COMMISSION ON REFORM AND EFFICIENCY

CORE

ENVIRONMENTAL SERVICES PROJECT

FINDINGS

Revised and Consolidated

November 1992

CORE STATE OF MINNESOTA
COMMISSION ON REFORM AND EFFICIENCY

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"The environment touches everything in Minnesota . . .

it affects everything we do."

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PREFACE: Environmental programs more than most areas of public policy, provide services and relate to customers that often have competing and seemingly irreconcilable interests. Any system established to resolve conflict among these interests should be efficient and effective. Of equal importance, it should be fair and equitable. Striking a balance between these two objectives may be the greatest challenge to policy makers and advocates of change and reform.

CORE FINDING #1: Environmental services programs in Minnesota are carried out by a complex and fragmented maze of federal, state and local agencies. This governmental complexity results in: 1) unclear, overlapping and redundant lines of authority, responsibility and accountability; 2) increased cost to the customer and taxpayer; and, 3) customer dissatisfaction.

CORE FINDING #2: Minnesota's environmental system could be categorized as a collection of advocacy agencies, whereby each agency presents one or more differing perspectives, such as the environmentalist, conservationist, public health guardian and business proponent. At times, these separate and clashing perspectives lead to administrative gridlock, which means customers of the system cannot get decisions from the state.

CORE FINDING #3: The environmental system relies too heavily upon centralized decision-making, which has produced significant alienation in non-metropolitan counties. Many rural citizens are dissatisfied with their interactions with the centralized bureaucracy, and perplexed as to why state agencies do not assign more authority to regional agency offices.

CORE FINDING #4: The environmental system relies heavily on "command and control" regulatory processes to implement environmental goals rather than using a balanced mix of diverse approaches to achieving compliance with the goals.

SUMMARY OF FINDINGS

CORE FINDING #5: The current environmental system relies upon the customer to coordinate among the agencies, instead of the agencies presenting a coordinated response to the customer.

CORE FINDING #6: Minnesota's governmental structure in environmental services over the past several decades has grown by a process of addition, fragmentation and specialization rather than by subtraction, combination, consolidation and services integration. No consistent organizational or administrative pattern exists with regard to the responsibilities of departments, offices, boards, commissions and other agencies.

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CORE FINDING #9: The existing multi-layered, fragmented, environmental advocacy system makes it difficult to manage conflicts among competing interests in a timely fashion.

PREFACE

This report was introduced with the words of a county commissioner speaking of the scope of environmental issues in Minnesota. He said that it touches "everything we do." In one sentence, this observation seems to capture the importance of efforts in Minnesota to address problems related to natural resources management and environmental protection.

One overall finding must be articulated at the outset which might be thought of as an "umbrella" that provides a frame of reference for all others.

> ***Environmental programs more than most areas of public policy, provide services and relate to customers that often have competing and seemingly irreconcilable interests.***

In their recent book Environmental Policy in the 1990s, Norman Vig and Michael Kraft question whether democratic political institutions are capable of resolving the crucial ethical and value conflicts that underlie environmental politics. They ask how we will respond ". . . as we are increasingly forced to choose among ecological, aesthetic, efficiency and equity values."[1] Much of the current political and policy debate over environmental issues has focused upon whether these are "false choices," and whether "sustainable development" is a more appropriate approach.

It is also important to recognize that, although government plays a dominant role in programs relating to the environment, it is only one of many actors. The International Business Council on Sustainable Development contends that the environment is "everybody's business." In its book, Changing Course, it argues:

> Given that ordinary people -- consumers, business people, farmers -- are the real day-to-day environmental decision makers, it requires political and economic systems based on the effective participation of all members of society in decision making. It requires that environmental considerations become a part of the

[1]Norman Vig and Michael E. Kraft (eds), Environmental Policy in the 1990s (Washington D.C.: Congressional Quarterly Press, 1990), p. xiii.

> decision-making processes of all government agencies, all business enterprises, and in fact, all people.[2]

Competing interests in the environmental services field advocate from what often seem to be polarized perspectives. From the vantage points of each of the advocates, these interests are legitimate. The concerns which the agricultural community has about wetlands or feedlots, for example, will likely be different from those of environmental groups that focus on the preservation of natural habitat for wildlife or the citizens groups concerned about the quality of groundwater.

Business and industries concerned about the time and cost associated with obtaining permits and licenses view regulation from a different perspective from those who see the review process, though not necessarily its current form, as central to assuring that the environment is protected from exploitation or degradation. Some groups express interest in more vigorous and timely enforcement of regulations. Yet others point out that such enforcement should not be at the expense of fairness and due process.

One of the most troublesome questions is how well the present system manages these inevitable conflicts and how well it balances competing interests. To what extent does the system itself contribute to prolonging conflict rather than managing and (ideally) resolving it? Does it result in increased economic burdens or environmental damage and degradation.

While listening to hundreds of people across Minnesota, CORE staff found dissatisfaction with a system that seems to frustrate people from all perspectives. The systems are seen as excessively complex, burdensome, and unresponsive. The concerns did not seem to be dominated by an "environmental perspective" or an "economic perspective." Rather the concern seemed to be about governmental and procedural complexity.

Developing mechanisms for achieving a balance among the multitude of competing interests in the environmental services area is one of the greatest challenges confronting reform efforts. Many of the observers with whom staff spoke noted that a system was needed which could give adequate consideration to all perspectives, but which could do so in a timely, fair, and efficient manner.

The following Findings describe the current environmental system and identify problems that must be addressed in order for the state to improve upon environmental services delivered to the citizens of Minnesota.

[2]Stephen Schmidaheiny, Changing Course (Cambridge: M.I.T. Press, 1992), p. 7.

FINDINGS

CORE FINDING #1: Environmental services programs in Minnesota are carried out by a complex and fragmented maze of federal, state and local agencies. This governmental complexity results in:

- ***unclear, overlapping, and redundant lines of authority, responsibility and accountability***
- ***increased cost to the customer and taxpayer***
- ***customer dissatisfaction***

Staff met with hundreds of individuals who indicated that environmental services programs, rules, regulations, and federal-state-local relations in general were becoming so complicated that from the standpoint of the "customer" it was often difficult to determine **which** unit of government and **which** agency was responsible for **what** particular program.[3]

Concerns were frequently voiced that there were too many agencies and too many governments involved in environmental programs; too many laws and rules; too much state control. This was often expressed as "overlap and duplication," "multiple permitting," "multiple fees" and "layering." As one observer expressed it: "We have too much government and too little governance." A related problem cited was the propensity of state government to establish policies and rules on a statewide basis without adequately taking local and regional differences into consideration. Third, whether in the form of laws, rules, planning requirements, or grants, state environmental services programs were seen by local officials as having the effect of increasing state control at the expense of local flexibility and discretion.

Vertical Complexity -- Federal-State-Local Relations

Central to understanding the complexity of intergovernmental relations as they relate to the delivery of environmental services programs in Minnesota is the extent to which the state has relied upon local governments to implement state policies and programs. In addition to 87 counties, 856 cities and over 1,800 organized township governments, the state has created (or provided for the creation of) soil and water conservation districts, watershed districts, watershed management organizations, lake improvement districts, solid waste management districts and numerous regional special districts. Generally speaking, all of these governmental entities function as "political subdivisions of the state."

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[3]The term "customer" is used in a generic context throughout this report to refer to any individual, group, organization, or unit of government that is the recipient or subject of an environmental program.

It should not be concluded that this pattern in intergovernmental relations leads automatically to a delivery system that is "decentralized." It might more appropriately be called "localized." A system that is truly decentralized is one in which commensurate decision-making authority is delegated along with the responsibility for policy implementation. In many cases of state mandated/locally administered services, responsibility, authority, and accountability have not been clearly nor closely linked.

Another factor contributing to the complexity of intergovernmental relations is the fact that the state has established a distinct and separate system of "regional governance" and enacted separate laws, particularly in the area of environmental services, that are unique to the seven-county metropolitan area.[4] The most distinguishing feature of this system is the existence of several regional special districts which function as public corporations and political subdivisions of the state.

As a result, in no part of the state are intergovernmental relations more complicated than in the Twin Cities area. Although the issues that surface in the metropolitan area are in many ways similar to those in the remainder of the state, they are nonetheless sufficiently distinctive to require separate discussion and they will be elaborated upon later.

Finally, it would be difficult to over-emphasize the importance of the role of the federal government and federal agencies in environmental services, a topic which itself could be the subject of a separate paper. This role is important from at least two perspectives. First, federal law is paramount and federal agencies (e.g., Department of Interior, Department of Agriculture, Corps of Engineers, and Environmental Protection Agency) are active participants in many decisions made at the state level. Customers must often deal with both state and federal agencies and comply with separate federal and state regulations.

Second, Minnesota law, policies, and rules must at least meet minimum thresholds established by federal law and regulations. A concern frequently voiced during CORE research was the existence of parallel and duplicative regulations and regulatory systems and the extent to which Minnesota law, policies, and rules exceeded thresholds established by federal law.

To the extent that this complexity complicates decision making by public officials at all levels of government, the burdens placed on the average farmer, business owner, company official or other private citizen would seem almost immeasurable. Taken as a whole, these "horizontal" and "vertical" relationships defy simple description. One metaphor might be helpful. Sliced diagonally, the overall system might resemble a multi-layered marble cake.

Related to the federal role is the interstate and international dimension of environmental services programs and policies. Minnesota is a party to several interstate compacts and multi-national

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[4]For these purposes, Minn. Stat. § 473.121, Subd. 2 defines "metropolitan area" as the counties of Anoka, Carver, Dakota excluding the city of Northfield, Hennepin excluding the city of Hanover, Ramsey, Scott excluding the city of New Prague, and Washington.

agreements which affect state policies and responsibilities. Moreover, the existence of several Indian reservations within the boundaries of Minnesota create a unique set of complicated governmental relationships. Given their status as sovereign nations, the state must, in collaboration with the U.S. Bureau of Indian Affairs and Indian Health Service, conduct separate negotiations with Indian Tribal Councils regarding any state involvement in environmental services within the reservations. There has been considerable interaction recently between the state and representatives of the Tribal Councils in connection with numerous environmental protection issues. These have included fishing and hunting rights, the management of solid and hazardous wastes, and problems related to rapid land and facilities development within the reservations associated with casino gambling.

Horizontal Complexity -- State Government Inter-agency Relationships

The vertical complexity that exists in intergovernmental relations is paralleled by a horizontal complexity at the state government level. Responsibilities are vested primarily in five cabinet level agencies -- Natural Resources (DNR), Pollution Control (PCA), Agriculture (MDA), Health (MDH) and Waste Management (OWM). In addition, important -- but less extensive -- environmental responsibilities are assigned by law to Trade and Economic Development (DTED), Transportation (MnDOT), Public Safety, Public Service (DPS), Commerce, and the Office of Strategic and Long Range Planning, along with several boards, commissions, and committees. The two most prominent boards are the Environmental Quality Board (EQB), which is assigned numerous responsibilities under the Environmental Policy Act, and the Board of Water and Soil Resources (BWSR), which is generally responsible for coordinating water and soil programs with local governments in the state. In total, there are more than 30 state agencies involved in administration of environmental services programs.

In addition to executive branch agencies, there are three legislative commissions with a variety of oversight and funding responsibilities -- the Legislative Commission on Minnesota Resources (LCMR), the Legislative Commission on Waste Management (LCWM), and the Legislative Water Commission (LWC). Several regular legislative committees also have divisions which deal with environmental services in addition to the Environment and Natural Resources Committees in both the Senate and House of Representatives.

The cabinet level departments are the administrative responsibility of commissioners appointed by the governor and confirmed by the Senate. The Environmental Quality Board is composed of 15 members (all appointed by the governor) and includes the chairman, five citizen members, and the commissioners of DNR, PCA, MDA, MDH, MnDOT, DPS, the directors of the Office of Strategic and Long Range Planning and Office of Waste Management, and the chair of the Board of Water and Soil Resources. The EQB is administratively housed in Strategic and Long Range Planning. BWSR is composed of twelve persons. It must include three county commissioners, three soil and water conservation district supervisors, three watershed district or watershed management organization representatives and three "unaffiliated" citizens. At least three, but no more than five members, must come from the seven-county metropolitan area. In

addition, the board contains non-voting representatives from the University of Minnesota, MDA, MDH, DNR, and the MPCA.

The Minnesota Pollution Control Agency, although headed by a commissioner appointed by the governor, operates under the authority of a nine member citizen board, also appointed by the governor. The law requires that the PCA Board contain one member "knowledgeable in the field of agriculture." Other key boards appointed by the governor include: the Agricultural Chemical Response Compensation Board, the Harmful Substances Compensation Board, the Public Facilities Authority, and the Petroleum Tank Release Compensation Board. Although each has independent authority, these four boards are administratively based, respectively, in the Department of Agriculture, Department of Health, Department of Trade and Economic Development, and Department of Commerce.

Finally, a number of advisory committees exist. One of the most active recently has been the Wetland Heritage Advisory Committee. This committee was established in 1991 to provide advice to state agencies (particularly BWSR) on the implementation of wetlands statutes and rules being promulgated in connection with that new law. It consists of nine members appointed by the governor. In addition to the commissioners of Agriculture and Natural Resources (or their designees), the law specifies that the remaining five members will include a county commissioner, a representative of a statewide sporting group, a statewide conservation organization, an agricultural commodity group, one faculty member of an institution of higher education with expertise in the natural sciences, and one member each from two statewide farm organizations.

Without elaborating on the specific responsibilities of the various agencies discussed above, several key points are illustrated which bear upon the finding relating to fragmentation of authority and accountability. First, there is a strong tradition in Minnesota in support of direct citizen involvement and participation in government. This together with the tradition of utilizing multi-member citizen boards in policy making roles has resulted in the existence of numerous boards and hundreds of citizens who in one way or another are to some degree "accountable" for public policy and administrative actions connected with those policies.

Second, the nature of the composition of the various boards and commissions illustrates both the diversity of interests in the environmental field and the legislature's desire to assure that these interests are directly represented. They also reflect legislative efforts to assure that particular specialties and areas of expertise are represented on boards. The complex arena of overlapping and interlocking memberships on boards and commissions is designed to provide balance and to assure multi-interest and multi-disciplinary representation. It also seriously complicates the appointment process and lines of executive accountability.

Third, various dimensions of environmental services -- those related to health and sanitation, conservation, environmental protection, agriculture, resource development, fish and wildlife, etc. -- are reflected in responsibilities and programs of different departments and divisions which over the years have developed strong relationships with "customers" who have strong interests

in particular issues. Although separate organizationally, numerous provisions exist in the law which acknowledge the close inter-relationships among these various program areas and mandate that activities among departments be "coordinated." The overlapping and interlocking advisory committee and board memberships are intended to facilitate this coordination. More importantly, the Environmental Quality Board -- which itself is by definition representative of the various interest sectors -- is mandated by law to assure this coordination.

Metropolitan Complexity -- Special Districts and Regional Governance

As noted earlier, the Minnesota State Legislature has created a unique system of governance within the metropolitan area. Regional special districts and independent public authorities are common throughout the country, particularly in large metropolitan areas. But the central actor in the Minnesota system, the Metropolitan Council -- its structure and functions, its authority, and its relationship to the state, to other regional organizations, and to local governments -- is unique. This system of governance is not replicated elsewhere in Minnesota, nor, for that matter, anywhere in the nation. The Metropolitan Council differs from the pattern in other metropolitan areas where regional planning is often carried out by "councils of governments" -- usually creations, if not creatures, of local government. It also differs to the extent that it has taxing and tax redistribution authority, operational responsibilities (either directly or indirectly) for large complex metropolitan public enterprises, and responsibility for implementing state law and policy.

The Metropolitan Council and the regional agencies with which it interacts have been the subject of periodic examination and review. They have also been the subject of frequent modification, both in powers and structure. Each of the agencies has a slightly different structure creating slightly different lines of accountability. It would seem that the specific composition of the governing boards of these agencies is a manifestation of the prevailing concern among legislators that existed at the time they were created. In cases when there seemed to be an interest in strengthening the state's role, emphasis was placed on gubernatorial appointment and legislative confirmation. In instances when there was interest in strengthening the Metropolitan Council's power and authority over the regional agencies, the composition of governing boards was more closely linked to the council.

Over the years, the council has evolved from an agency whose primary responsibility was long range planning to one which now has significant operational responsibilities over large complex metropolitan enterprises. There has been considerable legislative debate during the past several years about the changing character of the council and as yet there does not seem to be any clear consensus in the legislature with respect to which of these somewhat conflicting roles should take precedence. Currently, the council itself is examining these basic questions about its mission and function.

Although certainly carrying out functions which are usually thought of as "local" rather than "state" functions, the council and (to lesser degrees) the other regional agencies in the

metropolitan area function as "instrumentalities or political subdivisions of the state." The Metropolitan Council is mandated by law to develop a Metropolitan Development Guide and Metropolitan Investment Framework containing chapters dealing with health, airports, housing, recreational open space, transportation, solid waste management, sewage disposal, surface water management, water use and availability, and law and justice.[5]

The law requires that governmental units in the area prepare local physical development plans consistent with the council's plans for sewers, transit, highways, parks, and airports. Also central to environmental issues in addition to physical development and land use planning is transportation planning. This is the responsibility of the Metropolitan Council and the Regional Transit Board (RTB).

The RTB consists of eleven members which by law must have government or management experience. Eight are appointed by the council from specially created districts, each of which consists of two Metropolitan Council Districts. Two must be county commission board members and four must be elected city or town officials. The governor appoints the chair, one person who must be 65 years of age or older and one person with a certified disability. The RTB contracts with the Metropolitan Transit Commission (MTC) and other providers to operate regional transit systems, including those specifically addressing the needs of the handicapped. The membership of the MTC is appointed by the RTB.

Given the impact of airports on land use, transportation, noise abatement and other environmental issues, the Metropolitan Airports Commission (MAC) also plays a significant role. The MAC is composed of 15 members. The governor appoints the chair and 12 members, four of which must reside outside the metropolitan area. The mayors (or designees) of Minneapolis and St. Paul also are members.

The oldest and largest operating entity associated with the council is the Metropolitan Waste Control Commission (MWCC). The MWCC is the operating agency for the metropolitan wastewater treatment system. It is responsible for major trunk line collection systems and treatment facilities. The commission members are appointed by the council and the chair by the governor with senate confirmation.

In the area of recreational open space, policy is made by the Metropolitan Council, but with the advice of a legislatively established Metropolitan Parks and Open Space Commission (MPOSC). The members of this commission are appointed by the council and it in reality functions as an "agency of the council." Implementation of recreational open space policy, however, is the responsibility of 10 implementing agencies: Hennepin, Ramsey, Washington, Dakota, Anoka, and Carver counties, the Suburban Hennepin County Parks District, the Minneapolis Park Board, and the cities of St. Paul and Bloomington. Scott County operates its program through a joint powers agreement with the Suburban Hennepin Parks District.

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[5]Minnesota Statutes, Chapter 473.

In the area of solid waste management, the legislature departed from the pattern of establishing regional special districts in the metropolitan area. Responsibility for solid waste management was delegated to county governments although the Metropolitan Council, as well as each county, must have a solid waste management plan. Generally speaking, collection is the responsibility of cities and towns -- often implemented through private contractors -- and counties are responsible for disposal.

The roles of the Metropolitan Council and its associated agencies are central to the decision-making system in environmental services. In general, plans and permit applications from local governments and the private sector must be reviewed and approved by the Metropolitan Council prior to being considered for final approval by state agencies. The heritage of much of the council's "review and comment" responsibility is the former Federal A-95 regional planning requirements.[6] Although most of these federal requirements no longer exist (having been repealed in the early 80s), the council continues to exercise many of these responsibilities often through specific agreements with federal agencies. In addition, state legislation continues to delegate significant review responsibilities to the council.

In addition to the agencies noted above, there is also a separate Mosquito Control District and, as in other parts of the state soil and water conservation districts, watershed districts and two lake conservation districts (Minnetonka and White Bear) with key roles in water planning. Unique to the metropolitan area, there are also 46 separate Watershed Management Organizations, authorized by the Metropolitan Surface Water Management Act with responsibilities for water planning. The organizations vary in their scope and character and many are actually administered under contract by soil and water conservation districts.

Again, it is not necessary to go into great detail about each of these organizations to illustrate the governmental complexity which they represent. The pattern which was described earlier on a statewide basis also exists in the metropolitan area, but is magnified by the array of regional governance mechanisms which have been established. County, city, town, and special district governments have inter-related, overlapping and potentially duplicative and redundant functions with each other and with state agencies.

An Example: Complexity in Land and Water Use and Conservation

It should come as no surprise in a state known as the "Land of 10,000 Lakes" that the most elaborate systems in environmental services are those concerned with land use and water resource management. Minnesota law dealing with water planning, water use, soil and water conservation, etc. was largely rewritten and re-codified in 1990.[7] It assigns responsibilities to

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[6]"A-95" refers to federal planning requirements largely resulting from the Office of Management and Budget's Circular #A-95 and other specific review requirements in federal legislation.

[7]Minn. Stat. Chapters 103A - 103H.

several state agencies and hundreds of governmental entities. It provides the basis for the roles of state agencies such as the Environmental Quality Board (EQB), Board of Water and Soil Resources (BWSR), the Department of Natural Resources (DNR), the Legislative Water Commission and the Legislative Commission on Minnesota Resources, and at the local level counties, cities, towns, lake improvement districts, soil and water conservation districts and watershed districts.

Central to the state's role in water supply management is the DNR commissioner's responsibility for assuring adequate water supply ". . . to meet long-range seasonal requirements for domestic, municipal, industrial, agricultural, fish and wildlife, recreational, power, navigation and quality control purposes from waters of the state."[8] Except for domestic water supply purposes involving less than 25 persons, waters cannot be used or "appropriated" without a permit from the commissioner and may not be issued unless ". . . consistent with state, regional, and local water and related land resources management plans."[9]

Counties, Cities, and Towns. The Comprehensive Local Water Management Act provides much of the basic legal framework for water planning in the state.[10] It defines local units of government as ". . . municipalities, towns, counties, soil and water conservation districts, watershed districts, organizations formed for the joint exercise of powers and . . . other special districts or authorities exercising authority in water and related land resources management at the local level."

Counties are "encouraged" to develop and implement a comprehensive water plan, but may delegate its preparation to a local unit of government, a regional development commission, or a resource conservation and development committee. Once a comprehensive water plan is completed, before approval it must be submitted to: 1) all local units of government wholly or partly within the county, 2) the applicable regional development commission, 3) each contiguous county or watershed management organization, and 4) other counties or watershed management organizations within the same watershed unit and groundwater system that may be affected by proposals in the comprehensive water plan.[11]

Responsibility for developing guidelines and coordinating the development of local water plans is assigned to the Board of Water and Soil Resources. The law provides that it must use a local advisory committee consisting of persons representing counties, soil and water conservation

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[8]Minn. Stat. § 103G.265.

[9]Minn. Stat. § 103G.271, Subs. 1-2.

[10]Minn. Stat. §§ 103B.301 - 103B.355.

[11]Minn. Stat. § 103B.305, Sub. 4 defines "groundwater system" as the 14 principal aquifers of the state as defined by the U.S. Geological Survey.

districts, municipalities, townships, and persons interested in water planning to assist in the water planning process.

At the state level, coordination of water resources planning is the responsibility of the Minnesota Environmental Quality Board (EQB). In addition the law also assigns it the responsibility to ". . . coordinate water planning activities of local, regional, and federal bodies with state water planning and integrate these plans with state strategies."[12]

This litany of coordinating responsibilities is repeated throughout Minnesota law relating to water resources planning (and that relating to environmental services in general). Other examples could be cited:

> Relating to lake improvement districts, the law directs the DNR commissioner to coordinate and supervise a ". . . local-state program for the establishment of lake improvement districts by counties . . . based on state, regional, and local plans where the plans exist."[13]
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> Relating to watershed management plans, managers must send a copy ". . . to the county auditor of each county affected by the watershed district, the secretary of the board [BWSR], the commissioner [DNR], the director [of the Waters Division of DNR], the governing body of each municipality affected by the watershed district, and soil and water conservation districts affected by the watershed district."[14]
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> Regarding water permits: the DNR commissioner has authority ". . . to delegate public waters work permit authority to the appropriate county or municipality."[15] The commissioner is also prohibited from issuing a permit ". . . if a project does not conform to state, regional, and local water and related land resources management plans."[16]
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> Regarding Eurasian Water Milfoil Education and Management, the [DNR] commissioner is directed to ". . . coordinate a control program . . . with appropriate local units of government, special purpose districts, and lakeshore associations."[17]

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[12]Minn. Stat. § 103B.151 (3).

[13]Minn. Stat. § 103B.511.

[14]Minn. Stat. § 103D.401, Subd. 2.

[15]Minn. Stat. § 103G.245, Subd. 5.

[16]Ibid., Subd. 6.

[17]Minn. Stat. § 103G.617, Subd. 4.

Understanding this pattern of inter-relationships is paramount to understanding the complexity of policy development, decision-making, and administration in the environmental field in Minnesota.

Soil and Water Conservation Districts. Among the oldest local special purpose governments in environmental services are soil and water conservation districts, dating back to the mid-1930s. Although there already was a growing interest in soil conservation in Minnesota by this time, the impetus for creating the districts was the Federal Soil Erosion Service (now Soil Conservation Service). The Minnesota Soil Conservation Districts Law was passed in 1937. A major reason for creating these districts was a recognition that soil erosion problems more closely followed the boundaries of natural watersheds than the political boundaries of counties. However, the provisions for establishing them required landowner and electoral data that was available only on the basis of county boundaries. Ultimately, the primary boundary used to define SWCDs was that of the county. Ironically, the state would later create a separate and independent system of districts, the boundaries of which would be organized on the basis of watersheds.

There are currently 91 soil and water conservation districts. Their boundaries are coterminous with those of counties, except in four cases.[18] SWCDs are governed by five-person boards of supervisors elected for six-year, overlapping terms. The territory of the SWCD is divided into nomination districts for purposes of both nomination and election.[19] These organizations have a variety of responsibilities, including the preparation of comprehensive soil and water conservation plans, administering cost-share funds, providing technical assistance to landowners in securing funds and carrying out soil erosion, and water conservation projects.

Coordination of SWCD activities at the state level is the responsibility of the Board of Water and Soil Resources (BWSR). The Board establishes rules and policies, provides technical assistance to SWCD supervisors, reviews plans and programs relating to the use of state funds and generally coordinates soil and water conservation improvement projects.

Watershed Districts. A second type of local district provided by state law is the watershed district. These governmental entities date back to 1955, but really have their origins in state drainage and flood control legislation enacted shortly after the turn of the century. The law indicates the purpose of these organizations is ". . . to conserve the natural resources of the state by land use planning, flood control, and other conservation projects by using sound

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[18]St. Louis County districts are divided on a north-south basis, those in Polk and Otter Tail on an east-west basis, and there is a joint district consisting of portions of Beltrami and Marshall counties in addition to separate districts for Marshall and Beltrami counties.

[19]State law provides for appointment of supervisors by Tribal governing bodies when a nomination district is ". . . entirely within lands of an American Indian tribe or band to which county election laws do not apply (Minn. Stat. § 103C.305, Subd. 5)."

scientific principles for the protection of the public health and welfare and the provident use of the natural resources."[20]

Watershed districts are governed by boards of managers which can be no smaller than three, nor larger than nine. They are appointed by county commissioners from those counties in which the district's boundaries are located. Except in the case of soil and water conservation district supervisors, persons who are public officers of county, state, and federal governments are not eligible to be appointed watershed district managers. In contrast to soil and water conservation districts, watershed districts perform substantial regulatory functions and have the powers of both eminent domain and taxation independent of county authorization.

The boundaries of these districts are determined on a hydrologic basis, i.e., they follow the natural boundaries of watersheds. Currently 41 watershed districts have been established in the state. Their boundaries are officially defined and may be modified by the Board of Water and Soil Resources according to procedures specified in the law. BWSR also has authority to redistribute power to appoint district managers among counties, to increase the number of managers, to review and comment on proposed watershed district projects, and generally coordinate water planning activities by the districts.

Lake Improvement Districts. State law also provides for the establishment of lake improvement districts by county boards.[21] Districts are established upon petition by landowners in the proposed district by boards of county commissioners. In the event a petition is not approved by one county in a proposed district that would be multi-county in scope, the Commissioner of the Department of Natural Resources, after following legally prescribed hearing procedures, may by order create (or deny creation of) the district. The origin of these districts dates back to legislation in the 1930s when the law provided for landowners to petition the DNR commissioner to take steps to assure uniform lake water levels. The legislature subsequently authorized the establishment of lake improvement districts in 1973 to address this issue.

The composition of the boards of directors of lake improvement districts as well as their authority are determined by the county board or boards. The law provides, however, that their programs and services must be consistent with the statewide water and related land resources plan prepared by the DNR commissioner and with regional water and related land resources plans.

Other Programs. Numerous other programs exist under this general topic of land and water use and conservation. Those included in Chapter 103 F of the Minnesota Statutes under the heading of "Protection of Water Resources" are: Floodplain Management Policy, the Southern Minnesota Rivers Basin Area II Program, Shoreland Development, Municipal Shoreland

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[20]Minn. Stat. § 103D.201, Subd. 1.

[21]Minn. Stat. § 103B.501

Management, the Minnesota Wild and Scenic Rivers Act, the Lower St. Croix Wild and Scenic Rivers Act, the Mississippi Headwaters Planning and Management Program, Project Riverbend (a land and water use planning program for that part of the Minnesota River between the city of Franklin in Renville County and LeSuer in LeSuer County), the Reinvest in Minnesota Resources Act (RIM), the Water Bank Program, the Clean Water Partnership, and the Lake Preservation and Protection Program. These programs, in varying ways, assign responsibilities to state and local agencies and separate boards to plan, coordinate, and implement water resources policies.

Wetlands Protection. Closely related to water resources programs discussed above are those relating to the protection of wetlands.[22] In addition to thousands of lakes, Minnesota is blessed with thousands of acres of wetlands. These lands are of enormous importance from a number of environmental and economic perspectives. They provide shelter and breeding grounds for fish and wildlife, water for irrigation, and play a key role in replenishing the ground water supplies on which Minnesota depends for much of its drinking water. Many of the natural wetlands have disappeared -- much in the same way as have the native prairies. Parts of the state are now literally devoid of wetlands; on the other hand, other parts of the state are virtually nothing but wetlands.

The law provides that the drainage of wetlands is generally prohibited without replacement. Drained wetlands must be replaced (usually referred to as "mitigated") by wetlands that will have equal or greater public value. Limited exceptions are provided in the law for draining wetlands for agricultural use.

The responsibility for wetlands regulation is vested in the Commissioner of the Department of Natural Resources. Development of rules relating to wetland regulation are currently being coordinated by the Board of Water and Soil Resources in cooperation and with the advice of the Wetlands Heritage Advisory Committee. The most recent legislation dealing with wetlands modified the role of the Board of Water and Soil Resources and vested it with a significant role in wetlands regulation. Not unlike those in the area of water resources planning, management and coordination, issues involving wetlands also directly affect cities, towns, soil and water conservation districts, and watershed districts.

Authority and responsibility for wetlands is also shared with the federal government. Those that fall within the "navigable waters of the United States" are subject to the jurisdiction of the United States Army Corps of Engineers (Corps) under Section 10 of the Rivers and Harbors Act of 1899 and within the definition of "waters of the United States" under Section 404 of the Federal Clean Water Act. The Clean Water Act has been construed to extend the jurisdiction of the Corps to all water bodies, including wetlands, which can be shown to have a connection

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[22]Defining "wetlands," often referred to technically as "wetland delineation, " has become a very legalistic, technical, and scientific process. In common parlance, one usually thinks of terms such as "marsh" and "bog." The law distinguishes wetlands from "public waters" in that they are waters not confined but spread and diffused over the land. For additional detail, see Minn. Stat. § 108G.005.

with interstate commerce. Federal regulations and guidelines relating to wetlands -- generally referred to as the "404 program" -- are the responsibility of the U.S. Environmental Protection Agency. States are authorized to administer the 404 program and although the DNR has conducted a feasibility study on this question, the state has not applied for such authority.

One of the most time-consuming issues is determining whether the Corps or DNR, or both, have jurisdiction over particular wetlands. Minnesota has limited its jurisdiction to three of eight types of wetlands (types 3, 4, and 5). In 1979, the DNR commissioner was directed to inventory and classify all public waters of the state and to file an inventory map with the auditor of each county. Generally speaking, DNR's jurisdiction is determined by these classifications, but determination of federal jurisdiction often requires a specific site visit by the Corps.

Securing the necessary permits to drain wetlands often becomes one of the most complicated and time-consuming components of both public and private development projects. For example, CORE research found that the most difficult issue associated with the development of a recently completed county multi-services center involving several state and local departments and agencies was that involving the wetlands that would be affected by the project.

As noted earlier, wetlands are not evenly distributed across the state. However, state law and proposed regulations require that wetlands be replaced, in some cases on a "2 for 1" basis. In other words, for every parcel of wetland that is lost (i.e., drained), one of equal value (or twice that if the 2 for 1 rule applies) must be developed, replaced, or mitigated. Local officials in some parts of the state -- those richly endowed with wetlands -- argue that there are enough or more than enough in their counties and that it violates common sense to require them to mitigate all wetland losses. Others with a deficiency in wetlands argue that given the nature of land use, topography, and hydrologic factors, it doesn't make sense to try to produce new wetlands. Minnesota's policy is that of "no net loss."

One of the most controversial issues connected with wetlands mitigation is the concept of "banking." Simply put, if a project mitigates more wetlands than required given the amount destroyed, the balance can be banked. If in a subsequent project, problems exist in replacing wetlands, those on deposit in the bank can be withdrawn and applied to the deficit. Conceptually, the total amount of wetlands mitigated over the course of several projects will equal that destroyed (or twice that amount if that is what is required). The controversy surrounds whether mitigation must occur in a nearby location, in the same drainage area, in a nearby drainage area, or anywhere in the state.

CORE research found in its discussions with local officials and other interested parties across the state that the parallel and overlapping responsibilities of several units of government and agencies in the administration of wetlands laws and regulations was a matter of major concern. There seemed to be little question of the value of wetlands and the need to protect and preserve them. Considerable concern was expressed, however, about the complexity of procedures and what appeared to many to be the arbitrary application of uniform standards to widely differing situations.

Concluding Observations

Governmental complexity is not by definition bad or undesirable. Nor does it necessarily lead to inefficiency and poor customer service. To some extent, it is and will be inevitable in the environmental field. There is no state in the nation where the same observations about complexity could not be made -- regardless of the type of organizational structure that predominates at the state level. On the other hand, in its efforts to assure coordination among all parties and interests involved in environmental programs, Minnesota has developed a system that may be self-defeating. As important as coordination and citizen participation are, excess of both can often lead to policy and decision-making gridlock. One effect of the extensive coordination, review, and approval requirements which pervade Minnesota law and administrative procedures and practice is that the scale seems to be tipped in favor of delaying or stopping rather than expediting and obtaining decisions.

At the outset of this discussion of CORE's finding about governmental complexity the metaphor of the maze was employed. The dictionary defines the word "maze" as an ". . . intricate, usually confusing network of pathways, a labyrinth, or a physical situation in which it is easy to get lost." The example of water planning is arguably the most complicated of the environmental services areas. But, to varying degrees, the same patterns exist in other areas: water pollution, air pollution, solid, hazardous, and infectious waste, resource management, etc. It seems to be a fitting metaphor.

CORE FINDING #2: Minnesota's environmental system could be categorized as a collection of advocacy agencies, whereby each agency presents one or more differing perspectives, such as the environmentalist, conservationist, public health guardian and business proponent. At times, these separate and clashing perspectives lead to administrative gridlock, which means customers of the system cannot get decisions from the state.

When a business, landowner or local government unit seeks a state permit to engage in an activity that affects the environment, the customer applicant wants a response from the state. But that desire for a timely state response is sometimes unfulfilled, because state agencies have disputes among themselves. Meanwhile, the applicant waits for an answer. If the applicant gets frustrated, he or she may call a legislator to put pressure on agencies to make a decision.

The paralysis that results when agencies are in sharp disagreement on particular projects led some legislators in 1992 to sponsor a bill that would consolidate the competing agencies into one super-agency. The rationale was that more accountability would be instilled on a system basis, if the agencies were forced to reconcile their differences within the new super-agency.

Legislative sponsors said they preferred that approach to non-decisions that result when agencies are deadlocked.

Frustration occurs when the state fails to make a decision. At an Association of Minnesota Counties meeting in Montevideo, one county official said: "Nobody dares make a decision. The system rewards people, who don't make a mistake." He was upset by the fact that a state employee is safe if he doesn't make a decision, instead of being penalized for inaction. At an Environmental Quality Board hearing in Detroit Lakes, a north-central county commissioner described the current environmental system as an "utter nightmare." She complained about disputes between the Department of Natural Resources and the Pollution Control Agency, and disagreements within divisions of DNR. At the same meeting, a northwestern Minnesota farmer complained about DNR's Waters and Fish and Wildlife divisions taking opposing sides on wetlands regulation.

These anecdotes illustrate that there is more than ample opportunity in Minnesota's environmental service system for differing perspectives to surface and they give rise to the following questions:

- Should the competing environmental interests be given voice primarily in the legislative process?

- Is the public's interest well-served by several agencies which each represent a distinct advocacy perspective?

- Should the competing perspectives be acknowledged within a smaller number of agencies, a system which would require that multiple perspectives be considered within a particular agency?

- Would an executive branch appeals board ensure that administrative agencies consider the competing perspectives of citizens? Would a strong appeals board that is responsive to citizen complaints prompt agencies to justify their decision-making by weighing multiple and relevant perspectives?

Two points are clear:

- A number of Minnesotans are exasperated by the operation of the current system of advocacy agencies, because the different state agencies don't have incentives to reach decisions in a timely fashion.

- Alternative environmental service systems must be designed to incorporate the four major concerns of environmental protection, conservation, commerce and public health.

Does the current amalgamation of advocacy agencies serve the public interest? Citizens, businesses and local government units which have felt the negative effects of the internecine struggles would say no. Those which have grown comfortable with the personalities and missions of particular agencies would say yes.

In isolation, the creation of new departments to handle new environmental regulations and challenges was rational at the time the decisions were made. However, when examined from a broader system perspective, confusion emerges.

Legislators, who listen to constituents who vote, constructed an environmental system that meets the needs of the various interest groups that are involved in the environmental arena. Each has an important concern, and generally has an agency in state government to give voice to these special concerns.

Each of the seven major environmental agencies has a distinct advocacy perspective. This public persona has developed over time based on the laws the agency administers, the values of the agency and its employees, and the types of policies the agency recommends to the legislature. Although each agency attempts to balance a number of legitimate concerns, each agency tends to have a primary advocacy concern.

DNR has a conservationist profile, which can be traced back to the department's creation in 1931 when it was named the Department of Conservation. A conservationist is generally defined as one who favors the controlled use and systematic protection of natural resources. MPCA is perceived as upholding the concerns of environmentalists, who seek to protect the natural environment from destruction to the land, air and water.

In its mission statement, the Department of Health calls itself an "advocate and protector of public health." The Department of Agriculture emphasizes promotion of a strong agriculture economy, which includes support of farmers and agri-businesses. Meanwhile, the Board of Water and Soil Resources and the Office of Waste Management exist primarily to provide resources and advocate on behalf of local government units. The Environmental Quality Board, which has a majority membership of state agency heads, is designed to play a coordinating role. EQB aims to serve the broad public interest, but it also serves as a forum for the advocacy agencies to clash and engage issues or to avoid them.

In a February, 1987 Legislative Auditor's report on "Water Quality Monitoring," the pros and cons of the agency advocate system were discussed. The report stated:

> One of the reasons that many agencies are involved is that water issues are complex and far-reaching, affecting almost every citizen. Government agencies are concerned with ensuring an adequate supply (enough, but not too much) of quality water for a wide variety of uses. Consequently, agencies dealing with agriculture, health, public safety, natural resource management, pollution control and recreation all have legitimate interests in water-related issues. The result, in

> both Minnesota and other states, is a complex interrelationship among different agencies at different levels of government.[23]

Further, the report concluded, "The major rationale for Minnesota's organizational approach is that separate agencies can advocate better for their specific areas of responsibility."[24] The same report included the fact that the complex advocacy system prevails, despite the development of at least 14 different reform proposals and completion of reorganization studies between 1970 and 1986.

In the water arena, the Legislative Auditor said:

> Although the advocacy approach may prevent one agency or point of view from over-shadowing competing interests, it can have disadvantages as well. Agencies can work at cross purposes or subvert each other's efforts. Agencies may not be able to agree on solutions to problems. If such an approach results in an absence of communication and coordination, agencies may duplicate each other's activities or implement conflicting policies. Such a situation, besides being inefficient, can confuse the public and the local agencies that are affected by state programs and policies.[25]

Many people inside and outside government would acknowledge the confusion in the system that exists in 1992. However, each agency has its own political constituency, and the agencies and interest groups are concerned about structure reorganization and service delivery reforms. Both agencies and private organizations are worried about the unknown consequences, which may result from reforms designed to accelerate decision-making and improve customer satisfaction.

The objective of CORE is to create a reformed environmental service system that operates in the general public interest, balances the competing perspectives and makes decisions in a time-efficient manner. In summary, the aim is to develop a more effective way of administering the current environmental laws, rules and regulations. Ultimately, that objective is one that a number of interested parties may be able to agree upon.

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[23]Office of the Legislative Auditor, Water Quality Monitoring, February, 1987, p. 23.

[24]Ibid.

[25]Ibid.

CORE FINDING #3: The environmental system relies too heavily upon centralized decision-making, which has produced significant alienation in non-metropolitan counties. Many rural citizens are dissatisfied with their interactions with the centralized bureaucracy, and perplexed as to why state agencies do not assign more authority to regional agency offices.

Dispersed Customers, Centralized Bureaucracy

Minnesota's 4.4 million residents are scattered across 84,000 square miles, but the people who administer the state's environmental policies are concentrated in St. Paul.

That concentration of authority angers citizens and local government officials who live outside the seven-county metropolitan area. At recent regional meetings of the Association of Minnesota Counties (AMC) and the Environmental Quality Board (EQB), rural residents expressed their displeasure over what they perceive to be a sluggish and unresponsive environmental bureaucracy.

In New Ulm, a county commissioner said, "Let St. Paul people do what they do best. Let people in rural areas do what they do best." In a non-metro EQB hearing, a state agency commissioner acknowledged that there is a "trust problem" between the central and regional offices. In Detroit Lakes, a citizen complained that many people in regional offices have their "hands tied" by the bureaucratic layers within a state agency department. That was echoed by two others who testified and argued that regional offices should have the authority to issue permits.

In 10 non-metro meetings attended by CORE staff, the message was clear. The state's environmental customers who live outside the metro area believe the centralized bureaucracy takes too long to make decisions. Secondly, they believe that environmental agency staff are so far removed from non-metro counties that they do not understand the differing needs of various parts of the state.

The Current Service Delivery System

Seven state agencies have major responsibilities in implementing Minnesota's environmental policies. Four agencies have staff assigned to regional offices. They are: the Department of Natural Resources (DNR), Minnesota Pollution Control Agency (PCA), Minnesota Department of Health (MDH), and Board of Water and Soil Resources (BWSR). Three agencies do not use regional offices; they are: the Minnesota Department of Agriculture (MDA), Environmental Quality Board (EQB) and the Office of Waste Management (OWM).

Eleven Minnesota communities are home to state agency regional offices. Because the service boundaries of these agencies are not coterminous, regional staffs are located as follows:

Northern Communities:

Bemidji (DNR, MDH, BWSR)
Brainerd (DNR, PCA, BWSR)
Detroit Lakes (PCA)
Duluth (PCA, MDH, BWSR)
Fergus Falls (MDH)
Grand Rapids (DNR)
St. Cloud (MDH)

Southern Communities:

Mankato (MDH)
Marshall (PCA, MDH, BWSR)
New Ulm (DNR, BWSR)
Rochester (DNR, PCA, MDH, BWSR)

The Department of Natural Resources (DNR) is decentralized in its assignment of personnel to about 350 offices in Minnesota cities, small towns, woods and farming areas. About two-thirds of DNR's 1,500 full-time employees and nearly all of its seasonal workers are situated close to the resources they manage.

But despite this large dispersal of DNR employees, the DNR regional offices are limited in their power. Major policy and program decisions are made in St. Paul by the commissioner, his top appointees and the directors of the divisions of Forestry, Fish and Wildlife, Parks and Recreation, Minerals, Trails and Waterways, Enforcement and Waters.

The allocation of DNR power has been the subject of many executive and legislative debates, and was addressed about 20 years ago by a precursor of CORE. The Loaned Executive Action Program (LEAP) studied DNR in 1973, and concluded that DNR was operating as a "loose coalition of independent divisions." DNR's divisions had operated as independent agencies until 1931, and LEAP determined that DNR's divisions were still functioning quite autonomously more than 40 years later. LEAP recommended a major shift in DNR's operating structure, which emphasized shifting power to regional offices.

A 1986 Touche Ross & Co. report provides some useful history. It said, LEAP "recommended a highly decentralized field structure with regional administrators reporting directly to the

Commissioner. Line authority was removed from division directors with the division directors serving only in a planning and advisory role."[26] To continue from this report:

> According to the LEAP report, the reorganization would improve public responsiveness, improve interdivisional cooperation and improve cost effectiveness. The LEAP recommendations were implemented in 1973 and 1974.
>
> In 1978, an internal task force of DNR managers concluded that the agency had serious problems with public responsiveness and in the accountability of field operations. The DNR was reorganized, restoring line authority for field operations to each division. The reorganization, however, retained the regional structure for Administration and Field Services (fleet and facilities management).
>
> In 1983, the Legislature directed the Department of Administration to study the regional organization of the DNR. This study recommended that line authority for field operations be retained by the divisions. The study, however, recommended strengthening the Regional Administrator's role in departmental decision-making.
>
> In 1986, legislation was introduced to reorganize and decentralize the DNR. This reorganization plan would have restored line authority for field operations to the Regional Administrators. The objective of this reorganization was to improve coordination among divisions, improve public responsiveness, reassign central office functions to the field and increase the DNR's sensitivity to local needs and concerns.[27]

The reorganization legislation did not pass, but the legislature authorized the study by Touche Ross. That study concluded that "improvements can be made in the DNR's delivery of public services without major reorganization." DNR still operates with the major powers vested in the divisions in the central office.

On a smaller agency scale, the Board of Water and Soil Resources (BWSR) has 75 percent of its 32 employees assigned to six regional offices. BWSR is primarily a service agency, and its clients are local governments, such as counties, soil and water conservation districts, watershed districts and water management organizations.

In contrast, the Minnesota Pollution Control Agency is highly centralized. According to a January, 1992 PCA report, PCA had 661 employees based in the central office in St. Paul, and 42 staff assigned to the five regional offices. Like DNR, the major program authority lies in

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[26]Touche Ross & Co., "Organization and Management Study of the Department of Natural Resources," a report prepared under contract to the Legislative Commission on Minnesota Resources, December 1986, p. 1.

[27]Ibid.

St. Paul with the commissioner, his staff and the directors of the divisions of Air Quality, Water Quality, Ground Water and Solid Waste, and Hazardous Waste.

The PCA leadership and an internal Regional Roles Workgroup have concluded that PCA must decentralize its operations. PCA published a 1992 report called, "The Role of the MPCA Regions: An Evolving Strategy for Program Delivery." In it, the agency said, "In the initial stages of program development, a centralized staff is essential. However, as procedures are established, regulatory roles are identified, and the regulated community is defined, program representatives must be located to reflect the geographic distribution of client groups."

PCA hopes to achieve four objectives by implementing regionalization:

1. Provide the general public and the regulated community with greater accessibility to MPCA staff;

2. Achieve faster response to inquiries from the public and the regulated community;

3. Achieve a greater level of effort in reaching and maintaining compliance with environmental regulations;

4. Provide greater emphasis on environmental issues unique to specific geographic areas of the state.

PCA is gradually moving personnel to regional offices, which includes filling some vacant positions in St. Paul by shifting them to regional offices.

In the Minnesota Department of Health, about 185 people are assigned to the Division of Environmental Health. The division includes such functions as water supply and well management and environmental field services. About one-fourth of the Environmental Health Division staff are assigned to Health's regional offices; however, their program supervisors are based in Minneapolis.

The Environmental Quality Board, which plays a coordinating function for the state's environmental system, has about eight staff people from the Minnesota Planning agency to assist with EQB research, planning and policy analysis functions.

The Department of Agriculture does not have regional offices in the state, and its program staff who supervise environmental regulatory activities are based in St. Paul. The Agriculture Department does have 12 field staff located outside the Twin Cities, and others are headquartered out of St. Paul and travel extensively to perform their duties. The Agriculture Department is responsible for regulating the use of pesticides and fertilizers. There are 50

supervisory, professional and technical positions based in St. Paul, which are dedicated to environmental programs.

The Office of Waste Management has about 55 employees, and they are all based out of St. Paul. OWM staff provide financial and technical assistance to counties, businesses and local units of government to help them prevent pollution and practice proper management of both solid and hazardous waste. Because of its mission to provide help to counties, OWM staff spend a lot of time traveling to the outlying regions. This is particularly true of the Local Government Assistance staff.

Minnesota's environmental agencies vary in their degree of decentralization of employees outside the metro area. However, all of them set policy and make major program decisions in the Twin Cities. The centralized authority appears to slow decision-making. In addition, increased cooperation and communication among environmental agencies at the regional level will have a limited impact, because those regional personnel do not have the power to make many critical decisions.

CORE FINDING #4: The environmental system relies heavily on "command and control" regulatory processes to implement environmental goals rather than using a balanced mix of diverse approaches to achieving compliance with the goals.

> ***Throughout the regulatory agencies you are dealing with a mind set that is in favor of command and control. They grew up in the agencies and have developed a set of values which is very command and control oriented. (local government official)***
>
> ***The agencies are in the business of managing permits, not water. (state planner)***
>
> ***We've gone about as far as we can with command and control. (MPCA manager)***

<u>Summary/Background</u>

"Command and control" is a shorthand phrase for a regulatory process designed to achieve compliance with environmental policies by the use of fixed standards or prohibitions described in rules and permits. Most commonly, the rule specifies the general standard applicable in the state, while the permit applies to a specific facility or site, i.e. the permit makes the general rule

very specific. Rule and permit violations are enforced through the use of legal proceedings, including administrative, civil and criminal law and a system of compliance orders, penalties, fines, and jail sentences. All forms of government (federal, state and local) are heavily dependent on this method to implement environmental policy goals. Its selection as the method of choice is dictated in the language of laws, in the funding of approaches, and in the resources devoted to its use.

Frequently mentioned alternatives to "command and control" to achieve compliance are: education and training, technical assistance, various economic incentives or some combination of the above. These approaches have been minimally utilized. While "command and control" has led to measurable environmental improvement, "command and control" has also led to highly complex and prescriptive rules; long times to process the large numbers of permits required; enforcement that is often perceived as acrimonious, arbitrary, or inadequate; and lengthy, costly litigation.

Description of the Current System

Development of Command and Control Standards. Prior to the late 1960s, most environmental problems were dealt with by local and state government officials who were concerned with regulating land uses and mitigating a "public nuisance." Nuisances were tackled on a case-by-case basis. But by the late 60s, environmental pollution nuisances were becoming far too numerous and serious and were clearly spreading beyond local and state government boundaries, jeopardizing the ability of legal authorities to deal with their mitigation. Thus a new federal environmental framework was developed to deal with this new awareness of the need to prevent and mitigate pollution, which was perceived to be a threat to human health and the environment.

The new federal environmental framework began with passage of the National Environmental Policy Act in 1969, followed quickly by the Clean Air Act in 1970. Ten major federal environmental laws now form the basis for the federal environmental program. In developing this regulatory framework, Congress used different criteria for mitigating the pollutants, each of them imperfect.

1. Health-based Approach: The main criterion was protection of the public health. This meant limiting pollutants to those levels that would have no impact on the public health. The difficulty was the wide variability in vulnerability to pollutants among the population. For some pollutants, only no discharge could truly protect all the public.

2. Cost-benefit Approach: The main criterion was balancing the benefit of controlling the pollution vs. the cost of control. Difficulty was the costs for control were relatively concrete and simple to specify; the benefits were more abstract and more value-laden.

3. Technology-based Approach: The main criterion was the use of the "best available technology (BAT)." While this focused discussion on fairly quantifiable issues (the efficiency, effectiveness, and costs of the technology) and provided some assured level of treatment, it sometimes lead to "treatment for treatment's sake" with costly treatment being required which offered little environmental benefit.

Whatever approach is used, the rules and regulations that aim to "control" pollution, if they do not totally prohibit the production of a pollutant, use the following types of standards.

1. Ambient Standards: These standards place limits on the amount of pollutant that can be found in an environmental medium (e.g. air, water) so as not to endanger its use or users. These are the benchmarks that describe the optimum limits of desired environmental conditions. They are not usually directly enforced but influence the discharge or operation standards or permit conditions.

   An example of an ambient standard from the Rules is:

   The quality of this class of the waters of the state shall be such as to permit the propagation and maintenance of cool or warm water sport or commercial fishes and be suitable for aquatic recreation of all kinds, including bathing, for which the waters may be usable. Limiting concentrations or ranges of substances or characteristics which should not be exceeded in the water are:

Dissolved oxygen*	***Not less than 5 milligrams per liter at all times (instantaneous minimum concentration)*******[28]

2. Emission or Discharge Standards: These standards place limits on the amount of pollutant that can be discharged or emitted from a facility.

   An example of an emission or discharge standard from the Rules is:

   . . .the following effluent standards may be applied without any allowance for dilution where stream flow or other factors are such as to prevent adequate dilution, or where it is otherwise necessary to protect the waters of the state for the stated uses: . . .

5-day carbonaceous biochemical oxygen demand	***5 milligrams per liter (arithmetic mean of all samples taken during any calendar month)***[29]

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[28] Minnesota Rules, Part 7050.0220, Subp. 3B.

[29] Minnesota Rules, Part 7050.0210, Subp. 8.

3. Equipment or Operation Standards: These standards require the use of certain equipment, construction or operation techniques to limit pollutants.

An example of an equipment or operation standard from the Rules is:

> ***It is herein established that the agency shall require secondary treatment as a minimum for all municipal sewage and biodegradable industrial or other wastes to meet the adopted water quality standards.***[30]

These standards are applied to specific situations through the issuance of permits for various activities which specify limitations and required monitoring and reporting. Depending on the program, the state may issue state permits, may be authorized to issue federal permits, may issue both types simultaneously or distinguish between activities that need a state permit vs. a federal permit. For certain activities, local governments may require permits in lieu of state permits or in addition to state permits, again depending on the law regulating the activity.

An example showing the detail and specificity of a permit issued by the MPCA is the following:

> ***. . . THE CITY OF ELK RIVER . . . is authorized by the Minnesota Pollution Control Agency (MPCA), to discharge from the municipal wastewater treatment facility located in the N 1/2 of the NE 1/4 of the NE 1/4 of Section 3, T32N, R26W, City of Elk River, Sherburne County, to receiving water named the Mississippi River, in accordance with effluent limitations, monitoring requirements and other conditions set forth in PARTS I, II, III and IV hereof. . . .***
>
> *EFFLUENT LIMITATIONS*
> ***During the period beginning on the effective date of this Permit and lasting until June 30, 1996, the Permittee is authorized to discharge from outfall serial number 010.***
> ***This discharge shall be limited by the Permittee as specified below using a flow of 1.04 mgd for calculating kilograms per day.***
>
EFFLUENT CHARACTERISTICS	*CONTINUOUS DISCHARGE LIMITATIONS*
	Calendar Month Average
5-day Carbonaceous Biochemical Oxygen Demand (CBOD5)[31]	*25 mg/l (98.3 kg/day) 85% Removal*

The Federal-State Relationship

The Congress in enacting environmental laws usually directs the Environmental Protection Agency (EPA) to administer the program. EPA then may delegate that responsibility to the state

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[30]Minnesota Rules, Part 7050.0210, Subp. 6.

[31]NPDES Permit No. MN 0020788.

in a process called "primacy" or "authorization." Primacy means the state is primarily responsible for operating and enforcing the program. Although the approach to obtaining primacy varies somewhat among programs, in general, to obtain primacy a state must have a plan for implementing the program, have state law in place providing state authority to conduct program activities, and have funding and personnel to match federal grants for program operation.

Minnesota has taken the initiative to obtain primacy or become authorized for implementing nearly all federal programs. Thus, the standards and approach present in the federal law and regulations are mirrored and, to some extent, modified in Minnesota Rules because the state rules which implement state law in primacy programs must be no less stringent than the federal regulations, i.e., the federal regulations are the minimum. (Minnesota Rules refer to adopted, formal state rules that have the force and effect of law.)

Minnesota does not generally adopt federal regulations "as is," but rather tailors the federal regulations to meet Minnesota conditions. This may mean the Minnesota Rules expand into areas the federal regulations do not address, or set standards that are more stringent than federal standards. An example of standards that are more stringent than federal standards can be found in the water quality toxics standards. Lower amounts of toxic compounds are allowed in Minnesota waters because Minnesota has a very active sport angler population, that reports consuming more fish than the national average.

Enforcement of Rules and Permits

Although the state may have primacy for a program, the EPA typically retains the right to directly enforce a permit condition or standard, either at its discretion or after a notice period to the state. While EPA's independent authority to enforce can serve as a check on inadequate enforcement, it can also produce conflicts with the state and concerns from the regulated party that deter settlement, prolonging an environmental risk. An approach used in more recent legislation, is the use of "co-operative agreements" between EPA and the state whereby EPA names the state as an agent of EPA to enforce federal law.

The major federal and state environmental laws are not consistent in the enforcement approaches sanctioned. However, the types of enforcement tools that are used in enforcing environmental standards and permits generally are listed below.

1. Notices of Violation (NOVs) are formal notices sent by an agency to a permittee describing a violation and requiring a response to correct the violation.

2. Stipulation Agreements (Stips) are legally enforceable document negotiated between the agency and the permittee which resolves a violation by requiring actions designed to bring the permittee into compliance within a specified time period. They may contain penalties if penalties are authorized in statute.

3. Administrative Orders and Penalties are orders issued by the agency that requires the permittee to perform activities to remedy noncompliance within a set time frame. Penalty authority allows the agency to impose monetary penalties of fixed amounts or up to a limit set in law.

4. Civil Court Actions.

5. Criminal Court Actions.

Difficulties of Command and Control Approach

The regulatory system of rules and permits is scientifically, legally, politically and technologically complex. The complexity of the system is costly: in time, in resources, in development and in maintenance. It is costly from the perspective of the government which must operate it and the person who must comply with it. Two recent highly controversial rules in the environmental area cost the MPCA $125,000 and $250,000 to promulgate. "Federal environmental policy is 'poorly designed' and 'absurdly inefficient'. . . and the cost is anywhere from $150 billion to $340 billion a year of lost gross domestic product."[32]

An attorney, testifying at a hearing held by the Environmental Quality Board in August, 1992, expressed concern that a recent law was "too complex to be enforced." The numbers of permits that must be processed and tracked are high. (For example, the MPCA estimates that there are approximately 1500 facilities in Minnesota requiring air permits and there are a thousand NPDES permits.) The complexity and quantity of specified rules may exceed the ability of many persons to comply and the ability of government to administer effectively. Additionally, inconsistencies between levels of government in the administration of the programs and inconsistent policies on enforcement make it difficult for persons who want to comply, to comply, or to appreciate the consequences of noncompliance.

The specificity and extent of the control expressed in rules creates the impression of inflexibility and unreasonableness. From a county commissioner: "Minnesota is not a flat table-top! We have 6 or 7 very distinct and unique ecosystems. . . . These unique ecosystems cannot all be treated the same. Can a single set of rules apply to such a diverse landscape and yet deal fairly and equally to everyone affected?"

From many diverse perspectives, CORE staff heard dissatisfaction, not with the environmental goals, but with the costly, inefficient system that presently exists to obtain the desired environmental results. Many persons spoke to the need to develop a more balanced and effective mix of approaches to achieve the environmental goals. From a county commissioner: "Of the

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[32]Star Tribune, May 18, 1992, p. 2D, Dick Youngblood quoting Robert Crandall, senior fellow at the Brookings Institution.

two issues that are the most important, financing and training, I don't know which has the higher priority. I am not talking about a few field people. This is going to be more than mailing out a few pamphlets, but some serious, in depth training." From another local official: "Agencies should change to outcome-based compliance, allowing flexibility in how we achieve the compliance." Finally, pleas for more technical assistance were mentioned in many settings. "Technical experts are different in mind set from compliance enforcers...We need a continuous improvement focus...We need to build technical expertise to move forward." (business owner)

CORE FINDING #5: The current environmental system relies upon the customer to coordinate among the agencies, instead of the agencies presenting a coordinated response to the customer.

> ***The citizen should not have to coordinate between two permitting agencies. Two agencies should not argue on my client's time. (attorney)***
>
> ***I asked once, when I had to test my well. The answer was, 'Well, it depends...Depends on why you're testing: health, pollution, aquifer, wetland...You need to talk to several different agencies to get answers. (administrator)***
>
> ***We just had a project that needed nine permits. It's driving people wild. (government engineer)***

Summary of Problem/Background

Relief from the burden of permits required by multiple agencies for multiple programs was the most frequent request to CORE staff. The frustration expressed focused on the following issues:

1. The number of permits required;
2. The length of time required to process the permits;
3. The costs of the permits;
4. The number of governmental units that required permits for the same or similar activities.

In the mid-1970s the Legislature passed the Minnesota Environmental Coordination Procedures Act to "provide better coordination and understanding between state and local agencies in the administration of the various programs relating to air, water, and land resources," (Minnesota Statutes, section 116C.23) and established an environmental permits coordination unit in the Department of Trade and Economic Development. The unit has no full-time, dedicated staff. According to the agency, information requests to the unit tend to come from persons with substantial investments. "It's not something that Ma and Pa operations use." The provision designed to help a business navigate the state system to secure the required permits and complete the various types of paperwork has not been used.

Current System

Despite efforts cited by the agencies to integrate programs across environmental media and agency boundaries, the environmental system is perceived by the customer as compartmentalized and lacking coordination within individual agencies, between agencies, and among agencies at different levels of government. While agencies understand the division of responsibilities among themselves, and use instruments such as memoranda of agreement and various committees to coordinate among themselves, this coordination is not perceived at the level of interaction with the customer. The customer does not define environmental responsibilities in terms of agencies, but rather in terms of environmental concerns or activities which impact the environment (e.g. wetlands, wells, shoreland).

While the public perceives "the environment" broadly, agency programs operate with specificity, seemingly isolated from each other, with each program aware of only its own objective. Each agency can provide information about its program but may not or cannot provide information to the citizen on a related program that is in another agency. The customer must contact all agencies separately. From a citizen: "All agencies should practice what they preach, demonstrate by their own actions what they expect everyone else to do. Some policies conflict within agencies. When the public perceives these conflicts, it creates problems...Citizens have to make too many phone calls, are subject to too much shuffling...it's exhausting."

Particularly frustrating problems develop when there are conflicts of opinions, perspectives or objectives among the agencies. Complaints were made about citizens being given conflicting information and needing to organize meetings between the staffs of various agencies to resolve uncoordinated responses. Disputes between agencies can delay the processing of a permit indefinitely, even though the customer has supplied all the information required by the state agencies. A county administrator says: "Your main concern is certainty about who and when and that the decision will be made." Yet the citizen perceives that he or she has limited ability to affect agency decision making gridlock. One citizen characterized this as a need for accountability issue: "The state demands information quickly, yet when the state is asked to respond, it takes forever."

The lack of coordination between agencies is evident to the customer seeking information on an environmental activity or concern. Access to data collected by the agencies is described as difficult at best. Agencies maintain separate data bases and records and they are not conveniently accessible to the public. Again, each agency must be contacted separately and little assistance may be available to retrieve the information.

The most frequent requests from customers were for "one stop shopping" for permits and one number to call to report an environmental problem or receive all needed information on a regulated environmental area or activity.

CORE FINDING #6: Minnesota's governmental structure in environmental services over the past several decades has grown by a process of addition, fragmentation and specialization rather than by subtraction, combination, consolidation and services integration. No consistent organizational or administrative pattern exists with regard to the responsibilities of departments, offices, boards, commissions and other agencies.

The complexity of intergovernmental and organizational relationships and the pattern of designing and creating agencies which address a particular policy issue or the representative interests of specific constituent groups were discussed in Finding #1.[33] The result at the state level is the existence of over 30 agencies involved directly in some aspect of the environmental services delivery system. This does not include four interstate and international organizations in which Minnesota is a participant, the seven regional special districts in the metropolitan area which function as political subdivisions of the state, and three legislative commissions with responsibilities in environmental services. (For additional detail, see Appendices A and B.)

It should be emphasized at the outset that not all of these agencies are equally involved in the environmental services system. Although the number "over 30" highlights the complexity of the system, in some respects, this number also exaggerates it. Many of the agencies included are advisory; others carry out important functions in the environmental area, but are not primarily environmental agencies.

At the state level, the bulk of responsibilities are vested in the Department of Natural Resources (DNR), the Pollution Control Agency (PCA), the Office of Waste Management (OWM), the Board of Water and Soil Resources (BWSR), and the Environmental Quality Board (EQB). The Department of Agriculture (MDA) and Department of Health (MDH) have major environmental

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[33]The term "agency" unless noted to the contrary is used throughout in a generic rather than technical sense. For the technical meaning under Minnesota law of "agency," "department," "board," "commission," etc., (see Minn. Stat. §§ 15.01-15.014).

responsibilities and related organizational subdivisions, but obviously have other broad responsibilities only tangentially related to environmental services. The roles of the departments of Transportation, Public Service, Public Safety, Commerce, Trade and Economic Development and the Office of Strategic and Long Range Planning (Minnesota Planning) include their involvement in specific activities with a direct impact on environmental services or by serving as the administrative base for several environmental boards, authorities, commissions, councils and task forces.[34]

Organizational Evolution

It should not be concluded that the pattern of organizations outlined above evolved in an accidental or haphazard fashion. Research into the history of each agency's creation or the assignment or reassignment of a responsibility to a particular agency will reveal a set of political, cultural and operational dynamics which resulted in that decision. Any proposed change will need to confront these same dynamics. As noted in earlier Findings, direct citizen participation in all aspects of government in Minnesota is supported by strong historical and cultural traditions.

Many of these agencies were created for the specific purpose of providing direct popular representation of local governments and specific constituency interests in governmental policy making and administration (e.g., BWSR, the Petroleum Tank Release Compensation Board, the Agricultural Chemical Response Compensation Board).[35] Others were created to provide a separate and identifiable organizational focus for a particular policy or program (e.g., the Office of Waste Management). The responsibilities for environmental programs assigned to the Department of Health reflect its long history in "environmental sanitation." The Department of Agriculture's involvement in fertilizer and agricultural chemical regulation also has historical roots and obvious constituency interest support.

The involvement of many governmental agencies -- either directly or indirectly -- in environmental services seems to be an inherent characteristic of this field of public policy and programs. It can be argued that there are really few governmental agencies whose programs do not in one way or another affect environmental issues. Carried to its logical conclusion, this characteristic could produce an organizational result that would be both illogical and unmanageable. As one Minnesota state senator noted, you could have just one department -- the

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[34]Unless noted specifically to the contrary the citizen members of boards, commissions, committees, etc., are unsalaried and serve on a part-time basis.

[35]It should be noted that the creation of the Board of Water and Soil Resources was the result of a merger in 1987 of the Soil and Water Conservation Board, the Water Resources Board and the Southern Minnesota River Basins Council. While it represents this pattern of establishing organizations to provide direct constituent representation, it is also a rare exception to the general contention in this Finding regarding growth by addition rather than by subtraction.

Minnesota Department of Environment. Conversely, another argued that government in Minnesota is more complex than necessary and certainly more so than would seem prudent given increasing concerns for economy, efficiency, effectiveness and responsiveness to customer service.

One legislative response in Minnesota to the pervasiveness of environmental issues across most of state government has been the creation of a number of agencies with overlapping or interlocking memberships of agency heads. The purpose of these relationships is to facilitate policy and program coordination among departments with related activities and to draw upon the expertise of diverse scientific, technical, program, and constituency orientations.

The agency with the most central role in this process is the Environmental Quality Board with commissioner-level representation from MDA, MDH, DNR, MnDOT, MPCA, and Public Service, the directors of OWM and Minnesota Planning, and the chair of BWSR. Other examples include the Wetland Heritage Advisory Committee (the commissioners of MDA and DNR and seven "stakeholder" members appointed by the governor), the Advisory Council on Wells & Boring (representatives from MDH, DNR, MnDOT, MPCA, BWSR, and the Minnesota Geological Survey), and the Emergency Response Commission (commissioners of Public Service, MDH, MDA, MPCA, and 17 "stakeholder" representatives).

Perhaps the most perplexing issue relating to the organizational structure of environmental agencies is that concerning the relationship between responsibilities that are primarily resource management and those that are regulatory in character. Related to this issue is that regarding the organizational separation of functions which involve advocacy, promotion, and the provision of technical assistance from those involving compliance and enforcement.

This issue is complicated by the fact that most agencies are now involved to varying degrees in both categories of activities. Clearly, DNR's programs in forestry, minerals, parks, trails, and fish and wildlife involve promotion and advocacy whereas its activities in waters involve regulation (e.g., water appropriation and wetland permits) and advocacy (e.g., partnerships with volunteer lake associations and its "lake advocates program"). MPCA is primarily a regulatory agency, but is also involved extensively in technical assistance and grant programs (e.g., the Clean Water Partnership and Citizen Lake Monitoring Program). Also, separate lines, which used to be clear, are becoming increasingly blurred. BWSR's role has been predominantly advocacy and technical assistance. But, its evolving role in wetlands programs includes a regulatory dimension. Similarly, OWM has focused upon technical assistance but also has responsibilities which are regulatory in character (e.g., certificate of need and solid waste plan approval).

Many constituent interests argue that separation of regulation and enforcement from technical assistance and advocacy leads to better working relationships between those needing and those providing assistance. Similarly, they argue that getting assistance from the "regulator" and "enforcer" is a little like "going to the police station to ask if you have broken a law rather than asking a lawyer." The most complete separation in Minnesota state government is in the area

of solid waste management where advocacy and technical assistance are located in a separate agency -- the Office of Waste Management.[36] It should also be noted that no other cabinet level agency has been established to deal with a single environmental services issue.

Those arguing for an integration of these functions in one agency point out that a separation of advocacy from regulation can be maintained by assigning responsibility to different organizational units and different people. They argue that these functions are already integrated in several departments, particularly in the Department of Natural Resources, and that increased efficiency can best be achieved when problem identification, technical assistance, and service delivery are closely linked organizationally. They also note that efforts to develop an organizational focus upon prevention (rather than being limited to enforcement and compliance) would be enhanced by eliminating this separation where possible. If the agency has responsibility for both technical assistance and enforcement, it can integrate the two activities into more effective prevention programs. They are essentially arguing that it will encourage integrated resource management.

The legislature has delegated considerable policy making responsibility to administrative agencies. This involves both the formulation of rules as well as discretion on the implementing and applying policy to specific situations -- usually referred to as "quasi-judicial" and "quasi-legislative" powers. This has prompted in some cases the creation of multi-member citizen boards with responsibility for:

1. the administration of agencies (e.g., the PCA Board);

2. approving the expenditure of funds to provide grants to carry out specific environmental programs (e.g., BWSR, the Public Facilities Authority);

3. compensation or reimbursement connected with pollution clean-up (e.g., Hazardous Substances Compensation Board, Agricultural Chemical Response Compensation Board, Petroleum Tank Release Compensation Board).

As noted above, the legislature also has elected to create a citizens board with policy and administrative responsibility for the Pollution Control Agency, although the commissioner of the agency is appointed by the governor rather than by the agency board. Although the legislature has granted some specific powers to the commissioner, in general, the commissioner and agency staff have only those responsibilities delegated to them by the board. In this regard, the board of the Pollution Control Agency is unique in Minnesota state government. In contrast to the PCA, the Department of Natural Resources -- also with extensive quasi-legislative and quasi-

[36]The origin of the Office of Waste Management goes back to 1980 when the Waste Management Board was established with primary responsibility for "siting" a hazardous waste facility in Minnesota. In 1988 it was dissolved by Executive Order and its responsibilities transferred to the Pollution Control Agency. In 1989, the Minnesota Legislature re-established it as a separate office, but did not provide for the creation of a board.

judicial powers -- functions without a board. (See Appendix E for a discussion of citizen boards written from the perspective of a board member.)

With regard to those boards which approve the expenditure of public funds for construction of facilities or environmental clean-up, the argument has been that agencies making decisions on grants and compensation should be administratively separate from those which identify problems, enforce regulations and monitor compliance. This is somewhat analogous to the general accounting principle which insists on the separation of responsibility for collecting money from that of spending it. Problem identification, enforcement, and compliance are primarily the responsibility of the Pollution Control Agency. The boards responsible for the approval of grants, compensation, and reimbursement have been administratively based in other agencies (MDH, MDA, Commerce, and Trade and Economic Development). Again, as noted above, the membership of these boards include direct representation of affected constituency groups.

In summary, the evolution which has occurred in the organizational structure of environmental services agencies is a result of several factors:

1. the strong political and cultural tradition in Minnesota which encourages direct citizen participation in government,

2. efforts to ensure that constituent groups specifically affected by governmental decisions have a direct role in administrative policy formulation,

3. efforts to obtain certain technical and scientific expertise in the policy process,

4. a desire to keep responsibilities for regulation, enforcement and compliance organizationally separate from those involving advocacy, promotion, and technical assistance,

5. efforts to keep the decision-making authority for awarding grants and approving compensation and reimbursement for selected activities separate from the agency that identifies the problem to be addressed by the funds and which enforces and monitors compliance with regulations, and

6. a preference for vesting quasi-legislative and quasi-judicial powers in multi-member citizen boards rather than in a single appointed administrative official. As noted at the outset, these factors -- or objectives -- have not been uniformly and consistently applied throughout state government. Exceptions can be found in every case.

Functional, Technical, and Scientific Specialization

As discussed in Finding #2, the organization of environmental services agencies in Minnesota in many respects follows "advocacy" lines. Related to this factor is the strong emphasis in the environmental field on functional, technical, and scientific specialization. This is particularly evident in the internal organization and division of responsibilities within individual organizations.

This specialization usually follows "media" lines (e.g., air, water, solid waste, groundwater and resource areas such as forestry, minerals, etc.). There has been a continuing effort over the past several decades to break down these lines of specialization and to foster "integrated resource management."

This specialization is both the product of and to some extent the basis of a central feature of environmental policy not only in Minnesota, but throughout the nation. Policies and organizational structure by and large follow these lines of specialization. In an analysis of state environmental management, Barry G. Rabe has noted:

> Governments have long chopped policy problems into small pieces, eschewing comprehensive solutions in favor of more incremental approaches. The narrower the focus, it has been widely argued, the more manageable problems become. Indeed, some analysts have gone so far as to suggest that the more comprehensive efforts in public policy are not viable intellectually, politically, or administratively. . . .
>
> What facilitates intellectual, political, and administrative convenience may not facilitate sound environmental management, however. Pollutants regularly defy the single-medium barriers that have been established, with the ongoing transfer, transport, and transformation of pollutants *across* media leaving our existing network of medium based laws and regulatory agencies as porous as the Maginot line of an earlier era. . . .
>
> More effective environmental management may require policy innovation that is neither incremental nor comprehensive (non-incremental) in nature.[37]

In his classic treatise written over 40 years ago entitled Breaking New Ground, the noted environmentalist Gifford Pinchot summarized the issue as follows:

> Suddenly the idea flashed through my head that there was a unity in the complication -- that the relation of one resource to another was not the end of the

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[37]Barry G. Rabe, Fragmentation and Integration in State Environmental Management (Washington, D.C.: The Conservation Foundation, 1986), pp xiii-xiv.

> story. Here were no longer a lot of different, independent, and other antagonistic questions, each on its own separate island, as we had been in the habit of thinking. In place of them, there was one single question with many parts. Seen in this new light, all these separate questions fitted into and made up one great central problem of the use of the earth for the good of man.[38]

Governments at the federal and state levels have struggled for decades over these questions of how best to organizationally address the delivery of environmental services. And there are almost as many approaches as there are governments. A few general patterns have emerged, however. These efforts occurred in two phases: 1) organizational integration and 2) permit coordination.

The principal effort at consolidation involved an abandonment of environmental sanitation as the organizing focus. Environmental protection activities relating to the protection of public health date over a hundred years, their focus being on the provision of safe drinking water and the elimination of disease producing environmental hazards. The responsibility for these programs was in state health departments. Initially, new environmental programs were often assigned to health departments, but this approach is now used in only 15 states, although -- as in Minnesota -- most health departments continue to have major responsibilities for environmental services programs.

By 1982, the consolidation of pollution control functions into one environmental super agency (defined as having responsibility for air, water, solid waste management and at least one conservation or resource management program) had occurred in 15 states. Using another approach, 12 states, including Minnesota, attempted to mirror the federal pattern represented by the U.S. Environmental Protection Agency and had created "little EPA's." Virtually all states have retained some boards and commissions in selected areas.

The second phase grew out of a flurry of activity in the 1970s to streamline the permitting process. By 1982, 26 states, including Minnesota, had enacted legislation establishing permit coordination procedures, 14 had adopted joint application procedures, 11 had joint or consolidated hearings, 8 established some form of one-stop permitting, and 8 had established computer based permit tracking systems. It is noteworthy that a process for permit coordination and one-stop shopping has been on the statute books in Minnesota for a decade. This is currently the responsibility of the Department of Trade and Economic Development, but the program is largely unused, unfunded, and non-operational.

Minnesota's organizational structure in environmental services is, therefore, much closer to being typical of the pattern in many states than an exception to the rule. Although there are states which have structures considerably more integrated than what exists in Minnesota, there are also states where structure is more fragmented. And, even in those states where integration

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[38]Quoted as headnote in Ibid., p. 3.

(or consolidation) has occurred, functional, technical, and scientific specialization still exists within the organizations -- whether they be few or many. (For information on selected states, see Appendices C and D.)

The area that is most fragmented is clearly that involving water resources and water management with significant responsibilities vested in DNR, PCA, MDH, MDA, and BWSR. Solid waste management responsibilities are divided primarily between OWM and PCA. And as noted above, several independent boards and commissions exist with responsibilities that relate directly to those of other agencies.

In summary, there are two dimensions to the question of organizational structure. First, there is the issue of whether the various environmental services programs should be integrated into fewer agencies than is currently the case. Second, there is the question of transferring and integrating the various functions within agencies, regardless of the number of separate organizational entities involved. But, as noted in Finding #1, much of the complexity that exists in Minnesota is due to intergovernmental issues rather than or in addition to those of an inter-organizational character. CORE staff heard dozens of pleas for "one stop" shopping. Given the intergovernmental character of the issues, successfully providing a single access point at the state level will not respond to this concern unless equal attention is given to what some have labeled duplication and redundancy at the sub-state or local level.

CORE Finding #7 : Several barriers have prevented the Environmental Quality Board (EQB) from exercising strong leadership as a planning, coordinating and oversight body in the environmental service system.

When the Environmental Quality Board (EQB) was created in 1973, it was charged with ensuring that the broad policy goals of the Minnesota Environmental Policy Act (MEPA) were implemented. During CORE research interviews, board composition, funding levels and the EQB's role were discussed. Many people, including some EQB members, argued that the EQB has not fully realized the vital role its founders conceived. Several opinions were expressed on how to strengthen the EQB and clarify its mission.

The evaluation of the EQB extends to the board itself, which held a retreat in September and discussed a new mission statement. Sustainable development, which promotes economic development that is in concert with environmental protection, is embraced in the 1992 EQB mission statement. Through a strategic planning effort led by Rod Sando, EQB planning chair and Department of Natural Resources Commissioner, it is the intent of EQB to spend the next

year looking at ways to incorporate the sustainable development philosophy throughout all state environmental agencies.

EQB Chairman Robert Dunn, who addressed the CORE Working Committee in June, said the 1973 Environmental Policy Act provided a framework and a philosophy for sustainable development in Minnesota. With the adoption of the new EQB mission statement, the EQB appears to be focusing on its historic roots. The CORE Commission will need to address EQB's role as part of its recommendations on state agency organizational structure and relationships.

Current Operations of the Environmental Quality Board

Mission: According to the new organizational mission statement: "The Environmental Quality Board will lead Minnesota's environmental policy by anticipating and responding to key issues, by providing appropriate oversight, by serving as a public forum, and by developing long-range strategies to sustain and enhance Minnesota's environmental quality."

Membership: By statute, EQB consists of 15 members, including five citizen members and a chair appointed by the governor. The nine state agency heads are the commissioners of the Departments of Agriculture, Health, Natural Resources, Transportation, Public Service, and the Pollution Control Agency, the director of the Office of Strategic and Long Range Planning, the chair of the Board of Water and Soil Resources, and the director of the Office of Waste Management.

Budget: EQB has an annual budget of about $320,000. Eight employees from the Office of Strategic and Long Range Planning are assigned to perform EQB work, and staff from other state agencies provide some assistance on EQB projects.

Customers: The EQB attempts to serve four distinct audiences:

1. The public, by providing a citizens' forum to discuss state policies and administrative decisions made by state agencies;

2. State agencies, by giving them a vehicle to communicate on issues that have broad environmental impact;

3. The legislature, which is looking for multi-agency oversight and results on specific environmental programs assigned to EQB;

4. The governor, who is seeking inter-agency cooperation among his environmental agencies, and substantive information that can be used for setting gubernatorial policy directions.

Powers: EQB's oversight authority powers are delineated in Chapter 116C of Minnesota Statutes. The law specifies EQB's role in long-term planning in the following areas: future population and settlement patterns, air and water resources and quality, solid waste management, transportation and utility corridors, economically productive open space, energy policy and need, growth and development, and land use planning.

In addition to the broad authorities of the board that deal with planning and policy development, the legislature also specified in statute that EQB be involved in the following programs:

1. Environmental Review -- The Environmental Impact Statement (EIS) program provides information to the public and local government units on the environmental impacts of proposed projects before government permits and approvals are given.

2. Power Plant Siting Program -- The EQB is responsible for locating large electric power facilities in an orderly manner compatible with environmental preservation and the efficient use of resources.

3. Timber Harvest Generic Impact Statement -- This study is examining the environmental and other impacts of timber harvesting, and will provide the executive and legislative branches with information to aid in making resource management and regulatory decisions.

4. Critical Areas Program -- This EQB effort provides a process for planning and management of geographic areas of regional and statewide significance.

5. Pipeline Routing -- EQB is responsible for selecting pipeline routes in a manner that reduces the environmental and human impacts of pipeline construction and operation.

6. Water Planning -- EQB works to coordinate and integrate water policy development and water planning in the state.

7. Genetically Engineered Organisms Regulation -- EQB is directed to adopt rules requiring a permit and environmental review for any release of genetically engineered organisms into the environment and to establish an advisory committee.

8. High-Level Radioactive Waste Program -- EQB monitors the federal high-level radioactive waste repository siting process and advises the governor and legislature on policy issues relating to the program.

Composition of the EQB

The EQB currently consists of nine state agency members and six citizens. Because the majority of members represent state agencies, some have observed that the EQB provides a setting for state agency representatives to protect their own programs by affirming each others positions on issues.

Others have remarked that the EQB is too unwieldy with 15 members. Some have argued that the EQB should sharpen its focus by serving as a long-range planning body, and reducing its membership. Under this scenario, the EQB would no longer act as an appeals body for citizens who are in disagreement with state agency decisions. Their complaints would need to be heard in another forum in the executive or legislative branch.

There is support in some quarters to expand the EQB to add the commissioner of the Department of Trade and Economic Development (DTED). Because economic activity has an impact on the environment and environmental regulation has an effect on the business climate, some people argue that DTED should be represented on EQB. Others believe the current EQB composition is appropriate, because all major environmental agencies are represented and the citizen members provide public and regional representation.

In 1985, a Governor's Task Force on the Role and Functions of the Environmental Quality Board made some recommendations about the membership of the EQB. That Task Force consisted of two legislators, a state agency commissioner, and 14 members representing local governments, environmental groups, business associations, regulated utilities and citizens.

The Task Force concluded that the EQB should consist of equal numbers of government members and citizen representatives. The Task Force proposed that EQB be expanded from 12 to 15 members, which would consist of seven citizens, the heads of six state agencies, a county commissioner and chair appointed by the governor.

Since that 1985 recommendation, the EQB was expanded to 15 members, but that growth came about through the addition of state agency members, not citizens or a local government representative. A newly defined role for the EQB would likely be the main determining factor in deciding who should sit on the board to carry out the responsibilities.

If the EQB is primarily a mechanism for state agencies to plan and coordinate, then equal citizen representation is less important. If it serves as a lead vehicle for citizen access, then major citizen membership on the board is critical.

Some interesting analysis was contained in the 1985 Task Force report on the membership issue. The pros and cons of an equal split between government members and citizen members were identified:

Pros:

- A balanced citizen/government EQB membership would provide for improved public participation in decisions made by the EQB.
- Increased citizen representation on the EQB would encourage state agencies to be more responsive to citizen concerns.
- Equal citizen/state agency representation on the EQB would cause more active state agency participation in EQB matters.
- A county commissioner EQB member best represents that level of local government often affected by decisions made by the EQB.

Cons:

- State agencies, because of their specific regulatory responsibilities, may feel that a strongly citizen member influenced EQB would not be sensitive to individual agency positions and problems, and seek mechanisms other than the EQB to develop and implement environmental policy.
- Equal citizen/state agency representation on the EQB may make it difficult for the Governor to use the EQB as his "Environmental Sub-cabinet."
- The identification of a county commissioner may alienate local officials representing cities and townships who believe that they should also be eligible to be appointed to the EQB.
- Providing a special seat for local government representation may be setting an undesirable precedent, which encourages all interest groups to seek special representation on the EQB.

In the Perpich administration, there was an Energy, Environment, Resources Sub-cabinet, which developed policy and advised the governor. In the Carlson administration, it is called an Environmental Cluster. The Environmental Quality Board is not a member of this internal gubernatorial group.

In his remarks before the CORE Working Committee, Chairman Dunn noted the need for EQB to have a closer association with the governor's office. He suggested that EQB become a sub-cabinet or cluster agency. Mr. Dunn was appointed to the EQB by former Gov. Perpich and appointed chair by Gov. Carlson.

Role of the EQB

EQB has functioned as a hybrid agency. It has played the following roles:

1. Watchdog over the Minnesota Environmental Policy Act.

2. Planner and policy analyst for the governor and legislature.

3. Inter-agency coordinator.

4. Conflict manager for resolving disputes.

5. Public access body for citizens who want to affect policy development or appeal an agency decision.

6. Operating agency for siting power plants and pipelines and regulating genetically engineered organisms.

As part of CORE environmental recommendations, these functions will need to be carefully scrutinized. A major question is whether EQB is the appropriate body to perform all of these roles. If so, what level of resources is needed to effectively fulfill these responsibilities? If not, what are more appropriate locations for these functions?

Budget and Staffing Levels

The EQB is unique in that it is staffed by the Office of Strategic and Long Range Planning, commonly referred to as Minnesota Planning. The staff complement for EQB functions is at an all time low of eight people. In fiscal years 1980-1981, EQB's staffing level hit a high point of 32 people, although 15 of those positions were devoted to power plant siting. EQB still has responsibility for power plant siting, but there is reduced activity in this area.

In his CORE appearance, Chairman Dunn said the $320,000 a year budget for EQB is insufficient to carry out its broad responsibilities. He said that EQB is no longer a specific line item in the Minnesota Planning appropriation, which creates some unpredictability in resource levels. Mr. Dunn recommended that EQB have its own staff and budget. Based on the size of EQB's operation and its major role in planning, others argue that it is appropriate for EQB to continue its long-term relationship with Minnesota Planning.

This issue was addressed by the 1985 Governor's Task Force. It said:

> The Governor should direct the State Planning Agency to provide the EQB with staff adequate to carry out the EQB's statutory responsibilities. Such staff should

be directed by the EQB through an executive director who would report to the chairperson of the EQB. The costs associated with the staff and programs of the EQB should be included as a separate item in the biennial budget request prepared by the State Planning Agency. Further, the EQB biennial budget request should be based upon formal direct consultations between the Director of the State Planning Agency and the EQB.

The Task Force recommendation was affirmed by a five-member subcommittee of the Environmental Quality Board, which consisted of state agency and citizen members.

Since these recommendations were made seven years ago, employees of the State Planning Agency, now called Minnesota Planning, have continued to staff the EQB. During that time, the overall Minnesota Planning budget has been reduced by the legislature, and the agency no longer contains an Environmental Division. When the 1991 legislature approved Planning's budget, it did place a priority on preserving EQB's staffing level.

The current arrangement is complex, because the people who provide staff to the EQB are not employees of the EQB. This situation requires a cooperative working relationship between the EQB chair, EQB board members and the Minnesota Planning director.

Summary and Conclusions

The Environmental Quality Board's effectiveness has been limited by the fact that its responsibilities are broad and its staff is small. Some specific programs, such as genetically engineered organisms regulation, do not require the attention of the nine state agency heads who sit on the EQB. On the other hand, the majority domination by state agencies on the board makes it difficult for citizens who wish to differ with decisions or policy directions set by one member agency of the EQB. In those instances, it appears the public would be better served by an EQB that had equal or majority membership by citizens.

Since the EQB was created 20 years ago, the legislature has preserved the statutes that assign EQB a watchdog role in the environmental system. Yet, it has also given EQB specific program responsibilities. There are a number of demands placed on EQB, so it is difficult for the agency to have a sharply defined identity and demonstrate its accomplishments in specific areas. EQB cannot be all things to all people.

EQB's role is integrated within the larger environmental system. Consequently, in CORE's redesign effort, the Environmental Quality Board must be considered in relationship to other agencies. Resolution of a number of issues will determine EQB's existence, board configuration and staffing level.

CORE will need to decide where the environmental planning function should be located in the administrative system. In addition, the Commission must determine whether a planning agency should also include program operation functions.

Currently, EQB's primary customer is unclear, because it provides service to state agencies, the governor, legislature and the public. It is essential to determine whether EQB should serve primarily an internal audience (agencies, governor, legislature) or an external audience (the general public).

From the citizen perspective, EQB acts as a safety valve to give citizens an opportunity to raise their concerns in a public forum before a collection of citizens and state agency administrators. If EQB or a new body plays a major role in facilitating conflict resolution in the environmental system, then it may be appropriate for that board to be controlled by citizen members.

In summary, it is difficult for EQB to excel with its current responsibilities, structure, and staffing level. Because of the nature of this small agency, its role and its future should not be considered in isolation. EQB must be evaluated in the context of a rational system-wide redesign.

CORE Finding #8: The linkage between the fees paid for environmental programs and the achievement of environmental policy goals is confused and unclear to payers of the fees and to the general public.

> ***Fees: What are they? Where do they go? (political analyst)***
>
> ***We promised our citizens there would be no more increases in fees and taxes this year. Then the legislature passed this water fee saying the municipalities must collect it. . . . It made us break our promise to our citizens. . . . Governments forget it's the same person who must pay all these fees. (city council member)***
>
> ***When an agency is heavily financed by fees, their budget doesn't get much scrutiny. (county program administrator)***

Background

Concerns were raised from several perspectives about the use of fees to fund environmental programs. Customers pay a multitude of fees for permits, licenses, and plan reviews associated with environmental programs. Much like the development of environmental programs, most fees

appear to be created in response to specific funding questions rather than in response to a comprehensive funding plan or in an effort to accomplish environmental policy objectives. Their use has increased over time. For example, a decade ago, the air quality program at the MPCA was 100% funded by the General Fund and federal funds; in FY 92, the air quality program is 100% funded by fees and federal funds. The definition of fee is also very unclear. This lack of clarity about the nature and purpose of fees in the environmental area has generated wide-ranging criticism.

Criticism of Fees

Although fees are numerous and widespread in the environmental area, the criticism related to fees focused on some fees paid for pollution control regulatory programs. Fees for natural resource recreational programs were not subject to the same criticisms. The criticisms of fees related to pollution control activities can be summarized as follows:

1. Inequity: Fees charge the "wrong" users or do not distinguish between users, e.g. only users of municipal water supplies pay the increased costs of monitoring for pollutants in all public water supplies, and these users do not pay according to the volume of usage;

2. Transference: Some fees are imposed only to raise money and are unrelated to service provided, e.g., the water pumping report fee is used to fund a variety of water research and management projects unrelated to the costs of reporting;

3. Redundancy: Sometimes multiple fees are paid to different levels of government or several state agencies for the same or similar environmental programs, e.g. a person having a well installed may have to pay the Department of Health a notification fee and a plan review fee and the Department of Natural Resources a water appropriation permit fee and pumping report fee, all for the same well;

4. Insufficient oversight: Fee-based expenditures are perceived as receiving less scrutiny because it's easier to raise fees than taxes;

5. Escalation: Fees to individual fee payers go up if an agency must recover enough to fund the program appropriation, even though the number of fee payers is decreasing.

Fees for Natural Resources Recreation Programs

The criticisms expressed above arise from the different ways the legislature has approached the use of fees in the environmental area. Minnesota Statutes § 16A.128 states in part:

> The legislature, in setting or adjusting fees, or taking actions affecting the setting or adjusting of fees, should attempt to ensure that (1) agency fees and fee adjustments include only those service-related costs that provide a primary benefit to the individual fee payer and (2) service-related costs that benefit the general community are borne by the agency.

It appears the legislature has followed this policy reasonably well in the area of fees for the use of natural resources. The users and the benefits of a natural resource recreation program are clearly defined. The payers of fees for these recreational activities see clear benefit from the payment of the fee and are actively involved in the oversight of the use of these fees, sometimes making very specific demands for spending priorities. The best examples are the fees for hunting and fishing licenses.

The legislature has also given specific direction as to where a public subsidy of the fee is appropriate because a program has benefits beyond those to the primary users, e.g. state park fees do not cover the entire costs of operating state parks because the legislature recognizes that the parks provide tourism and associated economic benefits. The debate on costs of fees for these resource uses focuses on the users and what is a reasonable cost for the user to bear. Thus the "customer" is clearly identified and the customer perceives clear benefits.

Fees for Pollution Control Regulatory Programs

Fees imposed for pollution control activities do not meet the same criteria. Fees are imposed to pay the administrative costs of some regulatory programs to control or monitor pollution. Who benefits from such regulation (and therefore who should pay) depends on your perspective. The perspectives can be summarized as: "make the polluter pay" or "everybody benefits if pollution is controlled so everyone should pay." As Marcia Gelpe, former Pollution Control Agency Board member and a law professor, explains:

> There are two basic reasons for pollution. . . . First, pollution is a classic externalities problem. The people who produce pollution do not have to bear the full cost of the harm it produces. Therefore, they produce more than they would if they incurred all the harm themselves. Second, sometimes even those who bear the harm of pollution do not recognize its cost, due to deficits in information, so they do not make informed choices about how much pollution to produce or to tolerate.[39]

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[39]Marcia Gelpe, "Organizing Themes of Environmental Law," William Mitchell Law Review, Vol. 16 (1990), pp. 898-899.

Permit fees for air, water and hazardous wastes are an attempt to get at the costs of pollution because one cost to the public (in addition to other costs related to the degradation of the resource and economic and health impacts) is the cost of regulating the discharge of pollutants.

But, instead of a fee directly linked to the discharge of pollutants, the fees are based on the administrative costs involved in the writing and enforcement of permits. "Only public regulatory costs are charged, and then only some of those costs. The costs of developing the regulatory programs, for example, are not included. Moreover, the relationship between costs caused by an individual source and the amount it must pay is loose."[40]

In the area of air quality permits, some clarification of the purpose of fees has begun. In response to the 1990 Amendments to the Clean Air Act, the air quality permit fee is being replaced by a fee based on the tonnage of regulated pollutants emitted. The air permits are also explicitly exempted from the services-benefit language of the law.

Who benefits from pollution control activities and who should pay are questions with less clear answers. This is not an easy standard to ascertain. Insufficient information exists to determine the costs that benefit the "general community." Paying to be regulated is clearly not perceived as a "benefit" to the payee. In addition, the focus of the fee calculation is usually administrative costs. The costs are considered first, then the fee is allocated among the "users" of the regulation "service." These objectives do not fit the perception of user-benefit.

What is clear is who benefits when pollution is discharged rather than prevented or controlled. The method of calculating pollution permit fees currently distorts the focus to administrative costs and diminishes the policy of "making the polluter pay." It emphasizes the costs of regulating pollution rather than focusing on reducing or preventing it.

The criticism of fees for pollution control activities appears to be related to the fact that the fees many times have multiple, unclear or competing objectives: to increase revenue, to internalize the costs of pollution, and to recoup administrative costs. The Department of Finance is currently attempting to clarify what is meant by fees. In its instructions to state agencies for preparing the 1994-95 Departmental Earnings Report, it suggests several categories of fees. Some which appear relevant are:

1. **Service and user charges:** any charge for goods or services provided by a state agency to an individual, business or other entity, provided that the **primary** benefit is private and tangible and that the purchase is discretionary (i.e., the purchaser is not effectively compelled to make a purchase or pay for a service).

2. **Business or regulatory charges:** any charge imposed by the state on a business, industry or other public or private enterprise for the purpose of controlling,

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[40] Ibid, p. 906.

directing or otherwise limiting its economic or productive activities. Typically, charges of this type serve a predominately public (as opposed to a private) interest.

3. **Special taxes and assessments:** any charge imposed by the state on a business, industry, individual or other entity **primarily** to raise revenue for a public--yet special or targeted-- purpose. Unlike regulatory/licensure charges, special tax or assessment revenues, while earmarked for special rather than general purposes, are not necessarily restricted or dedicated to the support of specific programs and activities of interest to the paying entity (e.g. a pollution "fee" levied against selected industries but used to support statewide air quality programs should be treated as a special tax rather than a regulatory charge).

The criticisms heard emphasize the need for clarification and communication about the nature of the fees in the environmental area, as well as the relationship of fees to implementation of policy goals.

CORE FINDING #9: The existing multi-layered, fragmented, environmental advocacy system makes it difficult to manage conflicts among competing interests in a timely manner.

Conflicts are natural and unavoidable in the environmental system. A basic principle of ecology is that everything is interconnected. In an area which touches aspects of everyone's lives and in a population that is diverse, there will be different perspectives on the use of land and resources and different interests in them, both public and private. Several forums have been crafted to address the conflicts and competing interests. They have developed a mixed measure of success.

Administrative Law Judge Phyllis A. Reha summarizes the obstacles to conflict resolution:

A. There are no standard procedures for convening the parties for face-to-face discussions to resolve their differences. The governmental agency is the logical convener, but it is not seen as a disinterested third party by business or the public. The influence of government on the way conflict is handled is complicated by uncertainty as to which level of government or which agency within one level has responsibility for resolving the problem.

B. Enforcement of agreements is also done on a case-by-case basis . . . .

C. A complex system of federal, state and local rules and regulations influence efforts to deal with public problems. For example, some procedural rules mandate public

hearings before a decision can be made. Ex parte contact rules prevent discussion between parties and regulators. There are obligatory public comment periods and other regulations governing the way decisions are made which exist to protect the public interests. Oftentimes, they can constrain discussion and restrict the search for new options.

D. Each party brings its own set of facts and figures into the discussion, and all sides must agree on a common data base before solutions can be developed. Parties rarely have equal access to all relevant information or equal ability to understand or use the figures. . . .

E. Nearly all environmental controversies involve divergent beliefs about what is right and what is wrong, and what is just and what is unjust.[41]

How does the existing environmental system consider competing perspectives?

The Environmental Quality Board

As described earlier, the major state agencies have been organized according to an advocacy model in which each agency "advocates" for a specific perspective. In fact, the staffing of each agency is based on technical specialization for that perspective. This technical specialization and advocacy mission can impair consideration by each agency of other perspectives and broader societal and non-technical factors.

The task of resolving conflicts between state agencies was delegated by the legislature to the Environmental Quality Board (EQB) in Minnesota Statutes § 116C.04, subd. 2(c):

> The board may review environmental rules and criteria for granting and denying permits by state agencies and may resolve conflicts involving state agencies with regard to programs, rules, permits and procedures significantly affecting the environment, provided that such resolution of conflicts is consistent with state environmental policy.

Although this responsibility was granted the EQB, the EQB does not appear to have used it in a formal sense. There is no specific process set up for conflict resolution and no specific authority to compel compliance with the outcome. Additionally, the standard of providing that the resolution of conflicts is "consistent with environmental policy" can be unclear due to the ambiguous nature of statutes which allow multiple interpretations. For example, the Minnesota Environmental Policy Act, Minnesota Statutes § 116D.02, subd. 1 declares:

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[41]Phyllis A. Reha, "Mediation In Environmental Cases," Environmental Law in the 1990s, Minnesota State Bar Association, Continuing Legal Education, March 1990, pp. 5-6.

> . . . it is the continuing policy of the state government, in cooperation with federal and local governments and other concerned public and private organizations, to use all practicable means and measures, including financial and technical assistance, in a manner calculated to foster and promote the general welfare, to create and maintain conditions under which human beings and nature can exist in productive harmony, and fulfill the social, economic and other requirements of present and future generations of the state's people.

It is difficult just to know all the social, economic, and environmental needs, let alone to meet them simultaneously, for today and tomorrow. When these needs conflict, which controls? This unclear direction, together with an unclear process, makes it difficult to know how the EQB would handle conflicts in these needs. This may in part explain why citizens or affected parties have not appealed conflicts to the EQB but rather to the courts or to the legislature.

Board of Water and Soil Resources Dispute Resolution

The Board of Water and Soil Resources (BWSR) has a committee for dispute resolution established by Minnesota Statutes § B.101 subdivision 10. By statute, BWSR can act as both mediator and adjudicator in resolving resource management conflicts between people, local governments and agencies. It can recommend procedures to avoid future conflict. The specific conflicts BWSR is authorized to act on involve comprehensive county water plan disputes, appeals of watershed district decisions, metropolitan water management organization project disputes and conflicts over water policy.

Despite the existence of this authority, only a few conflicts have come to BWSR. The Board hears about 3 cases annually, almost entirely appeals from watershed district decisions. In some cases, the BWSR authority is to make recommendations; in others, its decision is binding. One obstacle has been the lack of rules describing the conflict resolution process. Rules are currently in preparation.

Office of Dispute Resolution

The Office of Dispute Resolution was established in 1985 to promote the use of means other than litigation for resolving disputes affecting the public interest. It is now administratively housed in the Department of Administration. The Office has increasingly been called upon to mediate and facilitate in the environmental area or to recommend mediation services. It has mediated disputes between two local governments over the siting of a controversial wastewater treatment project and mediated between affected parties on the siting of a solid waste incinerator. It has participated in facilitation of public meetings to generate comment on environmental impact statements and permit renewal standards. It has facilitated negotiated rule-making sessions in which a consensus-building process was used to involve parties affected by the rule. The results of the mediation have been mixed.

Some mediated disputes have lead to settlement at significant savings; other mediated settlements have been rejected by one of the parties and continued to litigation. However, even in these cases, the mediation clarified and modified initial positions and concerns.

MPCA Board

The MPCA Board provides a unique opportunity for public input into decision-making prior to the decision being finalized. Related to conflict resolution, CORE staff heard the following perspectives on the Board:

1. Many multi-faceted issues come before the Board because it is an open, accessible forum in which to raise dissenting views in contrast to agencies headed by a commissioner.

2. The Board can moderate the narrow technical perspective of staff and temper it with social, political and economic concerns.

3. The Board process does function to reduce litigation by providing a forum for discussion of conflicting views.

Although there are other legitimate questions concerning the role of the Board, it appears the Board does to some extent serve a conflict resolution function. It has broad authority to implement its decisions. Minnesota Statutes § 115.071, subdivision 1, gives the Board authority to enforce its decisions relating to:

> . . . all rules, standards, orders, stipulation agreements, schedules of compliance, and permits adopted or issued by the agency thereunder or under any other law now in force or hereafter enacted for the prevention, control or abatement of pollution. . . .

Administrative Procedures Act and the Office of Administrative Hearings

The Administrative Procedures Act, Minnesota Statutes Chapter 14, establishes the procedure for resolving conflicts over policies established by agencies in rules and disputes over permitting, disciplinary actions, and other decisions made by individual state agencies. The scope which the Administrative Law Judge can address and the application of the judge's findings are somewhat limited. In contested cases, the dispute must be a dispute over facts, not the law. The Office of Administrative Hearings has no independent authority to initiate a contested case hearing. The agency must initiate one only when one is required by law. The rule making hearings and contested case hearings procedures vary somewhat, but in both the ALJ makes recommendations to the agency prior to the agency's final decision. Although the agency can decide to proceed differently from the recommendations, the agency decision must be in writing and must be based

on the hearing record. Final decisions by the agency are appealable to the Court of Appeals and from there to the Supreme Court.

Hearings conducted by the Administrative Law Judge are formal and legalistic in tone. They can be expensive for the agencies and individuals involved and several months can pass between the decision to schedule a hearing and the receipt of the Administrative Law Judge's report.

The Courts

The courts and the adversarial process of litigation have been widely used to resolve conflicts in the environmental system. The legislature has provided powerful tools for the use of the courts in the penalties and standards established in environmental law. For example, the Minnesota Environmental Rights Act, Minnesota Statutes Chapter 116B, grants broad authority to any person to maintain a civil action in district court for "relief in the name of the state of Minnesota against any person, for the protection of the air, water, land, or other natural resources located within the state, whether publicly or privately owned, for pollution, impairment or destruction." While the courts have been useful in clarifying ambiguities and clarifying policy direction in resolving specific controversies, it has been a costly, slow, and divisive way to resolve conflicts and set policy.

The Legislature

Over twenty years ago, Walton and Hills wrote about the use of the courts to settle environmental issues:

> There is no reason that the judiciary should be the ultimate guardian of the public interest. In the ideal world, legislatures are the most representative and responsive public agencies; and to the extent that judicial intervention moves legislatures toward that idea, the citizenry is well served.[42]

The ultimate forum for resolving disputes between competing interests is the legislature. The environmental area is one in which the legislature spends a significant amount of time hearing competing concerns. More than 11 percent of all bills introduced into the 1991-92 Legislative Session dealt directly with environmental and natural resource issues. Many more contained provisions with environmental issues. To hear and weigh the competing concerns, the legislature has created a number of committees and commissions:

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[42]William Walton and David Hills, Water and Related Resources, State Administration, Legislative Process and Policies in Minnesota, 1970, p. 41.

1. Three commissions with members from both bodies of the legislature (Legislative Commission on Minnesota Resources, Legislative Commission on Waste Management and Legislative Water Commission);

2. House and Senate Environment and Natural Resources Committees;

3. Environment and Natural Resources Divisions of the Senate Finance Committee and House Appropriations Committee.

Through the process of hearings by different committees, conflicts may be identified and resolved, both in areas relating to policy and to program administration. Not infrequently, conflicts which are not resolved administratively are ultimately resolved by the legislature, and in some cases, are referred back to administrative agencies.

Summary and Conclusions

Multi-party conflicts are most likely to erupt in the areas of rule making, permit issuance, and environmental review. Individual-agency conflicts occur in enforcement or application of laws. Intergovernmental conflicts can occur over overlapping authority and differing perspectives.

Without doubt, many conflicts are resolved successfully by skillful intervention and negotiation by agency staff. Planning processes which provide time to uncover and discuss potential policy conflicts also act to reduce conflicts. However, when the competing interests are seemingly irreconcilable or participants have beliefs that are so strongly held they cannot be compromised, conflict will continue regardless of the number or types of forums.

Ann Cohen, Special Assistant Attorney General, used an analogy that seems appropriate in describing the quagmire of conflict that can occur when values clash in particularly difficult cases:

> "No Exit" is the title of a famous Jean Paul Sartre play in which three people, formerly strangers, suddenly find themselves sharing a single room after death. As the play progresses, you realize that the three have been chosen to share the room because each has the power to drive the others crazy. Finally, as there is no getting away from the situation, you realize that this is Hell.
>
> Permittees, interested citizens and the MPCA are trapped in the same room when it comes to permit issues. Obtaining a permit from the MPCA in the face of

> citizen opposition isn't necessarily a "no exit" situation--but it sometimes seems that way.[41]

Although there are a number of systems that have been designed to prevent the situation which Sartre caricatured, they have not been effective to any great extent or have intensified the conflict with overwhelming costs in time and money. The system has been built using largely adversarial procedures, narrowly focused advocates, and rigid command and control mentality.

Mazmanian and Morell call for a new attitude and shift in focus from sporadic pollution abatement to comprehensive environmental management, hallmarked by cooperation:

> Successful environmental policy in the 1990s will need to build everyone's appreciation of the unacceptable costs to industry, public health, and the environment of continuing policy gridlock and superficial implementation of major existing statutory initiatives. During the new decade, each competing interest group needs to agree that no single interest can expect to dictate policy into the future...genuine progress can be made in the 1990s only with the concurrence of business, environmental, health, and local community interests.[42]

While conflict in the environmental system cannot be eliminated, it can be better managed by increasing the effectiveness of formal and informal dispute resolution procedures, redesigning the system to reduce dependence on procedures that tend to promote conflict, and building in procedures that may prevent or minimize conflicts in the first place.

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[41]Ann E. Cohen, "Contested Permits: 'No Exit' Comes to State Government,"Environmental Law Institute (June, 1992), Minnesota Institute of Legal Education, p. 1.

[42]Daniel A. Mazmanian and David L. Morell, "EPA: Coping With the New Political Economic Order," Environmental Law, Vol. 21, (1991), p. 1484-85.

APPENDICES

APPENDIX A

State Agencies involved in Environmental Services

Agency	Appointing Authority	Membership/ Administrative Head
Advisory Council on Wells and Boring	Commissioner of Health	17 members including representatives from MDH, DNR, MnDOT, PCA, BWSR, Geological Survey
Agricultural Chemical Response Compensation Board	Governor	Commissioners of MDA and Commerce and 3 private industry members, one each representing agricultural chemical manufacturers, farmers, and agricultural chemical retailers.
Board of Water and Soil Resources	Governor/Senate confirmation	12 members to include 3 county commissioners, 3 soil and water conservation district supervisors, 3 watershed district or watershed management organization directors, and 3 unaffiliated citizens
Citizens Advisory Committee on the Environmental and Natural Resources Trust Fund	Governor/Senate confirmation	11 members, one from each Congressional District and 3 at-large
Department of Agriculture	Governor/Senate confirmation	Commissioner
Department of Commerce	Governor/Senate confirmation	Commissioner
Department of Health	Governor/Senate confirmation	Commissioner
Department of Natural Resources	Governor/Senate confirmation	Commissioner
Department of Public Safety	Governor/Senate confirmation	Commissioner
Department of Public Service	Governor/Senate confirmation	Commissioner
Department of Trade and Economic Development	Governor/Senate confirmation	Commissioner
Department of Transportation	Governor/Senate confirmation	Commissioner

Agency	Appointing Authority	Membership/ Administrative Head
Emergency Response Commission	Governor	21 members including the Commissioners of MDA, MDH, PCA, Public Safety and one each representing fire chiefs, professional firefighters, volunteer firefighters, fire marshals, law enforcement personnel, emergency medical personnel, health professionals, wastewater treatment operators, labor, local elected officials, three representing community groups or the public, and four from business and industry (one of which must represent small business)
Environmental Education Advisory Board	Governor	17 members including Commissioners of MDA, DNR, PCA, MDE, Director of Minnesota Planning, Chair of BWSR, Executive Director of HECB, representative of the Board of Teaching, director of the Extension Service and eight persons, one appointed from each Congressional District
Environmental Health Specialist/ Sanitarian Advisory Task Force	Commissioner of Health	7 members including four registered environmental health specialists, one representative of a regulated industry or education and two public members
Environmental Quality Board	Governor/Senate confirmation	15 members including the chair, Commissioners of MDA, MDH, DNR, MnDOT, PCA, Public Service, the Directors of OWM and Minnesota Planning, the Chair of the Board of Water and Soil Resources, and five public members
Great Lakes Commission	Governor and Legislature	5 members, one appointed by the Governor, two senators appointed by the Senate, and two representatives appointed by the House

Agency	Appointing Authority	Membership/ Administrative Head
Harmful Substances Compensation Board	Governor/Senate confirmation	5 members including one physician knowledgeable in toxicology, one lawyer, one health professional knowledgeable about harmful substances injuries, and two public members
Hazardous Materials Incident Response Advisory Task Force	Commissioner of Public Safety	10 members including the Commissioners of Public Safety, PCA, three persons representing fire service, three representing private industry, one representing the Minnesota League of Cities, and a representative of the general public
Hazardous Waste Management Planning Council	Director of the Office of Waste Management	Up to 18 members including representatives of local government, hazardous waste generators, private hazardous waste management firms, and the public
Legislative Commission on Minnesota Resources	Majority Leader of the Senate and Speaker of the House of Representatives	16 members (8 senators and 8 representatives)
Legislative Commission on Waste Management	Majority Leader of the Senate and Speaker of the House of Representatives	10 members (5 senators and 5 representatives)
Legislative Water Commission	Majority Leader of the Senate and Speaker of the House of Representatives	10 members (5 senators and 5 representatives)
Metropolitan Airports Commission	Governor	15 members including chair and twelve members appointed by Governor (eight from precincts determined by the Governor, four from outside the metropolitan area) and the mayors of Minneapolis and St. Paul
Metropolitan Council	Governor/Senate confirmation	17 members including at-large chair and sixteen from districts

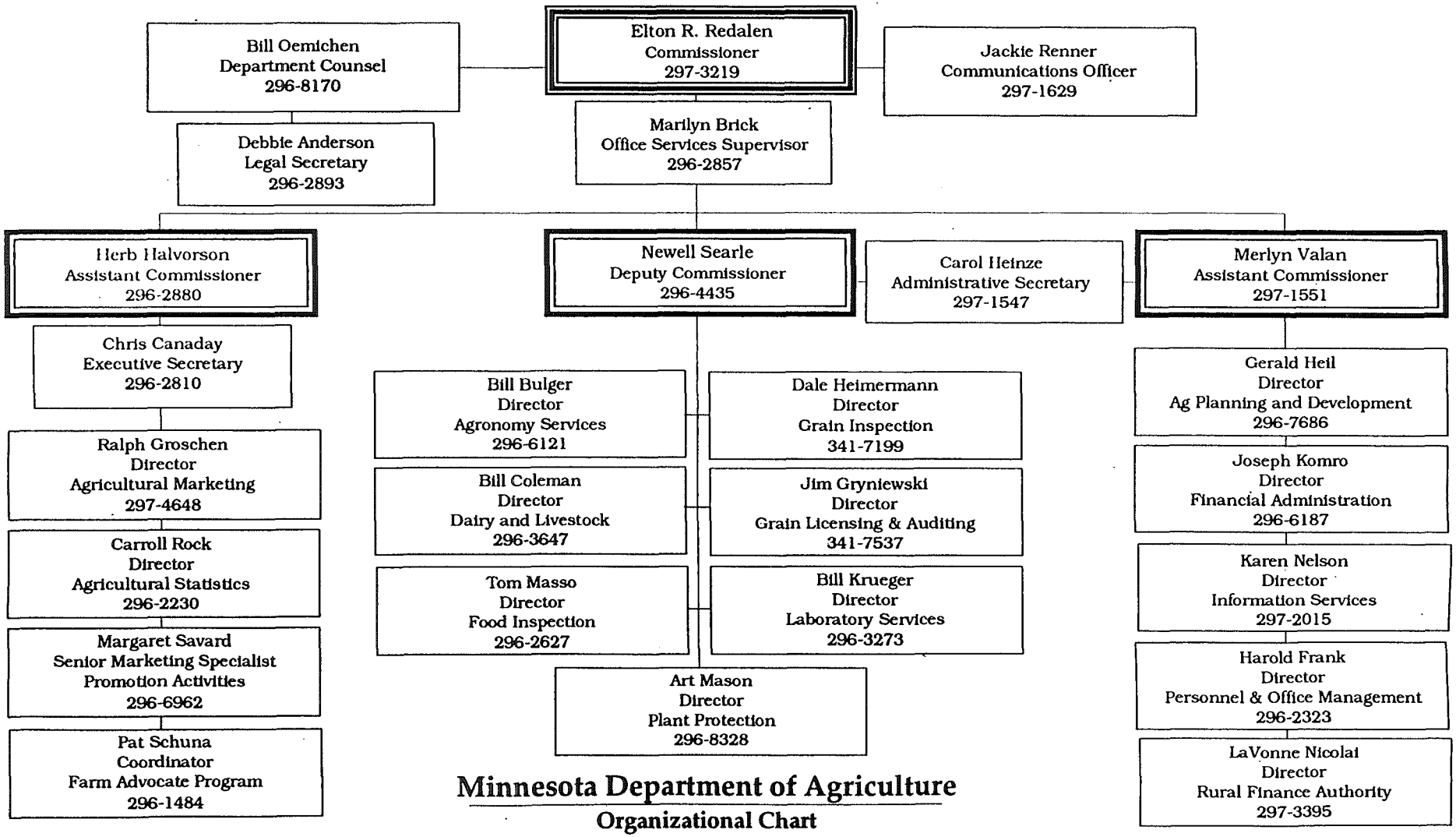
Agency	Appointing Authority	Membership/ Administrative Head
Metropolitan Mosquito Control District	Participating Boards of County Commissioners	17 members, three county commissioners from Anoka, Dakota, Hennepin, and Ramsey Counties, two from Scott and Washington Counties, and one from Carver County
Metropolitan Parks and Open Space Commission	Metropolitan Council	9 members (one at-large and eight from districts)
Metropolitan Transit Commission	Regional Transit Board	5 members (one from St. Paul, one from Minneapolis, two outside of Minneapolis and St. Paul, one from anywhere in the service area)
Metropolitan Waste Control Commission	Governor/Senate and Metropolitan Council	9 members (8 appointed by Metropolitan Council, chair appointed by Governor with Senate confirmation)
Midwest Interstate Low-Level Radioactive Waste Commission	Governors of participating states	Indiana, Iowa, Michigan, Minnesota, Missouri, Ohio, and Wisconsin. One member appointed by Governor from each participating state
Minnesota-Wisconsin Boundary Area Commission	Governors of Minnesota and Wisconsin	10 members (five appointed by each governor)
Office of Long Range and Strategic Planning (Minnesota Planning)	Governor/Senate confirmation	Director
Office of Waste Management	Governor/Senate confirmation	Director
Petroleum Tank Release Compensation Board	Governor	3 members including two representatives of the petroleum industry and one from the insurance industry
Pollution Control Agency	Governor/Senate Confirmation	Commissioner and a 9 member board appointed for four year staggered terms. One member must be knowledgeable in the field of agriculture.
Pollution Prevention Task Force	Office of Waste Management	15 members including representation from industry, citizens, and government agencies involved in pollution activities

Agency	Appointing Authority	Membership/ Administrative Head
Power Plant Siting Advisory Committee	Environmental Quality Board	Up to 25 members selected on a statewide basis
Public Facilities Authority	Governor	7 members including three public members and four ex-officio members
Red River Water Resources Council	Governor	6 directors, 3 each from North Dakota and Minnesota
Regional Transit Board	Governor and Metropolitan Council	11 members including the chair, one person over 65, and one person with a certified disability appointed by the Governor and eight members appointed by the Metropolitan Council
Seaway Port Authority of Duluth	Governor, St. Louis County and City of Duluth	5 members including one appointed by Governor, two by St. Louis County and two by City of Duluth
Water Supply & Wastewater Treatment Operators Certification Council	Commissioner of Health	6 members including a certified water supply system operator, a representative of the Minnesota League of Cities, a certified wastewater treatment facility operator, a university or college faculty member knowledgeable in the field of water supply or wastewater collection, and a representative of the Environmental Health Division of the Department of Health and the Pollution Control Agency
Upper Mississippi River Basin Association	Governors of participating states	Minnesota, Wisconsin, Illinois, Iowa, and Missouri. One representative and one alternate appointed by the governor of each participating state

Agency	Appointing Authority	Membership/ Administrative Head
Waste Education Coalition	Office of Waste Management	18 members including representatives from the PCA, Metropolitan Council, MDA, MDE, Environmental Education Board, EQB, educational institutions, other public agencies with responsibility for waste management or public education, and three persons representing private recycling or solid waste industries
Wetland Heritage Advisory Committee	Governor	9 members including the Commissioners of MDA and DNR and seven to include one county commissioner, one each who represents a statewide sporting organization, a statewide conservation organization, an agricultural commodity group, a faculty member with expertise in the natural sciences and two representing different statewide farm organizations

APPENDIX B

Organizational Structure of Major Environmental Agencies in Minnesota

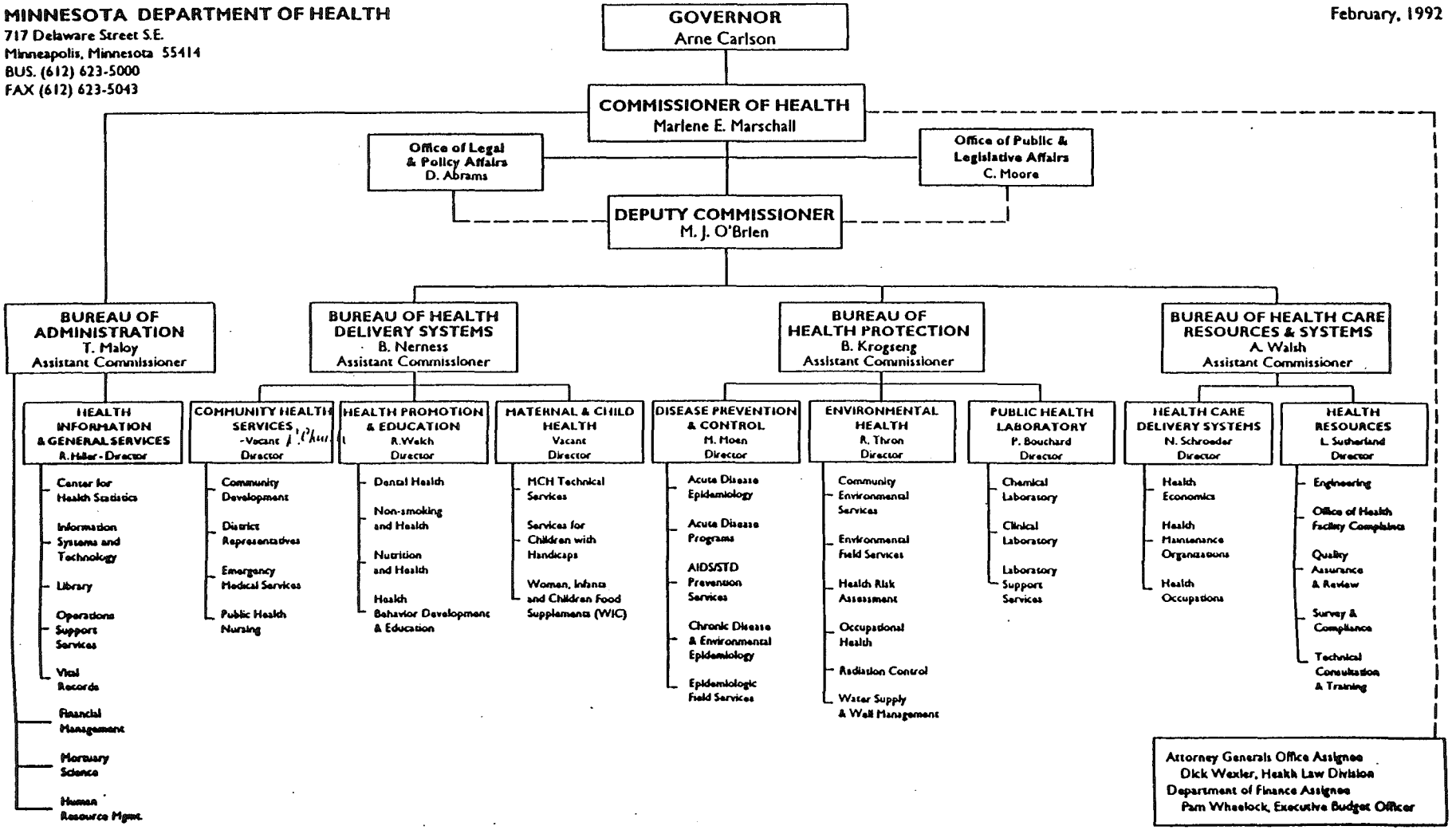


Minnesota Department of Agriculture

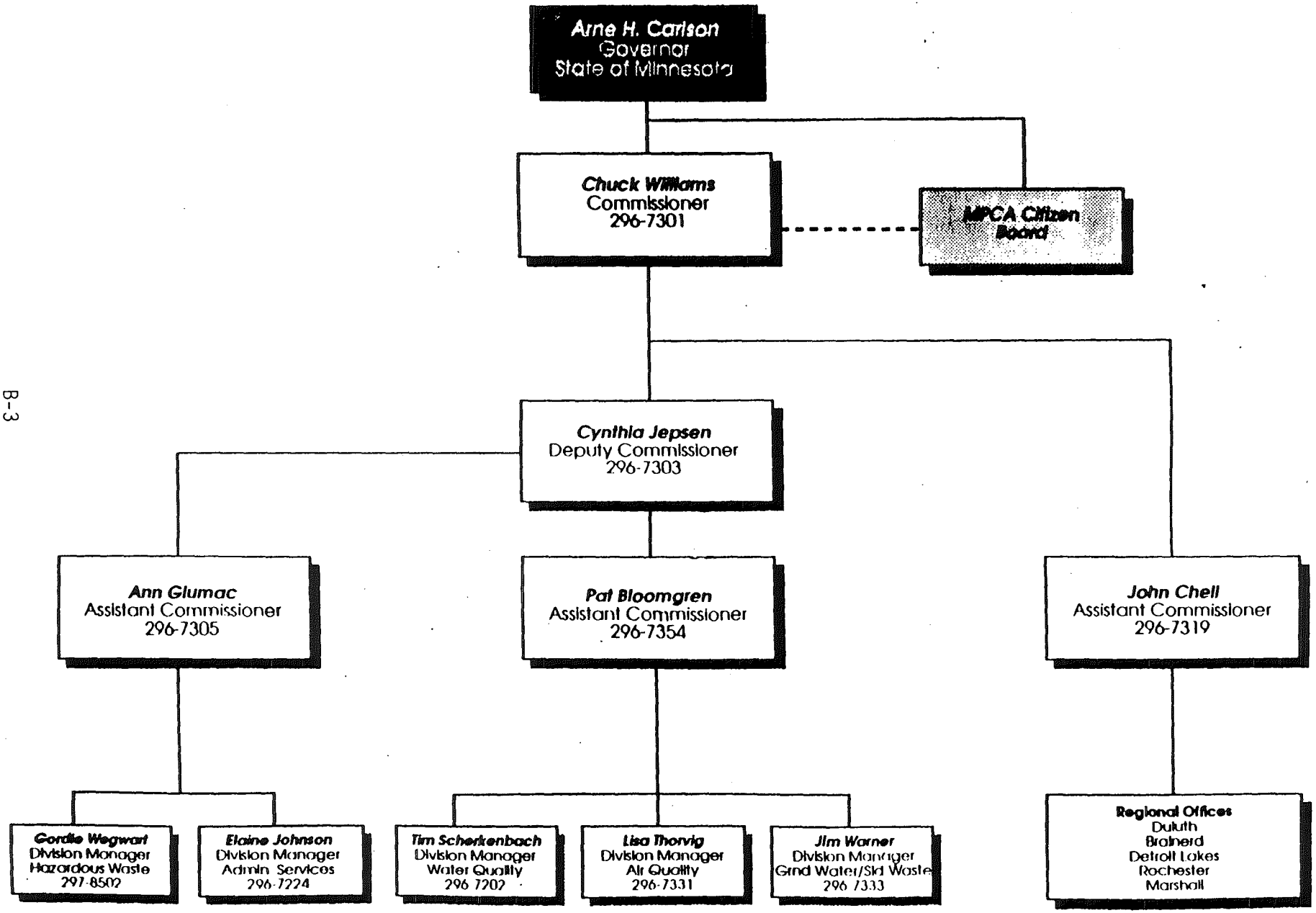
Organizational Chart

MINNESOTA DEPARTMENT OF HEALTH
717 Delaware Street S.E.
Minneapolis, Minnesota 55414
BUS. (612) 623-5000
FAX (612) 623-5043

February, 1992

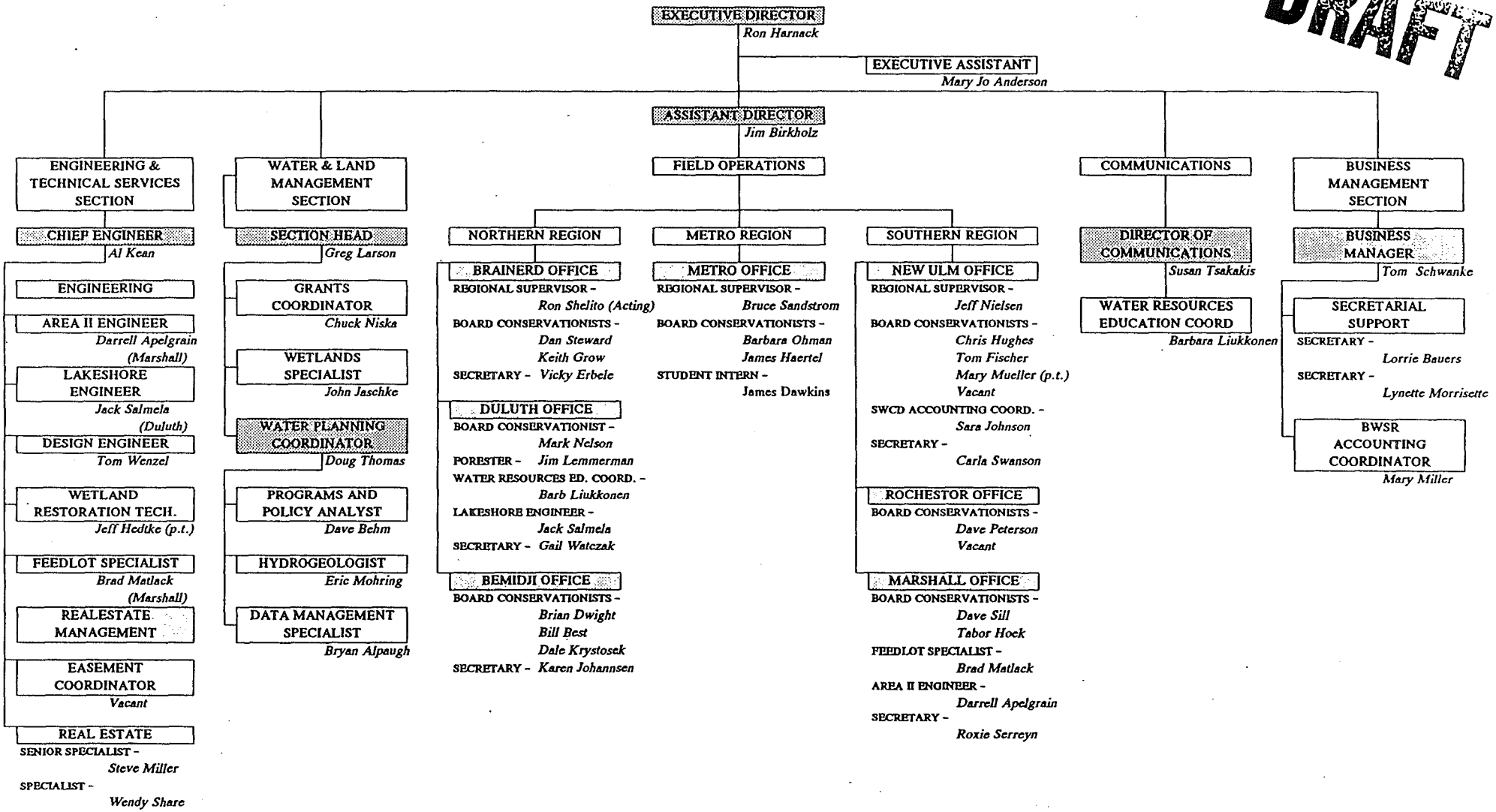


Minnesota Pollution Control Agency



MINNESOTA BOARD OF WATER AND SOIL RESOURCES

DRAFT

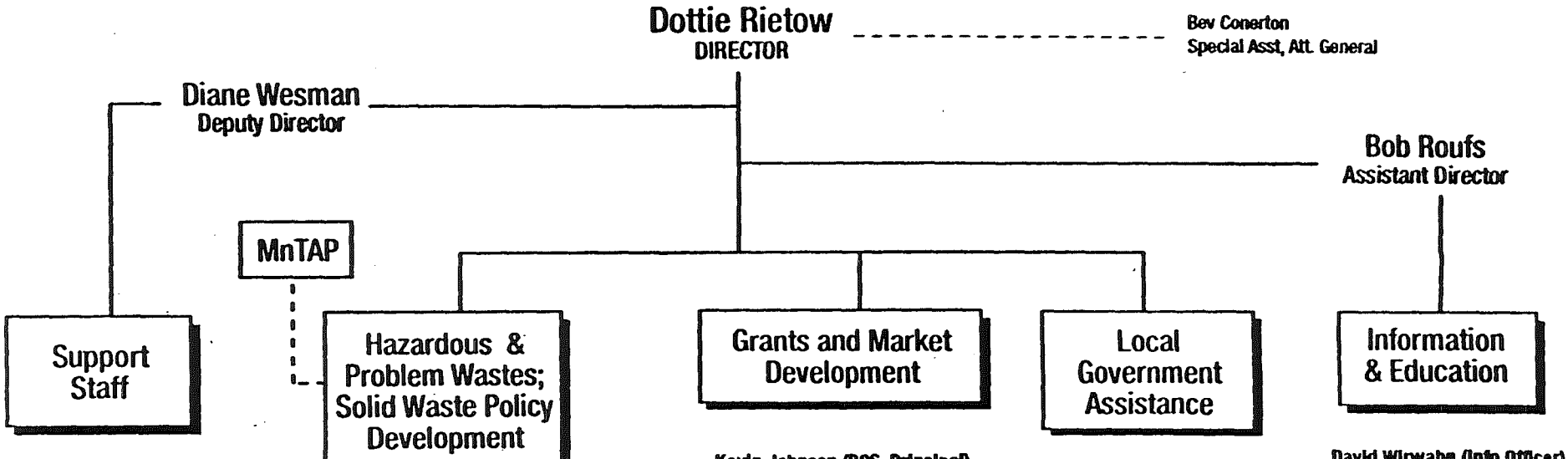


* *Specialists located in field offices but supervised by central office staff show up twice.*

October 1992

March 1992

MINNESOTA OFFICE OF WASTE MANAGEMENT



Financial Services
Mary Daly
(Accounting Officer, Sr)
Joyce Cook (Clerk Typist II)
(.5 with Office Services)

Computer Services
Matt Comstock
(Management Ananlyst II)

Office Services:
Kristi Hansen
(Office Services Supervisor I)

Helen Renner
(Clerk Typist IV, Supervisor)
Ellie Heyda
(Word Processing Operator II)
Joyce Cook (Clerk Typist II)
(.5 with Financial Services)
Richard Fields (Clerk Typist II)
Kristen Stahnke (Clerk Typist I)

Brett Smith (PCS, Principal)
Supervisor

Hazardous & Problem Wastes
David Cera (Planner, Princ)
John Gilkeson (PCS, Sr)
Vacancy (PCS, Sr)
Bruce Brasaemle (PCS, Int)

Solid Waste Policy Development
Mary Vandenbosch (PCS, Sr)

Toxic Pollution Prevention
Kevin McDonald (Planner, Sr)
Julie MacKenzie (PCS, Int)
Paul Moss (PCS, Int)
Janet Pelley (PCS, Int)
Diane Arnell (Graduate Engineer II)

Kevin Johnson (PCS, Principal)
Supervisor

Solid Waste Grants
Sigurd Scheurle - Coordinator
(Planner, Princ)
Mary James (PCA, Sr)
Dawn Molesky (PCS, Int)
Erin Barnes-Driscoll (PCS)

Market Development
Tim Nolan - Coordinator
(Planner, Princ)
Kevin O'Donnell (PCS, Sr)
Laura Millberg
(Planner, Sr)
Christopher Cloutier (PCS)

Source Reduction
Thomas Osdoba (Planner, Sr)
Jim Chiles (Planner, Sr)
Ken Brown (PCS, Int)

Ted Troolin (PCS, Principal)
Supervisor

Barbara Thoman
(Planner, Principal)
Don Kyser (Engineer, Sr)
Emily Moore (PCS, Sr)
David Benke (PCS, Sr)
Virginia Black (PCS, Sr)
Rick Patraw (PCS, Sr)
Tony Hainault (PCS, Sr)
Bill Dunn (Planner, Sr)
Richard Andre (PCS)
Ann Bernstein (PCS, Int)
Diane Wanner (PCS)
Mary Wenck (PCS)

David Wirwahn (Info Officer)
Supervisor

Public Information
Susan Wiley
(Information Officer 2)
Betsy Dick
(Information Officer 2)

Waste Education
Linda Countryman
(Planner, Sr)
Ruth Marston (PCS, Int)
Vacancy (PCS)

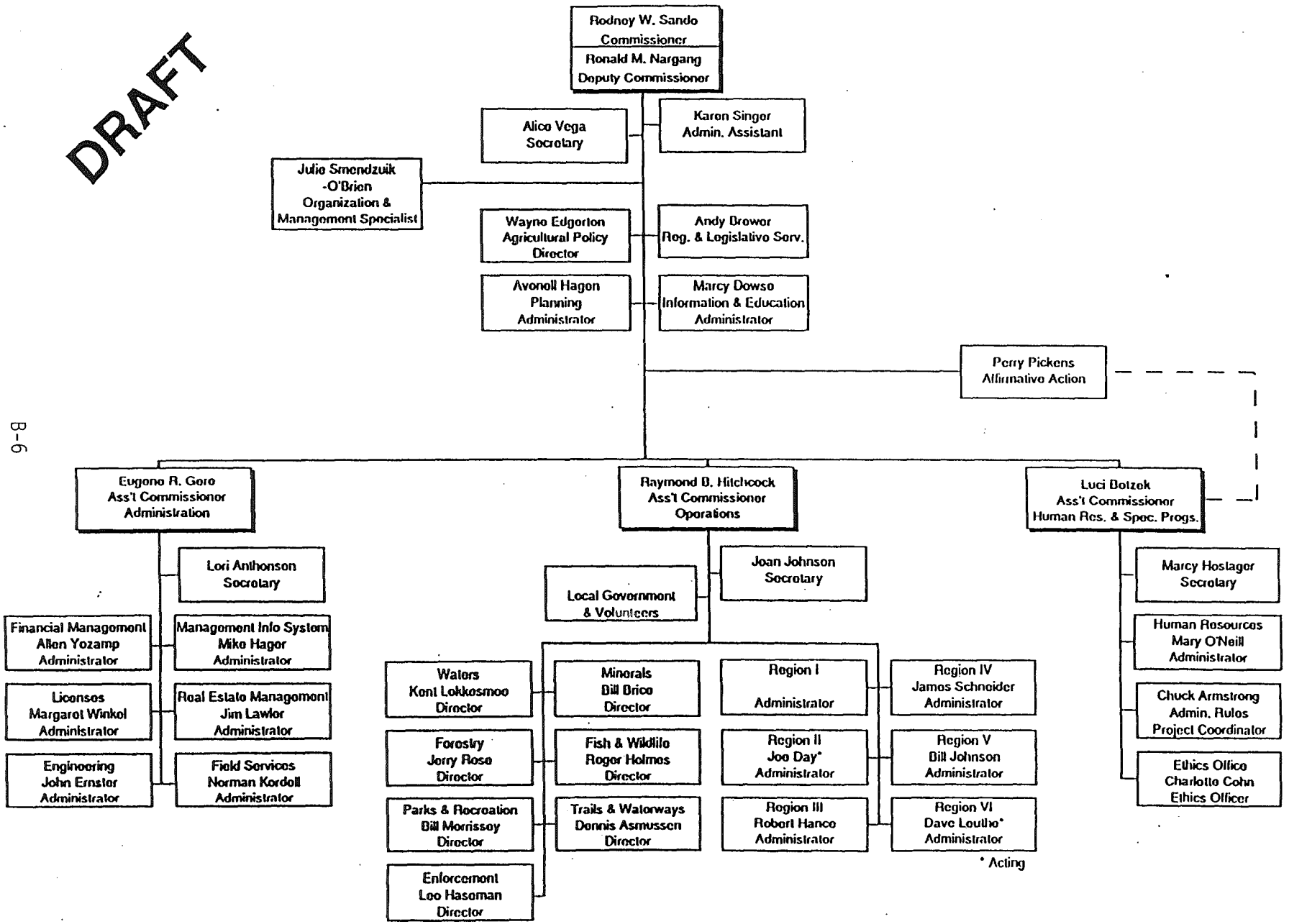
Clearinghouse
Nancy Skuta (Planner, Int)

Draft Minnesota Department of Natural Resources Organizational Chart*

*Interim pending recommendations of Management Improvement Committee

07/28/92

DRAFT



APPENDIX C

Summary of Organizational Structure in Selected States[1]

North Dakota: Responsibility for environmental protection programs is vested in the Environmental Health Section of the Department of Health and Consolidated Laboratories. The chief administrator of the Department is the State Health Officer appointed by the Governor. The Environmental Health Section is the responsibility of the Chief of Environmental Health. There is also a State Health Council appointed by the Governor with quasi-judicial and quasi-legislative powers. Game and fish programs are the responsibility of the Department of Game and Fish; forestry the responsibility of the North Dakota Forest Service; water programs are coordinated by the North Dakota Water Board.

South Dakota: Responsibility for environmental protection and natural resources management is vested in the Department of Environment and Natural Resources.[2] The chief administrator of the department is a secretary appointed by the Governor. Four boards with quasi-legislative and quasi-judicial powers exist, the members of which are appointed by the Governor: Board of Operator Certification, Board of Water Management, Board of Water and Natural Resources, Board of Minerals and Environment.

Iowa: Responsibility for environmental protection and natural resources management programs is vested in the Department of Natural Resources. The chief administrator is a director appointed by the Governor. Two commissions exist with quasi-legislative and quasi-judicial powers, the members of which are appointed by the Governor: Environmental Protection Commission and Natural Resources Commission.

Wisconsin: Responsibility for environmental protection and natural resources programs is vested in the Department of Natural Resources. Quasi-legislative and quasi-judicial powers are vested in the seven member Board of Natural Resources, the members of which are appointed by the Governor for overlapping staggered terms. The chief administrator of the Department is the Secretary who is appointed by the Board of Natural Resources.

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[1]R. Steven Brown, et al., Resource Guide to State Environmental Management Programs (Lexington, Ky: Council of State Governments, 1990), passim; Deborah Hitchcock Jessup, Guide to State Environmental Programs, Second Edition, (Washington, D.C.: Bureau of National Affairs, 1990). passim; telephone interviews with offices of environmental agencies in selected states.

[2]Prior to 1990 this department was called the Department of Water and Natural Resources.

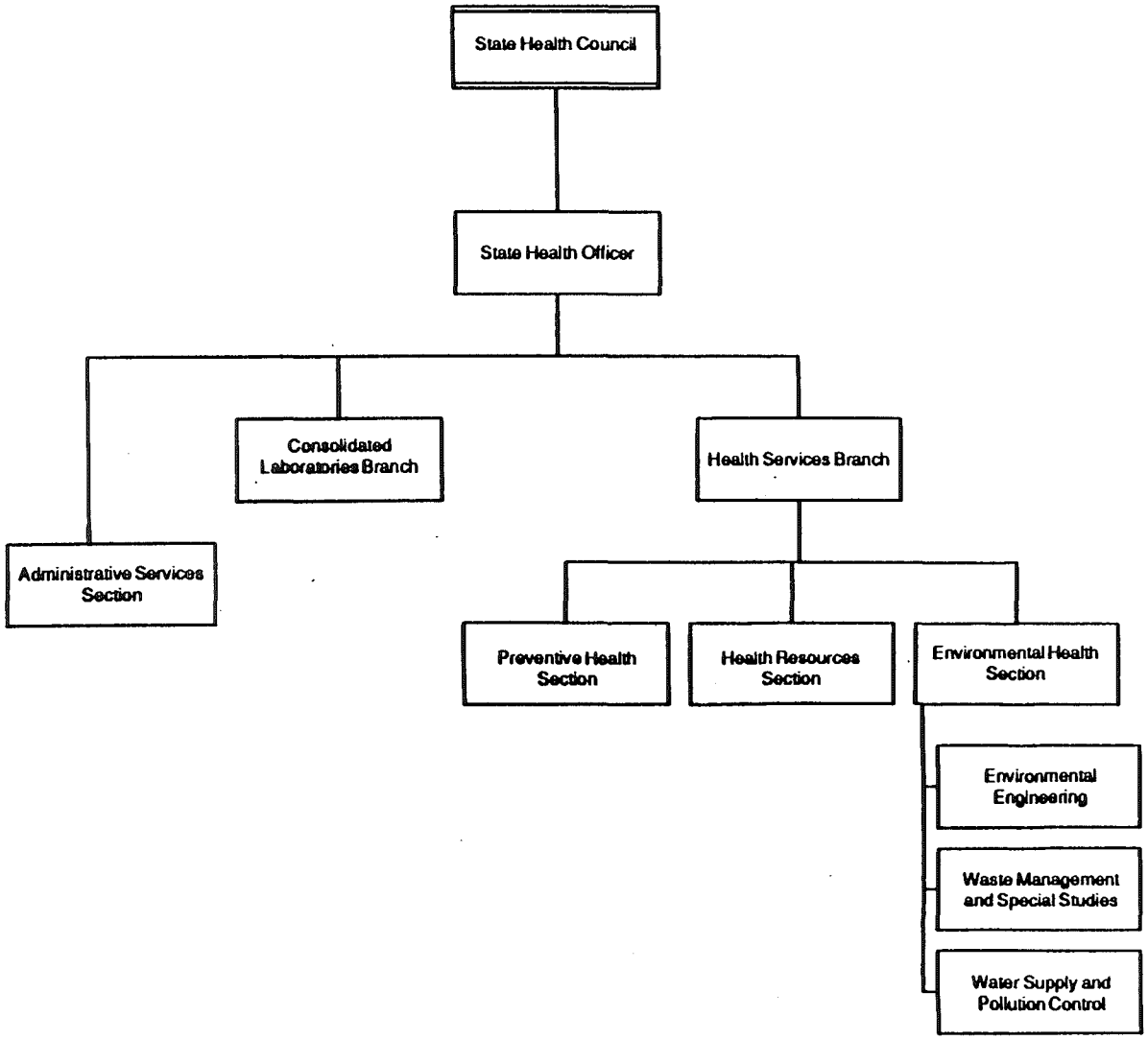
APPENDIX C

Michigan: Responsibility for environmental protection and natural resources programs is vested in the Department of Natural Resources. Quasi-legislative and quasi-judicial powers are vested in the seven member Natural Resources Commission, the members of which are appointed by the Governor. The chief administrator of the department is a director appointed by the Natural Resources Commission.

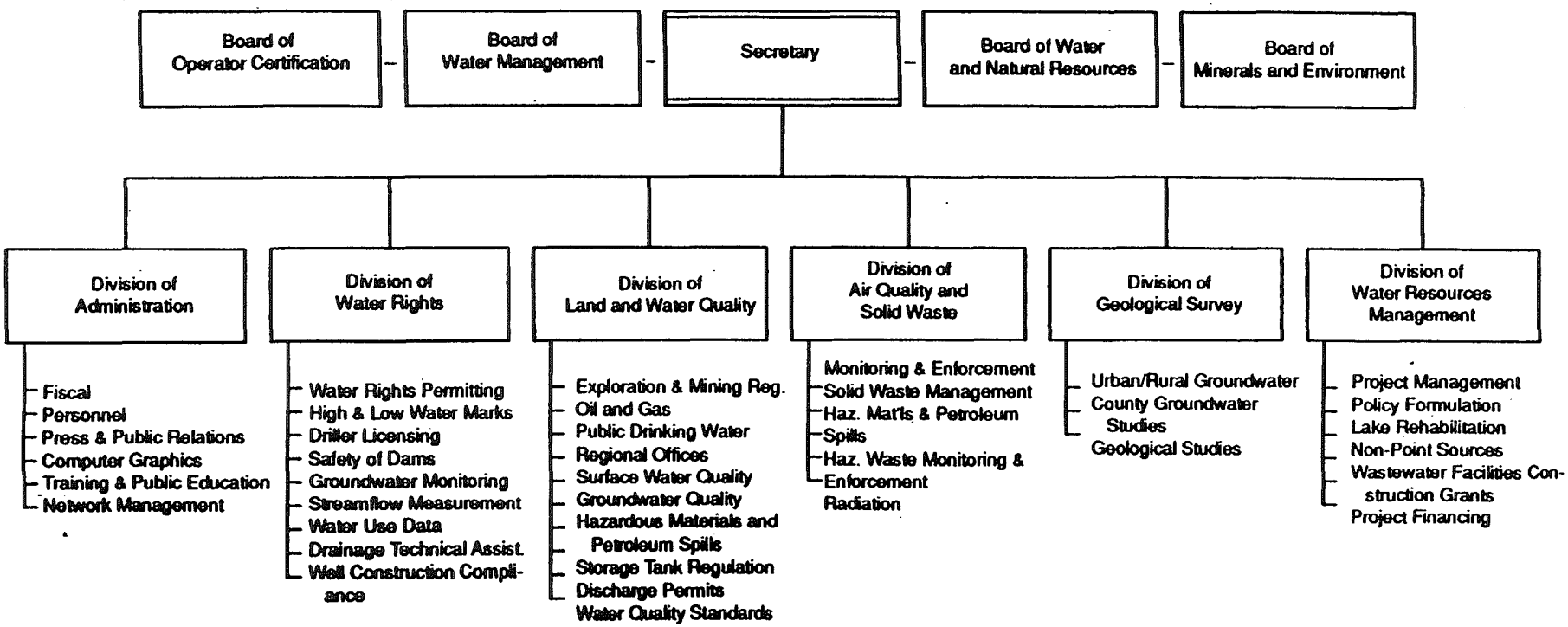
APPENDIX D

Organization Charts of Selected States

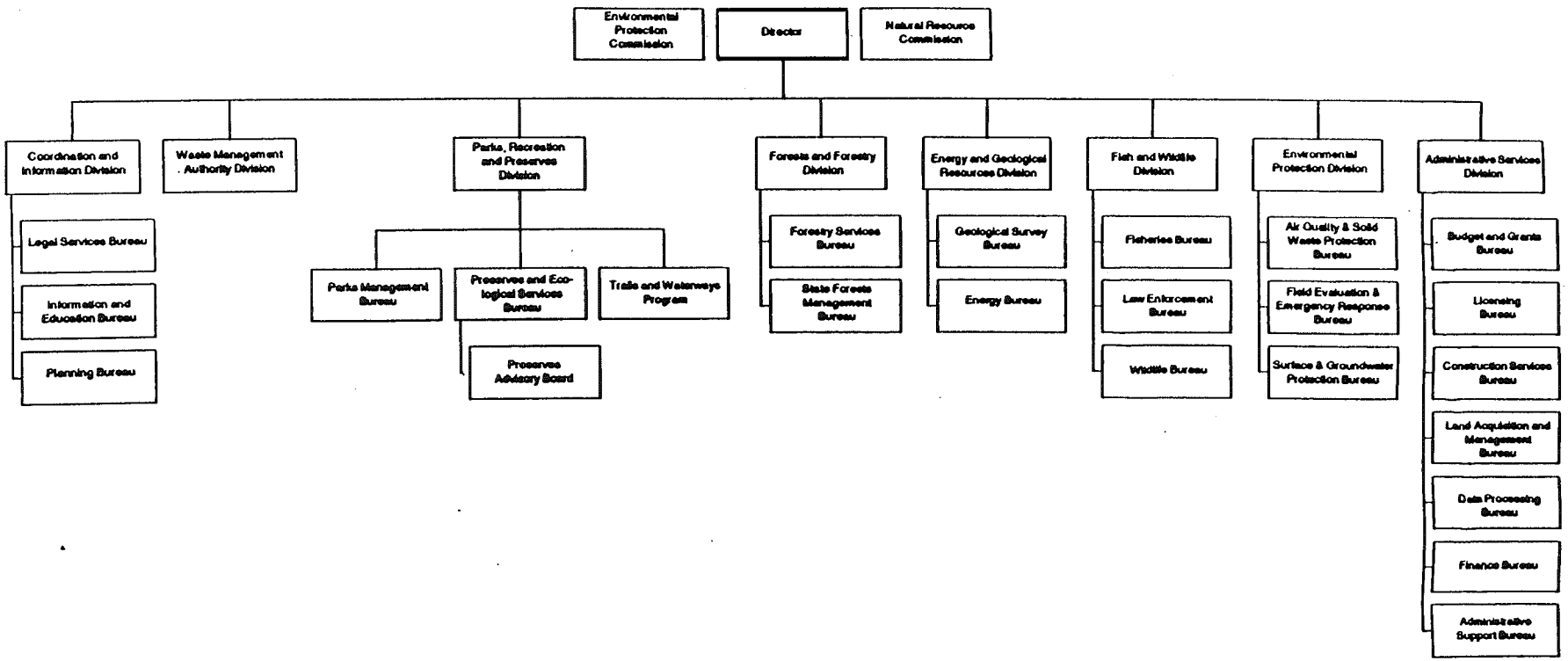
NORTH DAKOTA *Department of Health and Consolidated Laboratories*



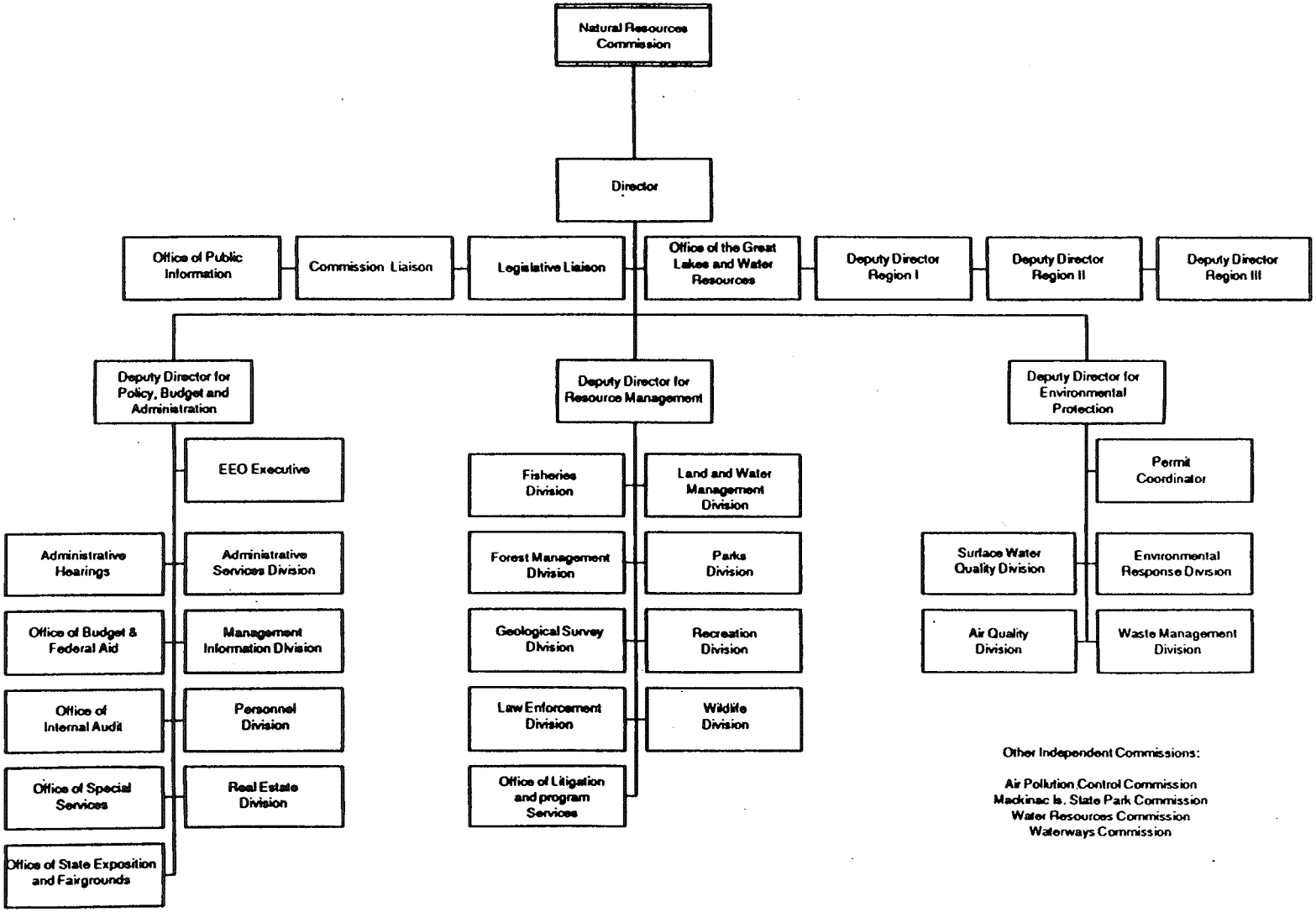
SOUTH DAKOTA *Department of Water and Natural Resources*



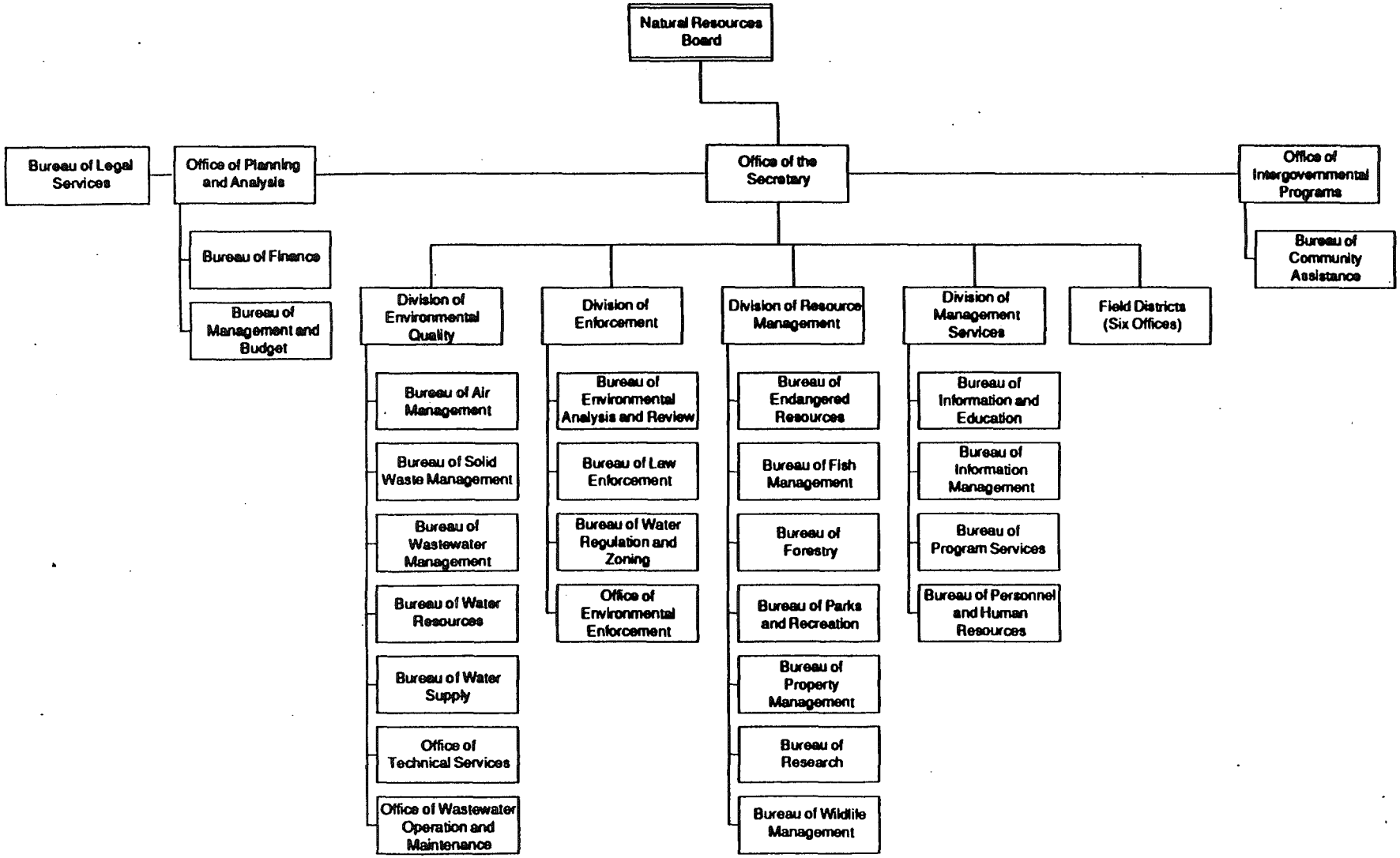
IOWA *Department of Natural Resources*



MICHIGAN *Department of Natural Resources*



WISCONSIN *Department of Natural Resources*



APPENDIX E

"Citizen Boards as Regulatory Agencies"

Summary

The following is a summary of an article entitled, "Citizen Boards as Regulatory Agencies," by Marcia R. Gelpe published in 1990 in The Urban Lawyer (Volume 22, No. 3, 452-483). This article was included under separate cover in the materials sent to the Working Committee for the October 20, 1992 meeting.

Ms. Gelpe, a law professor, identifies the strengths and weaknesses of the Minnesota Pollution Control Agency citizens' board from her perspective as a citizen and attorney, not as a manager or administrator. Ms. Gelpe's article was based on her five years of experience on the PCA Board, her legal training and academic research on citizen and administrative boards.

This summary is presented to the Working Committee as background information from CORE staff. State agency managers may view citizen boards from another perspective, because their experiences and responsibilities are different from those of citizen board members.

Conclusion

Despite the fact that Gelpe calls citizen boards "awkward and cumbersome," she supports retention of the MPCA Board and other citizen boards. The deciding factor for her was this conclusion: "Citizen boards provide significant advantages in making government decisions clearer to the public and giving the public greater access to the decision-making process."

MPCA Background and Citizen Board Defined

The MPCA Board consists of nine part-time citizen members and serves as the decision-making body for the MPCA, which has significant administrative responsibilities and employs about 700 people. Gelpe observed: "This agency makes the rules in the environmental area, issues pollution discharge permits, and enforces the environmental laws. The actions of the agency touch virtually every large business in the state, many small ones, and every local government entity. The areas it regulates are highly controversial, involving fundamental issues on the balance of economic growth and health protection. All of these important, far-reaching decisions that touch the lives of every state resident are made by a board of lay citizens, acting with little training and minimal compensation."

She defines a citizen board as ". . . a group of lay people who are not full time government employees, who constitute the body responsible for some or all decisions of an administrative agency." The MPCA citizen board functions as the administrative agency.

Statutes require that the nine members of the PCA board be ". . . broadly representative of the skills and experience necessary to effectuate the policy . . ." and do not stipulate any requirements other than one member be ". . . knowledgeable in the field of agriculture."

The governor appoints the citizen board members and the commissioner, who is not a board member. The board holds the agency's authority, although it delegates some power to the commissioner.

Public Notice, Public Discussion, Public Decision-Making

Gelpe reported: "The board meets at least once a month with meetings held in public and usually lasting a full day. (Generally, the public must have ten-days notice of any item to be considered by the board.) For each issue, the staff prepares a written document called a board item, which states the issue, describes the background, proposes the decision that the staff wants the board to make, and gives the justification for that decision. These board items are mailed to board members and affected parties and are available to the public prior to each board meeting. At board meetings, the staff is given the first opportunity to speak to each item, and then comments are taken from affected parties and members of the public, as time allows."

Role of the Citizen Board in Relationship to Staff

In agencies headed by commissioners who operate without citizen boards, there is a clear line of authority between the commissioner and agency staff. In the standard agency, the commissioner has the final authority on administrative matters.

In an agency headed by a citizen board, Gelpe said, the relationship between the agency head and staff is more "complex," partly because the ". . . role of the board, as compared to that of the staff, may not be clear."

She said a citizen board may assume one of three roles, or a combination of roles, but identifies the following categories:

1. Main Decision Maker -- "The board itself is seen as a more powerful body, with its proper role extending to all aspects of agency work. The board works as a final authority on all matters, much like the head of a standard agency, subject only to such delegations to the staff that the board chooses to make. One might adopt this model out of belief that the nature of the agency's work is such that the need for broad-based decisions responsive to more than expert concerns predominates, or if one wants the agency's work isolated from the everyday pulls of direct political accountability."

2. Final Oversight Board -- "Assume that the powers to initiate and shape proposals properly lies with the staff, and the role of the board by design is only to give or withhold final approval. Under this model the agency's power lies mainly with the expert or politically controlled staff, and the board exists only to limit extreme exercises of that power."

3. Appellate Board -- "The staff makes the decisions and the board hears and rules on objections to those decisions. The role of the board is limited as against that of the staff that carries technical expertise and, sometimes, independent political authority."

Strengths of Citizen Boards

1. Articulation of Positions -- "It forces everyone wanting to influence an agency decision to articulate clearly what they want and why they want it. . . . If the agency is a citizen board, agency staff members, regulated parties, or other members of the public who want the agency to issue a regulation or to decline to do so, to issue or deny a permit, to adopt a policy, to fund a project, or to take some enforcement action must come before a group of citizens and state in commonly understood language what they want and why the board should give it to them."

   Citing this as the greatest strength of the board, Gelpe said, the public articulation prompts staff to clearly think through and justify their recommendations and the public decision-making makes agency decisions more politically acceptable.

   She emphasized: "Public comprehension is essential if we are to have a society that exercises its value choices on matters involving technical or scientific knowledge."

2. Greater Public Voice in Decisions -- "Citizen boards provide the public with a greater voice in agency decisions. . . . The staff's need to respond to a citizen board on a regular basis is likely to create a culture of listening to non-professionals (general public.)"

   Gelpe said that the existence of a citizen board increases citizen input, because the board creates greater public access to agency decision-making.

3. Maintaining the Big Picture -- Because the citizens are not specialists or technical experts, the board members force the agency to focus on the broad agency mission and ". . . identify and reconcile inconsistencies in the approaches of various departments within an agency."

4. Political Independence in Agency Decisions -- "To the extent that greater political independence is desirable for a given agency, a citizen board is likely to provide it." Part-time board members do not derive their incomes from full-time agency jobs, consequently, their livelihoods are not linked to their agency decision-making. As Gelpe said: "While they (citizen board members) may be paid indirectly in feelings of power and prestige, this does not create as strong a will to please the governor as does the desire to keep a job."

5. Legitimizing Agency Decisions -- "The public is more accepting of agency decisions because they are made by respected citizen representatives rather than by career bureaucrats."

Weaknesses of Citizen Boards

A. Direct Effects on Substance of Decisions:

1. Weakness in Making Technical Judgements -- Citizen boards have a "hard time understanding, let alone judging, technical issues."

2. Difficulty in Understanding Complex Legal Authority

3. Limited Voice in Shaping Agency Actions -- Some citizen boards have been mainly "reactive" to staff. Gelpe said it is key for the board to decide what role it wants to play -- main decision maker, final authority or appellate board. "If the board retains the role of primary decision maker, it must then find ways to have more influence over the proposals brought before it."

   Gelpe said the MPCA Board members viewed themselves as the ". . . main decision-makers for policy matters. . . ," and chose to work closely with staff by working through board committees.

4. Parochialism in Decison Making -- She notes that a danger with citizen boards is members viewing themselves as representing areas or constituencies as opposed to the ". . . fair balance of the interests at stake."

5. Quality of Appointments -- "Work is only as good as the people who do it."

6. Limited Political Accountability -- "Citizen boards have been strongly criticized because of their limited accountability to the appointing chief executive. This results in their being less responsive to political charges than are agencies headed by a single executive appointee."

B. Effects on How a Decision Is Shaped or Used:

1. Lack of clarity in communications from head of agency to affected segment of the public or the regulated community.

   Gelpe said: "Both the public and members of the regulated community depend on prior agency actions as precedent. These prior actions should indicate what the agency will do in similar future situations, how to conform their behavior to the requirements of the law as interpreted by the agency, and how to shape requests or arguments to the agency. If a multi-member board is head of an agency, the value of prior decisions as precedent is reduced for two reasons."

   She observed that the ". . . agency as a whole may not agree on any reasons for its actions," and it is "more difficult for a multi-member agency to express the reasons for its actions."

2. Lack of Clarity in Communications from Head of Agency to Staff

3. Limited Ability to Monitor Staff Compliance with Board Directives

C. Effects on Procedure:

1. Longer Decision-Making Process -- "The presence of a citizen board draws out the time it takes to reach a final decision. There is no cure for this problem, but it rarely causes significant hardship and in fact has some advantages."

2. Tendency to Ignore Open Meeting Laws and Prohibitions on Ex Parte Contacts

3. Lack of Legal Advice -- "In at least some instances, the board as a group can receive legal advice only in a public meeting."

4. Difficulty in Understanding Negotiated Settlements

D. Effects on Staff Behavior:

1. Difficulty in Providing Adequate Background Information

2. Game-Playing in Staff Presentations to the Board

Gelpe Suggestions on Improving the Effectiveness of Citizen Boards

A. Types of Agencies -- "Citizen boards are best used where their main advantages are important, that is where communication to and from the public is especially important. These are agencies making decisions with a high degree of social value choice and where a broad spectrum of members of the public wish to participate in reaching this decision. These factors explain the extensive use of citizen boards in environmental and land-use agencies."

B. Role Definition -- "The role of a citizen board must be clearly defined by legislation, by rule, or by clear statement of the board itself. Several of the disadvantages of these boards are exacerbated by unclear role definition."

C. Policy Choices through the Committee Process -- "The committee process should be used to allow the board an early and effective role in choosing among alternative policies."

D. Technical Decisions through Oversight or Appellate Role -- "A citizen board should not decide specific technical issues."

E. Staff Members to Oversee Board Directions to Staff -- "One high level staff person should be assigned responsibility for overseeing staff response to board directions."