



Friends of Minnesota Scientific & Natural Areas

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May 15, 2019

Minnesota Senate and
Minnesota House of Representatives

Re: Omnibus Environment Bill - Proposed Right-of-Way Exemption to Endangered Species Law
(**SF 2314-3**, Section 14, lines 88.29 – 88.33; page R10 of Revisor Full-text Side-by-Side)
Please Vote “No”; and
Please Repeal Current “Ditches and Roadway” Exemption and “Ignorance” Exemption

Dear Honorable Senators and Representatives:

I submit this letter on behalf of the Friends of Minnesota Scientific and Natural Areas (FMSNA), a Minnesota non-profit corporation established for the purpose of preserving and enhancing Minnesota’s Scientific and Natural Areas or “SNAs”. Most of Minnesota’s SNAs adjoin public right-of-ways.

(Please note: a large portion of this letter is taken from the Minnesota Native Plant Society’s letter to the MN Legislature, dated May 8, 2019.)

FMSNA is concerned about the impacts of Senate version of the Omnibus Environment and Natural Resources bill. (SF 2314-3, Section 14, lines 88.29 – 88.33.) In a purported attempt to clarify the law, the language actually **weakens the protection of rare plants** under the Minnesota Endangered Species law (Minn. Stat. 84.0895) and **creates more uncertainty and confusion**.

FMSNA respectfully requests that you **vote “No”** for the following reasons:

1. **Expands Exemption to the Widest Possible Area.** The current law exempts “... ditches and roadways ...” from the requirements of the Minnesota Endangered Species law. [Minn. Stat. 84.0895, Subd. 2(1).] The current language is subject to an interpretation that the exemption includes the driven portion of the road, the shoulder or fore-slope, and ditch.

The bill deletes the present language “... ditches and roadways ...” Instead of creating a narrow exemption, the bill **expands the exemption** width to “public road right-of-way”, defined in Minn. Stat. 84.92, Subd. 6a (the all terrain vehicle statute), as the

“... **entire right-of-way** of a public road, including the traveled portions, banks, ditches, shoulders, and medians of a roadway that is not privately owned.” (Emphasis added.)

In other words, the bill expands the exemption as wide as possible; to land beyond the ditches and to land within the medians.

2. Endangered and threatened plants occur in public road rights-of-way throughout the state. Local populations are vulnerable to extinction if road authorities are not held responsible for determining whether and where rare plants are present prior to maintenance and construction activities that can result in destruction of the populations (activities such as spraying pesticides and soil disturbance).

County road authorities, the Commissioner of Transportation, and the Commissioner of Natural Resources have opportunity to collaborate in determining the status of endangered and threatened plant species in public road rights-of-way and to document those occurrences in the Department of Natural Resource (DNR) Natural Heritage Information System. The Minnesota DNR has specific authority under Minn. Stat. 84.0895 to undertake a census that would help road authorities make informed and efficient planning decisions related to the protection of endangered and threatened plant species. This is science-based decision making and an opportunity for governing bodies to work together.

We recognize that transportation and safety are priorities for road authorities in their operations and road improvement planning. However, road authorities must still be held accountable for due diligence in following laws related to species that are vulnerable to extinction in Minnesota. The minimal investment necessary for road authorities to address protection of endangered and threatened plant species is reasonable and necessary. It is just one component of a much larger road improvement planning process that road authorities undertake on behalf of the public. We expect that, through the planning process, priority would be given first to avoiding the destruction of populations of endangered and threatened plant species. We would also expect that any unavoidable losses would be mitigated through the Commissioner of Natural Resources' authority to guide transplantation and regulated taking (Minn. Stat. 84.0895 Subd. 5.)

3. Exception to Exemption is Worthless. Contrary to assertions of the bill's proponents, the bill does not clarify the law. Instead, the bill creates a worthless exception to the exemption: “... ground not previously disturbed by construction or maintenance ...”

The county engineers have interpreted this language such as 99% of all existing right-of-way is “previously disturbed.” The Minnesota County Engineers Association testified at a Senate hearing that mowing would be considered “previously disturbed.” If their interpretation is correct: **all endangered plant species within the entire right-of-way would be unprotected.**

4. Extinction Risks are World-wide; the bill would increase extinction risk. The Intergovernmental Science-Policy Platform on Biodiversity and Ecosystem Services (IPBES) published a summary report this week. One of the conclusions is: “The Report finds that **around**

1 million animal and plant species are now threatened with extinction, many within decades, more than ever before in human history.” See:

<https://www.un.org/sustainabledevelopment/blog/2019/05/nature-decline-unprecedented-report/>

The bill would increase the risk of plant extinctions.

5. **Lacks standard of evidence and burden of proof.** The bills fails to establish the standard of evidence and burden of proof necessary to establish that the “... ground was not previously disturbed”

6. **Fails to Allow Plants to be Re-established.** In general, plants have the capacity to reestablish in disturbed areas, if conditions are suitable and they are allowed to grow without further disturbance. The proposed bill does not take into account that some endangered and threatened plants can be reestablished in areas “previously disturbed by construction or maintenance.”

7. **Adverse Precedent.** Granting a ditches and roadway exemption from the Minnesota Endangered Species law (i.e. a “free pass”) to road authorities has already established an adverse precedent and an incentive for other entities to request special treatment. The bill proposes to expand the “free pass” to road authorities, which will increase the incentive for others to request special treatment – and will further weakens the law’s effect.

Repeal Roadway Exemption

The present “roadway” exemption from the Minnesota Endangered Species law should be repealed. [Minn. Stat. 84.0895, Subd. 2(a).] **Ditches within the public right-of-way should not be exempted.** (The exemption should apply only to ditches outside of public right-of-way.) The reasons are:

1. There is no rational basis to grant road authorities an exemption to the requirements of the Minnesota Endangered Species law. Road authorities are unable to adequately explain why the exemption is necessary.

2. There is no evidence in the record that road authorities are less able to comply with the law than any other person or entity.

3. It is only fair and equitable that road construction and maintenance by road authorities should be subject to the same requirements as any other activity under the Minnesota Endangered Species law.

Repeal “Ignorance” Exemption

The Minnesota Endangered Species law presently contains another exemption, rewarding ignorance:

“The accidental taking of an endangered plant, where the **existence of the plant is not known** at the time of the taking, is not a violation of subdivision 1.” [Minn. Stat. 84.09895, Subd. 2(d). Emphasis added.]

This statute unjustifiably rewards ignorance and creates no incentive to investigate the consequences of a proposed action. Ironically, the statute creates no exemption for “threatened” species, which are, by definition, in less immediate danger of extinction. In most legal situations, ignorance is not a defense to a harmful activity. Citizens should be responsible for their actions. Therefore, the above language should be repealed.

SUMMARY OF REQUESTS

On behalf of Friends of Minnesota Scientific and Natural Areas, we request that you **vote “NO” on this bill.**

Furthermore, **please amend the present Minnesota Endangered Species law by repealing: (1) the exemption for roadways and ditches within public right-of-ways** [contained in Minn. Stat. 84.0895, Subd. 2(a)(1)]; **and (2) the exemption that rewards ignorance** [Minn. Stat. 84.0895, Subd. 2(d)].

Finally, if the bill language did not pass, **we would be open to meeting with interested parties (DNR, MNDOT, and road authorities) after the Legislative session to discuss legal ways to advance the protection of endangered species, while allowing road authorities to do their job.**

Thank you.

Very truly yours,



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