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RED ALERT! DITCH THE RULE! **DEFINITIONS OF WATERS OF THE UNITED STATES!**

Puddles, ponds, ditches, ephemerals (land that looks like a small stream during heavy rain but isn't wet most of the time) and small wetlands dot the landscape. The Environmental Protection Agency, U.S. Army Corps of Engineers, Department of Army and Department of Defense, on April 21, 2014 issued the proposed rule that would expand their regulatory authority under the Clean Water Act (CWA) to many of these land features and waters, giving the agencies the to regulate or prohibit land-uses and farming practices in or near them. The rule could impact any property owner with a low spot on their property, no matter the size.

The Public has until July 21, 2014 to comment on the proposed rule. Submit formal comments to tell the EPA the harmful effects of this rule.

Easily submit comments through the Minnesota Farm Bureau Action Alert Center.



GREETINGS From Your PRESIDENT

Hello,

Again it is time to take computer in hand and jot down a few musings from your President. As I write this, I have received 3.75" + of rain in the last week of April. For us this has been a very beautiful and beneficial rain. I know it has slowed spring progress, but our soil profile desperately needed the water. When the weather warms up, I am sure I will be up to my knees in lush green lawn that will then need a mowing. We will also have fun with the mosquitos and bugs that follow.

The last time I wrote about our legislative visits both in Washington D.C. and at the State Capital. Since that time, the State legislature has so far left drainage alone but at the National level, the EPA, U S Army Corp of Engineers, Department of the Army, and the Department of Defense has issued the proposed rule that would expand their regulatory authority under the Clean Water Act. As stated, any puddle of water would fall under their jurisdiction. This could negatively impact what a person could do with their land if they happen to be near one of these bodies of water. As the Clean Water Act on states, the Corp has jurisdiction only on navigable waters. This new regulation would include ALL water. The comment period is now open until July 21, 2014. Let the EPA, Corp and your legislators know that this is not an acceptable rule, both in control of water and the ethics of how the agencies are trying to circumvent the legislative process.

Remember, those who show up and those who voice their opinions are the ones who make the rules. Stand up and make your voice heard.

As we head into spring, we will be busy and tired. Take breaks, get rest and above all work safe. We all want to go home at the end of the day. Keep it safe.

We have our MnLICA Board meeting on June 14, 2014 at New Ulm, MN at the Holiday Inn/Best Western and in July the summer National LICA Board meeting is in Indianapolis, IN.

Hope to see you this summer at a MnLICA function.

Karlen Nelson- MnLICA President

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Contractor Liability: Wetland Drainage and Pollutant Discharge

By Kale R. Van Bruggen and John C. Kolb
Rinke Noonan, Ltd., Saint Cloud, Minnesota May 9, 2014

Having a solid understanding of the federal and state wetland laws that impact a land improvement contractor's clients adds an immense amount of value to the contractor's services. Equally as important, a good understanding of wetland laws helps minimize or eliminate the liability risk faced by a contractor's business operation when working in or near wetlands subject to protection or regulation.

Whether a contractor working on behalf of a landowner or client can be held liable for draining, filling, impacting, or discharging a pollutant into a wetland depends on whether the wetland is subject to one of several state and federal laws that protect and regulation wetlands.

There are three federal wetland laws that a land improvement contractor should always be cognizant of: (1) Clean Water Act; (2) National Wildlife Refuge System Administration Act; and (3) the Food Security Act of 1985.

Clean Water Act: The Clean Water Act (33 U.S.C. §§ 1251, et seq.) states that, except for actions for which a person has a permit or the action is exempt under the Act, "the discharge of any pollutant **by any person** shall be unlawful." Pollutants are defined to include "dredged spoil . . . discharged into water." In our article published in the Feb./Mar. 2014 edition of this newsletter, we discussed the federal agencies recent efforts to require a Section 404 permit from the Army Corps to install drain tile of any-size in a wetland subject to the Act's jurisdiction. Likewise, the EPA is bringing civil enforcement actions against contractors and landowners who install drainage tile in a jurisdictional wetland without the necessary permit. Because the Clean Water Act statute prohibits "any person" from discharging a pollutant, a contractor working on behalf of a landowner client is subject to the same civil and criminal enforcement penalties as the landowner. Civil penalties under the Clean Water Act can reach up to \$75,000 per day: \$37,500 per day of violation of the Clean Water Act, and an additional \$37,500 per day that the contractor and landowner do not comply with the Administrative Compliance Order.

As discussed in our other article in this newsletter, the EPA and Army Corps have recently taken efforts to expand the wetlands which they claim are under the Clean Water Act's jurisdiction. A recent statement by the St. Paul District Regulatory Branch Chief for the Army Corps informed wetland delineators that all wetlands in the prairie pothole region are "jurisdictional" under the new agency rules. Land improvement contracts should carefully analyze the potential that their project includes a discharge of a dredged or fill material, or other pollutant, into a jurisdictional wetland and consider going through the tedious, formal permitting process to protect themselves from significant Clean Water Act liability.

U.S. Fish and Wildlife Service Easements: Another federal law of concern for land improvement contractors installing drain tile on agricultural lands is the National Wildlife Refuge System Administration Act (16 U.S.C. §§ 668dd–668ee). The Act states that all lands and waters administered by the Secretary of the Interior as wildlife refuges, areas for the protection and conservation of fish and wildlife threatened with extinction, wildlife ranges, game ranges, wildlife management areas, or waterfowl production areas are referred to collectively as the "National Wildlife Refuge System." This includes all wetlands covered on agricultural ground by a federal U.S. Fish and Wildlife Service easement.

The Act states that "**no person** shall knowingly disturb, injure, cut, burn, remove, destroy, or possess any real or personal property of the United States, including natural growth, in any area of the System." Most property owners will know if their land is subject to a Fish and Wildlife Service easement, but to be certain, a contractor or landowner can check whether a conservation easement is recorded at the county recorder's office. Fish and Wildlife Service easements can be recorded as far back as 1964. In our experience, enforcement actions by the Fish and Wildlife Service for draining wetlands covered by an easement is typically brought against the current landowner. However, similar to the Clean Water Act language, the federal law states that "no person" shall injure wetlands protected by the Act; therefore, contractors could potentially be criminally liable for installing drain tile that violates the Fish and Wildlife Service easement agreement.

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Southwest Minnesota Farm Water Management and Cover Crop Field Day

A field day is planned for August 13th, 6 miles north of Canby, Minnesota.

It will feature "learning stations" staffed by government and private individuals. Stations include a soil pit, controlled drainage, subirrigation, cover crops and pollinators (bees). Weather permitting, there will be a demonstration of seeding cover crops with an airplane in standing sunflowers. There is also a forum on "the future of farm drainage" planned, featuring government officials and private industry representatives. Various suppliers will have booths.

The field day takes place on a farm of 480 acres that has 13 controlled zones, which was designed by Mike Lehmann of Air-Row Survey, LLC.

Mark Dittrich of the Department of Ag, Yellow Medicine County SWCD, Lac Qui Parle Yellow Bank Watershed Board, and others are involved with the day, with Stu Frazeur being the lead organizer.

For more info or to participate, contact Stu Frazeur at 507-828-2219 or e-mail at:

frazeur5@frontiernet.net.

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To get more information on agriculture's issues.

MNLICA seems to be on the same page on most issues.

MNLICA members need to contact their Senators and Representatives in Washington DC on the EPA and Corp of Engineers water rights issue.

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MNLICA at work in St. Paul

Members of MN LICA again visited the state capitol, working to educate legislators on concerns of the members.

The sales taxes placed on service businesses last session was one of the topics, as was fiscal responsibility, with discussion concerning the proposed state office building. MSHA was an issue that, while being a federal agency, is brought up at the state level. The idea is that state legislators may be helpful in persuading the U.S. Congress in taking action.

Renewable fuels levels were scheduled to end this year, but have now been extended. These "renewables" provide support for commodity prices for farmers.

The locating of farm taps has moved ahead, largely due to Don Loken, Jeff Murray with the Office of Pipeline Safety, and Representative Petersburg, who introduced legislation last year. While that legislation did not pass, it sent a message to the gas companies and Gopher State One Call, who have met with Don Loken and Mark Morreim several times.

Those who participated were Karlen Nelson, Mark Morreim, Don Loken, Kevin Bakken, Mike Lehmann, Matthew Frazeur, and Stuart Frazeur.

Mike Lehmann
Don Loken
Representative
John Petersburg
Mark Morreim
Karlen Nelson



Kevin Bakken
Matthew Frazeur
Stuart Frazeur
Representative
Kevin Dahle



Mark Morreim
Karlen Nelson
Don Loken
Stuart Frazeur
Mike Lehmann



Mention Wetlands, Drainage, or Permits and Someone will Mention

 **RINKE NOONAN**
attorneys at law



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Gary Leistico
gleister@rinkenoonan.com

Landowners are becoming increasingly aware of the difficulties in dealing with wetlands, drainage, and acquiring permits. The DNR, NRCS, Corps of Engineers, county and local governments all may have interests that must be addressed.

Our work involves wetlands, drainage, and other water related issues, permits - areas of law that are constantly changing and becoming more specialized.

If you're facing a challenge in any of these areas, or are wondering if you could benefit from legal help, call Kurt, John, or Gary at (320) 251-6700 or (888) 899-6700

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Bruce Mosier from the Prins Insurance Company doing the Dawson Safety Class. (Left)

Classes at the Owatonna Pipe-laying and at the Dennison MSHA Safety Classes.



Tiling article was found by Everett Garlich

Farm had 3 pot holes that are drowning out each year. This was in a file on their farm tiling since their grandfather. Surveyor's bill 12 hrs. @ \$.50=\$6.00. The tiling was done in 1907-08 and 1915.



Continued from page 5:

Swampbuster: Another federal law, familiar to land improvement contractors working with landowners and farm operators enrolled in the federal farm program, is the Swampbuster provisions of the Food Security Act of 1985 (16 U.S.C. §§ 3801 et seq.), most recently amended by the Agricultural Act of 2014 (“2014 farm bill”). Unlike the Clean Water Act or U.S. Fish and Wildlife Service easements, violations of this law only impact the landowner and farm operator.

Swampbuster conditions the receipt of farm program benefits and, under the 2014 farm bill, federal crop insurance premium subsidies, on compliance with two key provisions: a participant is ineligible for farm program benefits and crop insurance subsidies (1) in any year in which he or she produces an agricultural commodity on a wetland converted after December 23, 1985; or (2) by converting a wetland after November 28, 1990 to make production of an agricultural commodity possible. While the land improvement contractor’s business might not be liable for violating these provisions, a contractor can add great value to his or her services by understanding the Swampbuster provisions and ensuring the agricultural clients have followed the Swampbuster requirements. For more information on Swampbuster compliance, see our article in the Oct./Nov. 2013 edition of this newsletter.

Public Waters Wetlands and Wetland Conservation Act: Minnesota has two state laws that are aimed at protecting Minnesota’s wetlands and have a policy objective of ensuring no net loss of wetlands within this state. Minnesota’s public waters law (Minn. Stat. § 103G.221) prohibits draining wetlands designated as “public waters” without a permit authoring its drainage, which is conditioned on replacing the wetland with wetlands that will have equal or greater public value. A permit is also needed from the Minnesota Department of Natural Resources for any work in a public waters wetland that will change or diminish the course, current, or cross section of any public waters by any means, including filling, excavating, or placing of materials in or on the beds of public waters. Similarly, the Wetland Conservation Act (Minn. Stat. §§ 103G.222-.2372) requires a project proponent to submit a replacement plan to the applicable local government unit for any wetland draining, excavation, or filling activity that is not exempt from the Act under Minnesota Rules Chapter 8420.0420.

Minnesota Statutes section 103G.2212 specifically prohibits an agent or employee of another, which includes land improvement contractors, from draining or filling a wetland unless the agent or employee has obtained a signed statement from the property owner stating that the wetland replacement plan required for the work has been obtained or that a replacement plan is not required. The statute also requires the agent, employee, or contractor to mail or email the statement to the local government unit with jurisdiction over the wetland.

The Minnesota Board of Water and Soil Resources developed a form titled *Landowner Statement and Contractor Responsibility for Work in Wetlands or Public Waters* which can be used to comply with the requirements in 103G.2212. A contractor who follows the procedure set out above and completes the applicable form will be protected from liability for violating the public waters law or the Wetland Conservation Act. Failure to comply with this requirement can subject a contractor to criminal penalties for failing to obtain the property signed statement, in addition to subjecting that contractor to liability for violating the State public waters law and Wetland Conservation Act.

It is important to remember that there are multiple agencies, both in state and federal government, with jurisdiction to protect or at least regulate draining, filling, impacting, or discharging pollutants into wetlands. Understanding the permitting and procedural requirements for compliance with each law can help expedite the project process and minimize liability to both your business and your client.

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EPA and the Army Corps of Engineers Release Proposed Rule Change

By Stuart Frazeur

The EPA and the Army Corps of Engineers jointly published a proposed rule change on April 21st, the day before “Earth Day.” While the two agencies claim that it is merely a clarification, many other groups see the proposal as an expansion of the jurisdiction of the agencies and the Clean Water Act.

This rule change comes as a response to two court cases from in the past: Rapanos vs. United States, and Swancc (Solid Waste Agency of Northern Cook County) vs. Army Corps of Engineers. In 1989 John Rapanos had placed fill in a wetland, without having a federal permit. The wetland was completely within the State of Michigan, but was connected by a man made ditch, to a stream, and finally to a river. Rapanos held that since the wetland was over ten miles from “navigable waters,” that the federal permit was not needed. The Supreme Court sided with Rapanos, that the Army Corps had over stepped their authority as defined by the Clean Water Act.

In Swancc’s case, the Army Corps of Engineers claimed that an isolated intrastate lake was under its jurisdiction, as the lake was used by migratory birds. The Supreme Court, again, ruled that since it was not connected to any “navigable waterway” that the lake was not under Army Corps control.

Environmentalists claim that the two trials were disastrous, leading to the draining of many wetlands, and the destruction of wildlife habitat.

The proposed rule is 371 pages in length, but according to Rep. Chris Collins, it does the opposite of clarify. He and Rep. Kurt Schrader



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have drafted a letter to the Army Corps and EPA that raises concerns that the rule expands the Clean Water Act’s jurisdiction. It is available at Chris Collin’s website. Over 166 of his colleagues have signed on to the letter as well.

The question becomes, how will the rule affect LICA members? EPA and the Army Corps claim the change would bring 3% of the wetlands, lakes, rivers, etc. under the Clean Water Act. Even at that, a contractor who works for 100 clients could be dealing with the federal agencies on three of them. Of course, the NRCS is a federal agency, but they are located within the county, and that they are approachable, as opposed to the offices of the EPA and Army Corps.

According to Rep. Collin Peterson’s office, Don Baloun has received verbal assurances that wetland mitigation and other NRCS functions would not be affected. However, there appears to be no written assurances of this.

EPA and Army Corps Rule on “waters of the United States”

By Kale R. Van Bruggen and John C. Kolb

Rinke Noonan Law Firm, Ltd., Saint Cloud Minnesota

May 9, 2014

In the December/January 2013-2014 MNLICA Newsletter, we reported that the U.S. Environmental Protection Agency and the U.S. Army Corps of Engineers sent a draft rule defining the phrase “waters of the United States” under the Clean Water Act to the Office of Management and Budget for administrative review. While under review, the proposed rule was not publicly released. At the end of that month, the Scientific Advisory Board of the EPA released a report titled *Connectivity of Streams and Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidence* to serve as the scientific support for the upcoming release of the new rule. (For a discussion of the EPA report, the definition of “jurisdictional wetlands,” and the *Rapanos* decision by the U.S. Supreme Court, please refer to our article in the December/January 2013-2014 edition of this newsletter).

On March 25, 2014, the EPA and Army Corps jointly released the proposed rule defining the scope of streams and wetlands the agencies claim jurisdiction for protection under the Clean Water Act. Not surprisingly, last fall’s scientific report was a true predictor of the broad and expansive rule released by the agencies.

Since *Rapanos* was issued in 2006, the regulated community has struggled to understand the scope of the EPA and Army Corps’ regulatory authority under the Clean Water Act. In promotional materials released by EPA, the agency claims the proposed rule “reduces confusion about Clean Water Act protection,” “clarifies types of waters covered under the Clean Water Act,” “saves businesses time and money,” “provides more benefits to public than costs,” and “helps states to protect their waters.” In addition, EPA has been quick to claim that input from the agricultural community helped shape its proposal and that the agency coordinated with the USDA to “ensure that 56 conservation practices that protect or improve water quality will not be subject to Clean Water Act dredge and fill permitting requirements.”

Our initial review of the rule leads us to conclude that many of the agencies’ claims are over-simplified or exaggerated. Many of the conservation practices now “exempted” from the rule were never subject to Clean Water Act jurisdiction in the first place. The rule will have a substantial impact on counties and watershed districts serving as public drainage authorities, as well as significant impacts to townships and counties serving as road authorities. In addition, the rule provides significant changes for property owners and contractors that do work on land which, for the first time, will now be considered a “jurisdictional wetland” and require Army Corps authorization or permits.

At a recent meeting of wetland delineators held in St. Paul, Minnesota, the Chief for the St. Paul District Regulatory Branch of the Army Corps told the delineators that all wetlands in the prairie pothole region (Minnesota, Iowa, North Dakota, South Dakota,

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and Montana) are now subject to the Army Corps’ jurisdiction under the new rule, a position never before taken by the agency. The rule expands the definition of “tributaries” to include any feature that has a bed, bank, and ordinary high water mark, regardless of the amount, frequency, or duration of flow. With the expanded definition of “tributaries” to include even intermittent or ephemeral streams that only run during excessive rainfalls, any wetland neighboring those tributaries, including all wetlands in the “riparian area” or “floodplain” of those wetlands, will now be subject to Clean Water Act jurisdiction.

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On Monday, April 21, 2014, the rule was officially published in the Federal Register, which begins the 90 day period for public comment required for federal rulemaking. Rinke Noonan has been asked to draft comments to be submitted to the EPA and the Army Corps on behalf of many of our public drainage authority clients. Comments to the rule must be submitted to the agencies on or before July 21, 2014. In order for our comments to represent the largest group possible, we sent a letter to all of our public drainage authority clients regarding the new rule and offering each of them an opportunity to join in the comments and contribute toward its preparation. If you have questions regarding the proposed rule, submitting public comments, or would like to join in submitting public comments as a public drainage authority, please contact our office.





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DIRECTORS REPORT

I am pleased to report that at the NLICA Convention at Las Vegas MNLICA was awarded the Kemp's Legislative Award! THANK YOU to all the MNLICA members that gave of their time and talents to make it possible to receive this honor the 2nd year in a row! YOU KNOW WHO YOU ARE! The men that attended all the extra meetings and went to see your state Legislators and meet with NRCS; MPCA; GSOC; BWSR; Washington DC Legislators and NRCS people. MNLICA APPRECIATES YOU!

I was honored to be nominated and elected to the position of Region 4 V.P. Representative on the NLICA Board. I will represent, Illinois, Iowa, Minnesota, Missouri and Wisconsin.

I appreciate all your support and I will try to do the best job that I can for each state and keep them informed of issues.

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Chicken Fruit Salad

2-cups cooked chicken, diced

1 Tbsp. minced onion

1 tsp. salt

Mix & refrigerate for several hours

1-cup grapes (cut in ½ if you wish)

1 cup diced celery

1 cup cooked macaroni rings

1-cup mandarin oranges

½ cup slivered almonds

Mix & refrigerate in a separate bowl

Just before serving, mix both bowls ingredients together and add 1-cup whip cream mix well.

LICA MISSION STATEMENT

**To promote, perpetuate
and improve**

**The proper use of our
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Resources for the Benefit of All!

NEW NATIONAL LICA BENEFIT

ADP

ADP helps you focus on what you do best - running your business. ADP helps thousands of clients every day by processing payroll, calculating, depositing and filing payroll tax documents. Through this corporate alliance with LICA, you can now leverage best business practices and the expertise of others to help improve your bottom line while alleviating your payroll tax compliance burden.

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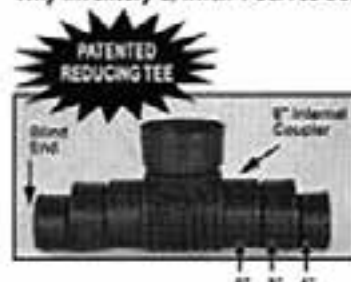
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Call the national ADP/ LICA Representative
Beau Nguyen at
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NLICA 2014 Summer Meeting**July 14-19****Indianapolis, Indiana****Marriott Downtown****\$129.00 (plus tax)****888-236-2427****Tuesday**, July 15th- Tour Indianapolis Motor Speedway**Wednesday**, July 16th- CAT Tour, Purdue**Thursday**, July 17th- Seminars, Golf Outing & Associates' Night**Friday**, July 18th- Committee Meetings**Saturday**, July 19th- Board Meeting & Go Karts**WANTED ONE LIVER DONOR****Sherry (Doug) Gysbers****Cannon Falls, MN.****Needs a live DONOR for a
Liver Transplant.****She was diagnosed with a rare liver disease
in 1998 and will need a liver transplant soon.****She has been approved by the University
Transplant Center as of 2-20-14.****If you know of an angel or you are
willing to be one please call Sherry
at 507-263-5630.****MNLICA WEB--www.mnllica.org****Check out the MNLICA web-site:****Membership: Benefits: Applications: Directory & Map****Scholarship Application: Ladies Activities****Newsletter Archive: Contact Information****Calendar of Events: Legislative Issues: National LICA****To add content or suggest changes for the website****Contact Mike Lehmann--507-381-9791****Or e-mail him at air-row@charter.net****Precision Intakes**
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Dawson, MN 56232

TREASURER

Doug Gysbers
Doug's Back-Hoe Service
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Cannon Falls, MN 55009

CHAIRMAN of the Board

Mark Morreim
Morreim Drainage, Inc.
71610263rd Street
Albert Lea, MN 55007
507-826-3449

MNLICA Executive Directors

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Phone: 507-789-5725
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Fax: 507-645-1654

NATIONAL LICA

3080 Ogden Avenue
Suite 300
Lisle, IL. 60532
Phone: 630-548-1984
Fax: 630-548-9189

AREA STATE DIRECTORS**East Directors:**

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Air-Row Surveying, LLC
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Kevin Ellingson
56113 State Hwy 56
West Concord, MN 55985

Don Loken
Don Excavating & Drainage
Owatonna, MN 55066

West Directors:

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Gass Trenching, Inc.
Fulda, MN 56131

Stu Frazeur
Stu Frazeur Tiling
Canby, MN. 56220

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Molenaar Drainage
Renville, MN. 56284

Otto Templin
E & T Contracting, Inc.
Hutchinson, MN 55350

Associate:

James Becvar
Century Plastics, Inc.
Hayfield, MN. 55940

2014 UPCOMING EVENTS
MNLICA Web-site: www.mnllica.org

TRAININGS

June 14	Summer MNLICA Board Meeting	Holiday Inn, New Ulm
July 14-19	NLICA Summer Convention	Indianapolis, ID
August	Fall MNLICA Board Meeting	TBD
August 31	Field Day	Canby, MN
August	Trap Shoot	Cortland, MN.
December	MNLICA Winter Board Meeting	TBD



MNLICA

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*Land, the foundation of the nation,
the basis of all wealth,
the heritage of the wise, the thrifty and prudent,
the poor man's joy and comfort,
the silent partner of man,
the producer of food, fiber and fuel,
the basis of factories,
the foundation of banks.*

*All that man builds is from the land.
We often take it for granted, or even abuse it,
and yet many unthinkingly and unknowingly pass the land by.
What man finally does with the land
will be the deciding factor in his survival.*