine (Feb. 4, 1992). At any rate, this simple concession turned out to set precedent for the *Mahnomen* court and is still good law. The DNR thus gave away any opportunity to regulate *all* artificial wetlands in the future.

168. 407 N.W.2d 434 (Minn. Ct. App. 1987).

169. Indeed, *Mahnomen* was the last county to be inventoried and thus represents the last opportunity for case law to have been laid down concerning the applicability of the Public Waters statutes on artificial wetlands. Telephone Interview with Andrew Tourville, Jr., Special Assistant Attorney General (Feb. 3, 1992). Mr. Tourville was counsel for the DNR in both *Todd* and *Mahnomen*.

170. *Mahnomen*, 407 N.W.2d at 439.

171. *Id.*

172. *Id.*

Chapter 105, the public waters statutes now codified at Chapter 103, was the source of wetland protection prior to 1991.[173] Under Chapter 105, types 3, 4, and 5 wetlands were protected. The WCA is not a new chapter in Minnesota law. The WCA is basically a number of amendments to the former Chapter 105 statutes by which types 1 and 2 wetlands are afforded similar protection. As such, the new language is subject to previous interpretations of the application of Chapter 105 unless the amendments expressly or impliedly overrule the case law.

An argument could be made that the new definition of wetlands is so broad and the intent of the legislature so sweeping that artificial wetlands must be included in its scope.[174] The WCA can thus be viewed as an entirely new approach to protecting wetlands in Minnesota and not merely an addition to the public waters statutes. It has an all-encompassing definition that covers everything but natural types 3, 4, and 5 wetlands.[175] Due to its broad nature, the new definition encompasses all artificial types 3, 4, and 5 wetlands.

A similar "broad" interpretation is applied towards Congress' intent under the Clean Water Act to justify federal jurisdiction over artificial wetlands.[176] The Clean Water Act was a series of amendments to the Federal Water Pollution Control Act which also put in place broad language that could realize jurisdiction over artificial wetlands.

But the problem remains that the WCA is designed to dovetail with other programs and most notably, the public waters statutes. Unlike the Water Management Law, the WCA requires no inventory; however, the exercise of jurisdiction over wetlands by the state will still occur only this time on a case by case permit approach. The DNR's policy of excluding artificial wetlands under the Water Management Law has become binding law on the operation of the public waters statutes. The WCA brings a new definition and a new procedure to the public waters statutes but does not expressly dispose of the prior policy of excluding artificial wetlands from the protective scheme.

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173. Chapter 105 has since been recodified as MINN. STAT. §§ 103A-G (1990).

174. This theory was offered to the writer by Augustus W. Clapp, Special Assistant Attorney General. Telephone Interview with Augustus W. Clapp, Special Assistant Attorney General (Feb. 4, 1992).

175. Natural types 3, 4, and 5 wetlands are excluded from the new definition because they are covered under the Water Management Law mapping and inventory approach. *See supra* text accompanying notes 60-80.

176. That is, the federal courts have consistently held that Congress' intent was to reach to the limits of the Commerce Clause to regulate wetlands within the various states. *See supra* note 26.

The *Todd* court obviously did not base its ruling on the 1991 WCA amendments. But to argue that the *Todd* distinction does not apply to the WCA overlooks the rule set out in *Todd*. Artificial wetlands were not included under the Water Management Act. The Water Management Act was an attempt to protect valuable wetlands resources. A policy of excluding artificial wetlands was set forth and became law under that approach.

Similarly, the WCA excludes artificial wetlands unless they are created expressly to be a "wetland." The WCA seems to recognize that landowners have come to rely upon the distinction and has accordingly codified it. This was a product of the intense interest balancing that went into the WCA and cannot easily be dismissed. *Todd* has, if anything, been codified into the WCA.

While the WCA expressly states that all wetlands are valuable, its operational language does not reflect a corresponding overturning of *Todd* and *Mahnomen* and the artificial versus natural distinction. Overturning the artificial verses natural distinction is unlikely because of two factors; first, the WCA's treatment internally of artificial wetlands is inconsistent with the concept that the distinction was eliminated, and second, the WCA is a compromise of numerous interests, and it is unlikely that the legislature intended broad interpretation.

Artificial wetlands are only referred to in the WCA in two sections. In neither section is the distinction between the two types of wetlands discarded—if anything, the distinction is codified. First, the WCA makes an exemption available for activities in a wetland created solely as a result of beaver dam construction, blockage of public or private roadway culverts, and actions by public entities taken for a purpose other than creating the wetland.[177] Landowners can use artificial wetlands without state regulation if they are made by one of these forces.

This exemption would encompass at least two of the artificial situations encountered in *Todd*. In *Todd*, the wetlands were artificially expanded by construction of a road, a man-made dam, and a ditch in disrepair.[178] *Todd* fits partly under the exemptions provided by the WCA. Even today, the *Todd* landowner could argue lack of jurisdiction under the WCA due to artificial creation.

Thus, the WCA seems to codify the concept that wetlands created by artificial forces, such as those in *Todd* and *Mahnomen*, are exempt

177. MINN. STAT. § 103G.2241, subd. 1(a)(10)(i)-(iii) (1991).
178. *Todd*, 356 N.W.2d 703, 704-05 (Minn. Ct. App. 1984).

from application of the WCA. No change has occurred from the rule laid out in *Todd* that artificial wetlands are not protected under the public water statutes. The WCA's exemptions of artificial wetlands explicitly removes them from the state's jurisdiction.

In addition, the WCA extends its protection to artificial wetlands created as a result of an approved replacement plan required by the WCA's "Replacement of Wetlands" section.[179] To comply with the no net loss policy, after the new wetland is artificially created, it is afforded the same protection pertaining to draining or filling of natural wetlands.[180]

Wetlands artificially created after 1991 under the WCA are specifically addressed but existing artificial wetlands created prior to 1991 are ignored. One can readily see that the legislature perceived a distinction between artificial and natural wetlands and also saw artificial wetlands created specifically to comply with the WCA as a valuable resource. The legislature chose to extend protection to artificial wetlands newly created and ignored the possibility of protecting pre-1991 artificial wetlands. This makes the distinction markedly clear and in no way diminishes it.

The second factor supporting the conclusion that the distinction was not overruled is the process by which the definition was produced. Since the WCA was a compromise of numerous political interests, it must follow from all the exemptions and carefully laid out language that the legislature did not intend a liberal interpretation.[181] Such an extensive exercise of interest balancing implies that the legislature's intent was to leave no doubt as to what wetlands were to be protected.

Unlike the Clean Water Act which simply defined protectable wetlands as "waters of the United States," the WCA expressly lays out the definition of wetlands, the manual for jurisdictional delineation, and most importantly, exempts artificial wetlands from protection under the act. It could be argued that by exempting some artificial wetlands, the legislature intended to include all the rest of artificial wetlands not specifically exempted from protection. However, such an argument is another theory of an implied overturning of *Todd*.

Such a meticulously defined concept of what wetlands are protected results in the conclusion that to overturn the *Todd* line of cases, the legislature had to do so expressly. To scrap the previous approach

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179. Article 6, § 8, Ch. 354, 1991 Minn. Laws 1925, 1939 (codified as MINN. STAT. 103G.222(h) (1991)).

180. *Id.*

181. This theory was put forth by Gregory Fontaine.

to excluding artificial wetlands under *Todd* would be to read a new section into the WCA. Any court finding an implied overturning of *Todd* would be engaging in judicial activism, preempting the proper interest balancing that must go into a policy of this nature. The legislature had the opportunity to include artificial wetlands. It is obvious that the legislature perceived the distinction but failed to eliminate it. Indeed, by codifying certain exemptions of artificial wetlands, it would appear that the artificial versus natural distinction has survived.

The WCA, therefore, acknowledges the existence of artificial wetlands but does not make any attempt to include existing artificial wetlands within its protection. Inadvertent creation of wetlands disqualifies those wetlands from protection. However, under the WCA, any wetland created specifically to be a wetland is protected. This distinction continues the 1979 Water Management Law approach to administering a wetlands protection program.

Under the 1979 Water Management Law mapping process, the DNR did not want to become involved in distinguishing between natural and artificial wetlands. Presumably, the DNR believed that artificial wetlands were created for a commercial purpose or were created inadvertently.[182] The DNR must have surmised that artificial wetlands are temporary in nature and created for specific commercial or agricultural purposes. As such, it would be unfair to regulate them.

But this simplistic view of artificial wetlands overlooked the fact that over time artificial wetlands can become an integral part of the watershed. The value of an artificial wetland is not necessarily dependent on its form of genesis. Wetland value is more a function of the development of natural wetlands characteristics. Indeed, the WCA bestows protection on artificial wetlands created under a replacement plan. But this ignores the fact that artificial wetlands already in existence are presently integrated into the watershed and are currently provided no state protection. Thus the line drawn in the WCA does not reflect a grasp of the true value of artificial wetlands.

The WCA simply fails to take into account situations like *Leslie Salt* and *Track 12, Inc.* where the wetland has, over time, "grandfathered" into a valuable resource, regardless of its origin. This is readily apparent when one surveys the cases arising under the artificial versus natural distinction. Cases like *Southern Inv. Co.*, *Bailey*, *Ft. Pierre*, *Ciampitti*, and *Track 12, Inc.* show the concern on the national

182. This presumption may have been fueled by the political climate rejecting land use regulation at the time of passage of the 1979 Water Management Law.

level with preserving so called artificial wetlands. The Corps, not usually known as a champion of the environment, saw the importance of protecting some wetland areas even though they were artificial. The Corps could not easily see a distinction between natural and artificial wetlands because, ecologically, they were indistinguishable.

Also, *Todd* and *Mahnomen* point out that the DNR, while trying to maintain the rule against artificial wetlands, has at times impliedly overlooked the distinction. The DNR sought to protect wetlands that were arguably in the gray zone as to "artificialness." The DNR could not seriously have contended that the artificial additions to existing natural wetlands made the wetland, as a whole, less valuable. The fact that the exact acreage of the wetlands could not be determined does not diminish the fact that the DNR vigorously tried to protect them. The DNR obviously viewed them as valuable resources.

Artificial creation is an affirmative defense to federal regulation. This is so because, as observed in *Track 12, Inc.*, the artificial wetlands take on characteristics of natural wetlands. They serve the same important purposes as natural wetlands and are worthy of federal protection. Exceptions to federal protection occur when the Corps directly creates the wetland by river dredging or if there is no plausible connection with interstate commerce because in these cases the wetland lacks wildlife or beneficial purposes.

The line drawing of artificial versus natural is inherently flawed. It is an attempt to distinguish between two things that, over time, become indistinguishable. The primary problem is determining when the creation of a wetland was "natural" as opposed to "artificial." A landowner's recollection, a field team's conjecture, or surveys from the 1800s can all yield differing conclusions as to origin. All assume a different time for when the wetland in question came into being "naturally." This assumption gives rise to the problem. In *Leslie Salt*, the changes in the land occurred over a time period of 100 years. An artificial versus natural distinction is flawed due to the arbitrary nature of determining whether a wetland was artificially created.

In 1979, the distinction may have made sense. The DNR was charged with inventorying every county in the state. In light of this, it is only reasonable that the DNR would want to lighten its load to get the job done. It was an administrative decision to aid in the job at hand. But the WCA requires no mapping; thus, no distinction is necessary to lighten the DNR's load under the WCA.

The problem of a *Track 12, Inc.* situation remains; Minnesota wishes to protect a valuable wetland but cannot because it is artificially

created. The only source of protection rests with the federal government operating through the Commerce Clause to make the jurisdictional reach. This is unacceptable. If Minnesota wants to get serious about wetlands protection, it must take these artificial possibilities into account. Even though it is quite possible that federal protection will always attach to artificial wetlands and thus moot the point, there may arise fact patterns similar to *Todd* and *Mahnomen* in which the wetland is out of the reach of the federal 404 program and its only protection will be from Minnesota law. To accommodate such eventualities, the WCA should be amended by the legislature to make clear that artificial wetlands are indeed a protectable resource.

V. Solutions to Minnesota's Artificial Oversight

A number of methods can be employed to skirt the artificial versus natural wetlands distinction under Minnesota law. The possibilities are: (1) let the DNR and the Board of Water and Soil Resources, the two agencies involved in the WCA's administration, claim jurisdiction over non-federally protected wetlands, clearing the way for a test case challenging jurisdiction; or (2) seek an amendment by the legislature.

A. Overrule Todd

The first solution may bring about the desired result. The Minnesota Court of Appeals could take one of two courses towards a challenge of jurisdiction based on *Todd*. The court could either hold that as a preliminary matter, the WCA stands alone and no previous case law interpreting Chapter 105 is controlling, or the court could find that *Todd* is controlling over the WCA and either overturn *Todd* or sustain *Todd* and send the WCA back to the legislature for amendment.

The first alternative may be very appealing to the court of appeals. It is probably the strongest argument to make on the issue. Without getting into a lengthy stare decisis discussion, the court could simply rule that the legislature has created an entirely new approach to protecting wetlands. As such, old case law interpreting Chapter 105, now Chapter 103, simply doesn't apply because the WCA, while amending Chapter 103, is nevertheless an entirely different approach to wetlands protection which demands review of the legislative intent of the WCA alone. In short, the WCA is self-contained; it rewrites chapter 103 entirely, and *Todd* doesn't apply.

Alternatively, the court of appeals could find *Todd* to be controlling on the theory that the WCA simply amends the public water stat-

utes, and therefore, is subject to prior interpretations of how those statutes operate. The court of appeals can then either find *Todd* to control and dispose of the case or overturn *Todd* based on an analysis of the underlying reasons for the rule.

Of all the above courses of action, the last seems the most appropriate. The court of appeals can both find *Todd* to be applicable and at the same time dispose of *Todd* in an honest manner. By looking to the WCA not for a way to avoid the *Todd* rule but for the underlying reasons why the rule should be eliminated, the court of appeals will keep the integrity of its decisions intact. The WCA can be used as evidence as to why the *Todd* distinction should be eliminated.

B. Amend the 1991 Wetlands Conservation Act

While the Minnesota Court of Appeals certainly has the power and jurisdiction to overturn previous case law such as *Todd*, this would also arguably be an usurpation of the extensive and complicated interest balancing the legislature has performed in enacting the WCA. The court of appeals, by judicial fiat, could eliminate the distinction by overturning *Todd* and allow the state to assert jurisdiction over artificial wetlands. But this is a policy decision most properly made by the elected members of the legislative body. Therefore, the only option that would comport with the spirit of compromise inherent within the WCA would be to draft an amendment expressly including artificial wetlands under the wetlands definition. Findings of the value of artificial wetlands should be included as well.

An express statement as to the value of artificial wetlands could be added under the "Wetlands Findings; Public Interest" subdivision of the WCA.[183] New language could be added to the end of that section that states that it is in the public interest to protect wetlands *regardless* of their origin. Or, in the language of any of the four reasons given under that subdivision, "wetlands" could be amended to read "wetlands, whether artificial or natural. . . ."

The easiest way to eliminate the artificial versus natural distinction would be to amend the "wetlands" definition itself. At the end of the present wetlands definition of the WCA,[184] a clause could be added that states: "Wetlands under this act includes wetlands that were created naturally or artificially."

Two concerns of landowners would have to be dealt with at the

183. MINN. STAT. § 103A.201, subd. 2 (1991).
184. MINN. STAT. § 103G.005 (1991).

same time. One concern is excessive regulation of areas converted to wetlands for a particular commercial or agricultural purpose. The other concern of landowners is that their land, due to lack of diligence on their part, may become artificially flooded and before the landowner becomes aware of the situation or can act, the land is suddenly protected as a wetland.

To facilitate these valid concerns, additional exemptions to state regulation can be added under the WCA's "Exemption" section.[185] The exemptions can read similar to how the Corps has dealt with this problem. The Corps has stated that it generally excludes the following from federal regulation:

> (c) Artificial lakes or ponds created by excavating and/or diking dry land to collect and retain water and which are used exclusively for such purposes as stock watering, irrigation, settling basins, or rice growing.
> (d) Artificial reflecting or swimming pools or other small ornamental bodies of water created by excavating and/or diking dry land to retain water for primarily aesthetic reasons.
> (e) Waterfilled depressions created in dry land incidental to construction activity and pits excavated in dry land for the purpose of obtaining fill, sand, or gravel unless and until the construction or excavation operation is abandoned and the resulting body of water meets the definition of waters of the United States (see 33 C.F.R. 328.3(a)).[186]

By using this language, the WCA can set a standard for what artificial wetlands will be excluded from the WCA's reach. The Corps' language indicates a desire to allow latitude with landowners as to the use of land. The comments above seem to embody a time limit as to abandoned artificial wetlands, though, that operates much like an "ecologic viability" standard. That is, when the abandoned water body meets the Corps' definition of wetlands by assuming characteristics of a natural wetland, it triggers federal protection.

Ecologic viability is a concept that seems to be present in the federal case law. In *Leslie*, the court relied on the above Corps comments to hold that the abandoned wetlands had become viable and thus protectable wetlands. Under *Leslie*, if the artificial wetland serves the purposes a natural wetland does, it is statutorily protected by the federal 404 program and reachable through the Commerce Clause.[187] This

185. MINN. STAT. § 103G.2241 (1991).
186. 51 Fed. Reg. 41206, 41217 (1986). This language was cited in *Leslie*.
187. *Leslie*, 896 F.2d at 354-60.

strange combination can be applied for Minnesota's use, although not to determine jurisdiction under the Clean Water Act and the Commerce Clause, but to determine when an artificial wetland should be protected under the WCA. Different reasons underlie the use of the Corps' comments, but they can be used to attain the same result—realizing jurisdiction over artificial wetlands while at the same time allowing latitude to landowners' use of their land.

Subsequently, if an artificial wetland is serving a commercial or agricultural purpose, it can be exempted. If, however, the wetland is abandoned and is ecologically viable, then it should fall under WCA protection. Ecological viability can be used as a threshold not only for determining federal jurisdiction, but also state jurisdiction over a wetland. This would be a simplification of geographical wetlands jurisdiction delineation and result in less duplication of effort in administering the two programs.

VI. Conclusion

The 1991 Wetland Conservation Act is an enormous step forward in Minnesota's effort to take control over protection of the state's wetlands. Unfortunately, the DNR gave away what could be significant wetland protection in its earlier mapping efforts. As a result, the legislature should amend the Act to expressly overrule the *Todd* line of cases. This will leave no doubts as to the WCA's jurisdiction over artificial wetlands which will also correspond with the federal 404 program. Without this last step, Minnesota may well never be able to assume the federal program. Regardless of the assumption issue, Minnesota will miss the boat on the wetland issue if it fails to draw artificial wetlands under the shelter of its Wetlands Protection Act.

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