

WETLAND CONSERVATION ACT



Coordination with the Public Waters Permit Program



BWSR/DNR Technical Guidance, 11-09-2017

Overview

Rule Reference: MN Rules Chapters 8420 and 6115

Applicability: This document identifies and provides guidance on the interrelationships between the Wetland Conservation Act (WCA) and the Public Waters Permit Program (PWPP). It does not carry the weight of rule and is not binding on any party.

Intended Use: To improve coordination between WCA and the PWPP by providing explanation and guidance on applicable program components to DNR and BWSR staff, Technical Evaluation Panels (TEPs), Local Government Units (LGUs), landowners and applicants.

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I. Background

Impacts to wetlands in Minnesota are regulated by several programs. The primary state wetland regulatory programs are the Wetlands Conservation Act (WCA), the Public Waters Permit Program (PWPP), and state water quality regulations. Many wetlands in the state are also regulated by the U.S. Army Corps of Engineers under the Federal Clean Water Act Section 404 Program.



The focus of this guidance is on WCA and the PWPP. Important characteristics of these two programs are highlighted in Table 1 on the following page. Despite their differences, WCA and the PWPP regulate similar resources and a single project may require authorization under both programs. Recognizing this, both WCA and the PWPP contain provisions to enhance efficiency and promote regulatory consistency. These provisions are identified in document, with guidance on their application.

Table 1. Comparison of the Wetland Conservation Act and the Public Waters Permit Program

	Public Waters Permit Program	Wetland Conservation Act
Administered by:	Minnesota Dept. Natural Resources, specifically area hydrologists in the Division of Ecological and Water Resources.	Local government units (LGU) with oversight by the Minnesota Board of Water and Soil Resources (BWSR)
Applicable rules:	Minn. Rules Chapter 6115	Minn. Rules Chapter 8420
Jurisdiction over:	Public waters identified on Public Waters Inventory (PWI) maps. Public waters include public waterbasins (typically lakes), public watercourses and public waters wetlands . ¹ See Part IX, Additional Resources for information on availability of PWI maps. An additional term applicable to this guidance is “ wetland areas of public waters ,” which refers to areas contiguous with and below the ordinary high water level and that generally exhibit emergent vegetation within public waters and certain public waters wetlands. ²	All naturally occurring wetlands (as determined by the 1987 Corps of Engineers Wetland Delineation Manual and applicable Regional Supplements) that are not Public Waters
Jurisdictional boundary determined by:	Ordinary High Water Level	Corps of Engineers Wetland Delineation Manual (1987 and Regional Supplements)
Impact defined as:	Alteration of course, current or cross-section	Draining, filling, and in some cases excavation
Exemptions:	Several - mostly activities that are regulated by other programs or de minimis-type activities ³	Several - see M.S. 103G.2241 and M.R. 8420.0420; note that the current (2009) rule language for several exemptions is superseded by more recent statute changes
Noticing requirements:	Applications and decisions sent to Soil & Water Conservation District, Watershed District (if one exists) and mayor of municipality (if applicable)	Applications and decisions sent to Soil & Water Conservation District, Watershed District or Watershed Mgmt. Organization (if one exists), BWSR, DNR, and members of public that request
Permit application review standards:	Riparian rights, evaluation of alternatives, minimize environmental damage, appropriate mitigation. Filling public waters for private upland development is generally prohibited. ⁴ See Part IV regarding public waters wetlands.	Sequencing (avoid and minimize impacts; replace unavoidable impacts with wetlands of equal or greater public value)
Replacement standards	For public waterbasins and watercourses – restore degraded public waters, create additional water areas having equal or greater public value, other measures. ⁵ For public waters wetlands – follow WCA replacement standards (see Part IV).	Prescriptive requirements regarding location, amount and other aspects of wetland replacement. See M.R. 8420.0522 – 0544 and M.S. 103G.222
Appeal procedures:	Contested case hearings with administrative law judge	Appeal to BWSR

II. Waivers of Regulatory Authority

WCA and PWPP rules allow the regulatory authority for a given impact to be waived from one program to the other under certain circumstances. The purpose of these waivers is to reduce regulatory duplication by consolidating the regulatory authority in one government entity when a project affects wetlands under the jurisdiction of both programs. In general, it's appropriate to consider waiving regulatory authority when:

- One program has jurisdiction over only a small portion of the wetland area affected
- The waiver will result in a more efficient permitting process with no loss of wetland protection. For example, if a proposed project involves wetland impacts that are regulated and/or require replacement under one program but not the other, then waiving to the program with less protection would generally not be appropriate.
- Staff from the DNR and the WCA LGU have communicated and mutually agree to the waiver

Good communication between DNR and WCA LGU staff is essential when considering regulatory waivers. Waivers should not result in inequitable shifts in workload.

DNR permitting authority is categorically waived (i.e., waived by rule) for projects involving the repair, rehabilitation, reconstruction, or replacement of currently serviceable existing public roads affecting 10,000 sq. ft. or less of public waters wetlands, except for public waters wetlands eligible to be reclassified as public waters (see Part VI of this guidance). Table 2 on the following page outlines the various rule provisions and procedures pertaining to waivers.

Additional guidance on DNR (PWPP) Waivers is provided in the appendix to this document.

III. Road Projects: Replacement for Wetland Impacts

Local Road Projects: Under WCA, BWSR is required to provide replacement for wetland impacts resulting from the repair, rehabilitation, reconstruction, or replacement of currently serviceable existing public roads by local road authorities (i.e., excluding MnDOT-sponsored projects) to meet design/safety standards, provided that impacts are minimized, consideration is given to on-site replacement of important site-specific functions, and the project is properly noticed.⁶ This includes impacts to the *wetland areas of public waters*⁷ and to *public waters wetlands* when DNR authority has been waived.

Nearly all public water wetland impacts associated with local road projects that are categorically waived by the DNR will qualify for replacement by BWSR since categorical waivers only apply to repair, rehabilitation, reconstruction, or replacement of currently serviceable existing public roads. Impacts to public waters (public waters wetlands or the wetland areas of public waterbasins) that are waived at DNR's discretion may also qualify for BWSR replacement if they result from the repair, rehabilitation, reconstruction, or replacement of currently serviceable existing public roads. In practice, the TEP reviews and makes the determination on whether projects qualify for replacement by BWSR.

When DNR authority is waived for public road projects, it's important that DNR, BWSR and the public road authority communicate to verify which agency is responsible for the replacement of impacts. This is often best accomplished by participation on TEPs.

Impacts to public waters due to local public road projects for which the DNR has waived permitting authority but do not qualify for BWSR replacement must be replaced by the sponsoring road authority or applicant under a replacement plan approved by the applicable WCA LGU. (Note: Public road projects that qualify for replacement by BWSR do not involve an LGU decision, however, LGUs coordinate the TEP review.) **There are no provisions in statute or rule that allow BWSR to provide replacement for local road project impacts to non-wetland areas of public waters (lake areas lacking wetland vegetation and watercourses).**

Table 2. Rule provisions and guidance regarding regulatory authority waivers.

<p align="center">Waiver of WCA authority to PWPP (WCA → PWPP)</p>	<p align="center">Waiver of PWPP Authority to WCA (PWPP → WCA)</p>
<p><u>Applicability.</u> Authority may be waived on a project-specific basis or on a government unit, watershed or waterbody basis, provided that:</p> <ul style="list-style-type: none"> • the project affects both public waters and WCA wetlands with the majority of the impact is to public waters; • the activity is subject to approval of a wetland replacement plan or a no-loss or exemption determination by the LGU; • an individual public waters permit is required; • the LGU that administers WCA in the project area provides to DNR specific requirements pertaining to the WCA impacts for incorporation into the DNR permit; • the DNR incorporates the WCA rule provisions relating to sequencing, replacement and banking (if applicable) in the PWPP process; • the LGU agrees to assist the DNR should appeals be brought against the DNR based on the provisions in the public waters work permit pertaining to WCA impacts. <p><u>Written agreement required.</u>⁸ Waiver of WCA authority to the PWPP requires a written agreement between the LGU implementing WCA and the DNR. In addition to documenting the items above, the agreement must identify the parties having authority to make the agreement, the location of agreement application (project or government unit, watershed or water body), and the activity, or scope of activities subject to the agreement. For area-wide agreements, the agreement must also address enforcement procedures and procedures for terminating the agreement</p> <p>A template for project-specific written agreements is included as an appendix to this guidance.</p> <p><u>DNR Procedures Apply.</u> If WCA authority is waived to the DNR, then PWPP procedures are to be followed, including DNR provisions for noticing and appeals.</p>	<p><u>Applicability.</u> The DNR may waive its permitting authority to LGUs administering WCA for:</p> <ul style="list-style-type: none"> • Projects affecting public waters wetlands, except public waters wetlands that are eligible to be reclassified as public waterbasins (see Part VI of this guidance) ⁹ • Public transportation projects affecting the wetland areas of public waterbasins and public waters wetlands eligible to be reclassified as public waterbasins ^{10, 11} <p>A written agreement is not required -- if the DNR waives its authority, the LGU administering WCA in the project area <i>must</i> regulate the impact under WCA authority and procedures.¹² However, PWPP authority should not be waived unless DNR and LGU representatives have consulted in advance. Regulatory authority may not be waived for projects affecting watercourses or the non-wetland areas of public waterbasins.</p> <p><u>Categorical waivers.</u> Projects involving the repair, rehabilitation, reconstruction, or replacement of currently serviceable existing public roads affecting 10,000 sq. ft. or less of public waters wetlands, except for public waters wetlands eligible to be reclassified as public waters (see Part VI of this guidance) are categorically waived by rule.¹³ For public transportation projects that qualify for replacement through the BWSR transportation wetland bank, there is no formal LGU decision. See Part III of this guidance.</p> <p><u>Discretionary waivers.</u> For projects that are not categorically waived and are otherwise eligible, the DNR may, at its discretion, waive permitting authority to the WCA LGU or to the public transportation authority, provided the activity does not qualify for any WCA exemptions other than the de minimis exemption. ¹⁴</p> <p><u>Notice required.</u> For discretionary waivers, the DNR must provide a notice of the waiver to the project applicant/sponsor and to the applicable WCA LGU or public transportation authority within 15 days of receipt of the application or road project report.¹⁵ For public transportation projects, a waiver notice should also be sent to BWSR. Waiver notices are not required by rule for categorical waivers; however, to ensure proper replacement of public water impacts, a notice should nonetheless be sent to the applicable public transportation authority, the applicable LGU and to BWSR. The DNR on-line permit system (MPARS) will generate an email waiver notice.</p> <p><u>Guidance on DNR Waivers.</u> Additional guidance for waiving DNR permitting authority is provided in the appendix to this document.</p>
<p align="center">For all waivers</p>	
<p>For all projects where waivers are being considered or implemented, it is strongly recommended that representatives from all involved agencies participate in TEP reviews. The DNR is an official member of the TEP for such projects since they involve a public water (see Section V).¹⁶ Participation in TEP reviews will ensure that all parties understand who will be responsible for the regulation and, in the case of public transportation projects, which agency will be responsible for providing replacement.</p>	

MnDOT Road Projects: MnDOT follows the same notification procedures for their projects as local road authorities do for local road projects eligible for replacement by BWSR. However, MnDOT provides their own replacement using established wetland bank credits, which may be used to offset impacts to wetland areas of public waters and public waters wetlands when DNR authority has been waived, either categorically or at DNR's discretion.

For public waters impacts resulting from transportation projects (local or MnDOT) that are not waived, replacement provisions consistent with WCA requirements must be included as a DNR permit requirement (see Part IV of this guidance).

IV. WCA Sequencing and Replacement Provisions Required for Public Waters Wetland Permits

To improve regulatory consistency between programs, PWPP rules¹⁷ require as a condition of approval for a DNR permit that impacts to public waters wetlands must comply with WCA sequencing requirements¹⁸ and replacement standards.¹⁹ If wetland bank credits from the state wetland bank administered by BWSR are to be used for replacement, the WCA banking procedures²⁰ must be followed. To emphasize, **these requirements apply to all DNR permits for impacts to public waters wetlands – not just WCA-regulated wetlands that have been waived to the DNR.** This means that the DNR cannot issue a permit for impacts to public waters wetlands unless the applicant:

- demonstrates that the proposed activity complies with WCA sequencing principles at M.R. 8420.0520, and;
- provides replacement following the replacement requirements and standards at M.R. 8420.0522 – 0544 and complies with the wetland replacement monitoring requirements at M.R. 8420.0810 – 0820, and/or purchases appropriate credits from the Minnesota Wetland Bank.



If the DNR permit authorizes wetland replacement through the use of wetland bank credits, please note the following requirements and procedures:

- The applicant must provide to the DNR a completed “Transaction Form to Withdraw Credits,” signed by the applicant and the owner/seller of the credits (see Section IX, Additional Resources for information on obtaining WCA forms).
- The DNR Area Hydrologist must sign Box 4 of the “Transaction Form to Withdraw Credits” as the regulatory authority and submit the form, along with a copy of the issued public waters permit to the BWSR Wetland Bank Administrator in the St. Paul office.
- The DNR public waters permit must explicitly authorize the use of the subject credits in the “Conditions” section of the permit and must clearly note that the approval is conditional upon receipt by the applicant of confirmation from BWSR that the subject credits have been withdrawn from the wetland bank.

V. WCA Technical Evaluation Panel Membership

Under WCA, a Technical Evaluation Panel (TEP) is responsible for making findings and providing recommendations to LGUs on a variety of technical matters such as the size, location, type, and functions of wetlands, as well as on issues such as sequencing and replacement plan adequacy.²¹ The TEP is comprised of a representative of the applicable LGU, the county Soil and Water Conservation District (SWCD), and BWSR. **For impacts affecting public waters, including public waters wetlands, and impacts within a shoreland**

protection zone (generally, 1000 ft. from the ordinary high water level of a basin or 300 feet from the ordinary high water level of a watercourse²²), the TEP is expanded to include a “technical professional employee” of the DNR.²³ The DNR has identified specific TEP representatives or a point of contact for all areas of the state (see Part IX of this guidance – Additional Resources). Depending on the project or expertise required, alternative or additional DNR representatives may become involved, although only one DNR representative can serve as the official TEP member.



Recent appeals and legal challenges of WCA decisions have emphasized the importance of conducting TEPs consistent with WCA rules. To the extent possible, all TEP members should participate in the project review (via in-person meeting, conference call and/or submission of written comments) as well as the development of findings and recommendations to the LGU. Each official TEP member should sign the TEP findings and recommendations. If a particular TEP member dissents, that should be noted in the TEP findings and recommendations. **For projects where the DNR is an official TEP member (see above), the DNR TEP representative should make every**

attempt to participate in the TEP process and should sign any TEP findings (whether consenting or dissenting) in order to avoid questions about the adequacy of the TEP. **For projects where the DNR is not an official TEP member**, the DNR TEP representative is encouraged to participate in TEP proceedings and may lend expertise and provide recommendations that can be noted in the TEP findings, but **the DNR representative should not sign the TEP findings**. In those cases, the TEP findings should indicate that the DNR representative participated as an “invited expert,” per M.R. 8420.0240, Paragraph B.

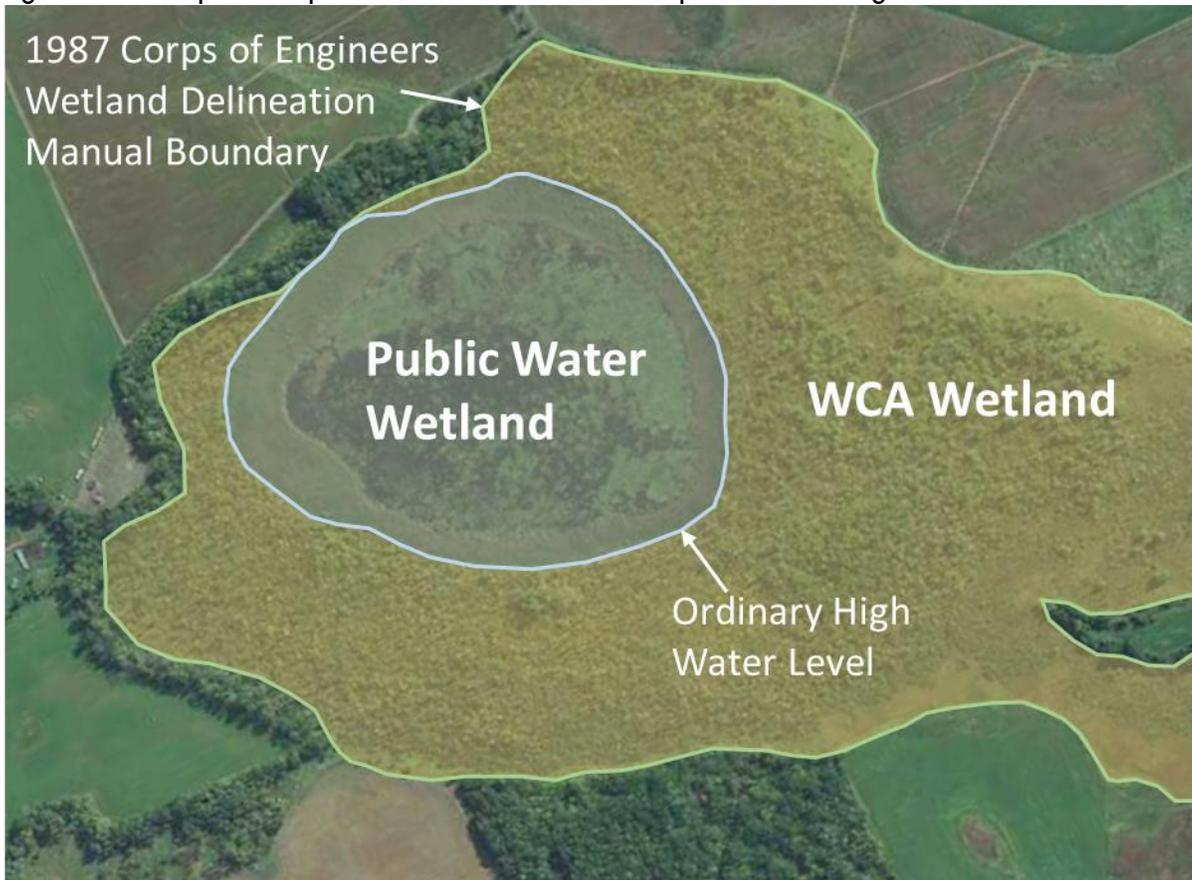
VI. Public Waters OHWL Determinations and Public Waters Wetlands Reclassification

DNR jurisdiction on public waterbasins and public waters wetlands extends to the ordinary high water level (OHWL). The OHWL is defined as, “an elevation delineating the highest water level that has been maintained for a sufficient period of time to leave evidence upon the landscape, commonly the point where the natural vegetation changes from predominantly aquatic to predominantly terrestrial.”²⁴ Wetland areas (as determined by the 1987 Corps of Engineers Wetland Delineation Manual) that occur landward of the OHWL of public waters fall under WCA jurisdiction. The OHWL of a basin reflects long term water level conditions. Occasionally, due to changes in the watershed, local climate, or outlet conditions, formerly determined OHWLs may not reflect current conditions. If no OHWL has been determined, or if the existing OHWL elevation appears to be in error, the DNR Area Hydrologist should be contacted.

M.S. 103G.201 authorizes the DNR to reclassify public waters wetlands as, 1) public waters (public waterbasins) or, 2) wetlands regulated under WCA. Public waters wetlands may be reclassified as public waters only if they meet any of the following conditions:

- they are assigned a shoreland management classification by the commissioner under sections 103F.201 to 103F.221;
- they are classified as lacustrine wetlands or deepwater habitats according to Classification of Wetlands and Deepwater Habitats of the United States (Cowardin, et al., 1979 edition); or
- the state or federal government has become titleholder to any of the beds or shores of the public waters wetlands, subsequent to the preparation of the public waters inventory map filed with the auditor of the county, and the responsible state or federal agency declares that the water is necessary for the purposes of the public ownership.

Figure 1. Example of a public water wetland and adjacent WCA-regulated wetlands



The commissioner must provide notice of the reclassification to the WCA LGU, the county board, the watershed district, if one exists for the area, and the SWCD.

The decision to reclassify a public waters wetland as a WCA-regulated wetland should be done in consultation with other DNR Divisions, particularly Fish and Wildlife, since it may have a bearing on other programs, such as aquatic plant management and wildlife lake designation.

There are cases where wetlands have been removed from the Public Waters Inventory (and therefore became subject to WCA jurisdiction) when there was clear evidence that the basin did not meet the size or wetland type criteria when it was included in the Public Waters Inventory (erroneously inventoried). The DNR does not consider these situations to be “reclassifications” under 103G.201 because the Department has no regulatory authority over these basins. Nonetheless, DNR procedures require that Area Hydrologists notify the WCA LGU, the county board, the watershed district, if one exists for the area, and the soil and water conservation district when making such corrections to the PWI.

VII. WCA Replacement Credit Involving Public Waters

In 2015, WCA statutes were amended in a manner that now allows actions on public waters to be considered as replacement for impacts to wetlands regulated under WCA.²⁵ This would also include establishing wetland bank credits involving public waters. Replacement actions that could be considered on public waters are the “Actions Eligible for Credit” described at M.R. 8420.0526. Obvious candidates for replacement actions are public waters wetlands or the wetland areas of public waters (see endnote 6) that have been previously drained, degraded or otherwise diminished but remain on the Public Waters Inventory. However, actions involving public waterbasins and watercourses may be considered as well, especially in northeast Minnesota, where traditional wetland restoration opportunities are more limited. Any replacement action that involves alteration of the

course, current or cross section of a public water requires a public waters permit from the DNR in addition to LGU approval of the WCA replacement/banking plan application.

Another option in which public waters may be considered as a component of a WCA replacement or banking plan is the WCA provision for Exceptional Natural Resource Value (ENRV) credit. Under this provision, credit can be granted for activities on wetlands or uplands adjacent to a public water that has been identified as an exceptional natural resource. For example, an ENRV project could include the restoration of a forested upland buffer adjacent to a trout stream. The amount of credit awarded for ENRV replacement projects is determined case-by-case by the LGU with TEP concurrence and, in the case where a public water has been determined to be an exceptional natural resource, is based on the increased value and sustainability of the public water itself. For more information on ENRV replacement, see the guidance referenced in Part IX, Additional Resources.

VIII. Decision Timeframes

Decisions on applications made under WCA must be made in accordance with the timeframes established in M.S. Chapter 15.99, which generally requires a decision within 60 days of receiving a *complete* application. The application of Chapter 15.99 to public waters permits is not as clear, but nonetheless the DNR attempts to make permit decisions within 60 days.²⁶ For projects affecting both public waters and WCA wetlands where coordination is required between the DNR and the LGU, employees of both agencies should be cognizant of this timeframe. **This is particularly important if a waiver is being considered so that the agency accepting regulatory responsibility is not unduly delayed in acting on the application.** For discretionary waivers of DNR authority to WCA LGUs, the DNR must send a waiver notice to the applicable LGU within 15 days of receipt of the application (see endnote 11). Although there is no clear statutory/rule guidance or case law at this time to clarify when the 60-day clock starts in cases where DNR authority is waived to an LGU, the Minnesota Attorney General's Office has suggested the following:

- The Chapter 15.99 60-day time period starts when the LGU receives the DNR waiver notice, assuming the WCA application is complete, including accounting for the impacts to public waters. If the WCA application requires revision to account for public waters impacts that have been waived, the LGU must notify the applicant within 15 days of receipt of the DNR waiver notice and the 60-day time period starts when the LGU receives the revised, complete application.

The Attorney General's office has not offered guidance addressing the timeframe for when an LGU waives WCA authority to the DNR. However, it would be reasonable to apply a similar standard: the DNR goal will be to issue the permit within 60 days of signing a waiver agreement and receiving a complete application.

IX. Additional Resources

Public Waters Inventory maps: http://www.dnr.state.mn.us/waters/watermgmt_section/pwi/maps.html

Updated National Wetland Inventory map data for Minnesota:
http://www.dnr.state.mn.us/eco/wetlands/nwi_proj.html

DNR Technical Evaluation Panel Contacts: http://www.bwsr.state.mn.us/wetlands/wca/DNR_TEP_contacts.pdf

BWSR WCA Work Areas and Contact Info: see links at <http://www.bwsr.state.mn.us/contact/index.html>

Guidance on Exceptional Natural Resource Value wetland replacement:
http://www.bwsr.state.mn.us/wetlands/wca/ENRV_Guidance7-1-10.pdf

WCA Forms: <http://www.bwsr.state.mn.us/wetlands/wca/index.html>
<http://www.bwsr.state.mn.us/wetlands/wetlandbanking/forms.html>

“Guidelines for Ordinary High Water Level (OHWL) Determinations,” available at:
http://files.dnr.state.mn.us/waters/surfacewater_section/hydrographics/ohwl.pdf

Endnotes

¹ For definitions, see M.R. 6115.0170 subparts 31 – 31d. Public waterbasins are identified on public waters inventory maps with a “P” designation; public water wetlands have a “W” designation.

² M.R. 6115.0250, Subp. 6.A.

³ M.R. 6115.0160, items A – E; 6115.0190 Subp. 4; 6115.0200 Subp. 4; 6115.0202 Subp. 4; 6115.0215 Subp. 4; 6115.0220 Subp. 4; 6115.0230 Subp. 4

⁴ M.R. 6115.0190, Subp. 3.B.

⁵ M.R. 6115.0250, Subp. 1a

⁶ M.R. 8420.0544 and M.S. 103G.222, Subd. 1(m)

⁷ There is an error in the current (2009) WCA rules. M.R. 8420.0544, para. 1 indicates that BWSR must replace impacts to *public waters* when authorized by the DNR. However, Minn. Statutes 103G.222, subd. 1(m), which takes precedence over the rule, limits BWSR’s responsibility to the *wetland areas* of public waters (see endnote 6).

⁸ M.R. 8420.0105, Subp. 2.E.(2) and M.R. 6115.0250, Subp. 7

⁹ M.R. 6115.0250, Subp. 5.D and E.

¹⁰ “Wetland areas of public waters” are areas contiguous with (and below) the ordinary high water level and that generally exhibit emergent vegetation (M.R. 6115.0250 Subp. 6.A).

¹¹ M.R. 6115.0250, Subp. 6

¹² M.R. 8420.0105, Subp. 2.E.(1)

¹³ M.R. 6115.0250, Subp. 5.E.(1)

¹⁴ M.R. 6115.0250, Subp. 5.(D)(2)(a). De minimis exemption – see M.R. 8420.0420, Subp. 8. As a result of WCA rule revisions in 2009, the current (2009) public waters rule at 6115.0250, subp. 5.D(2)(a) contains an incorrect reference to the WCA rule provisions regarding exemptions. The correct reference in the public waters rule should be to WCA rule chapter 8420.0420, subparts 2 to 7 and 9.

¹⁵ M.R. 6115.0250 Subp. 5.D.(1) and E.(2). The 15-day waiver notice requirement is to ensure that the local government unit administering the permit will be able to meet the Administrative Procedure Act (M.S. 15.99) requirement to make a decision within 60 days of receiving a complete application. Presumably, DNR permitting authority could still be waived after the 15-day period if the WCA LGU agrees to accept it.

¹⁶ M.R. 8420.0240, item A

¹⁷ 6115.0250, subp. 5.B.(1); see also M.S. 103G.221

¹⁸ M.R. 8420.0520

¹⁹ M.R. 8420.0522 through 8420.0544, 8420.0810 and 8420.0820

²⁰ M. R. 8420.0745

²¹ see M.R. 8420.0240

²² See M.R. 8420.0111, Subp 64. *Generally*, 1,000 ft. from the ordinary high water level of a basin or 300 feet from the ordinary high water level of a watercourse

²³ M.R. 8420.0240, item A

²⁴ M.S. 103G.005, Subd. 14.

²⁵ M.S. 103G.222, Subd. 1(a) was amended in 2015 as follows: “Wetlands must not be drained or filled, wholly or partially, unless replaced by ~~restoring or creating wetland areas of~~ actions that provide at least equal public value under a replacement plan approved as provided in section 103G.2242...” (Laws of Minnesota 2015, Ch. 4, Art. 4, S. 82)

²⁶ M.S. 84.027, Subd. 14a applies to public waters permits, setting *goals* for making permit decisions within 90 days of receiving an application for Tier 1 permits and within 150 days for Tier 2 permits. The DNR has determined that general permits under the PWPP are Tier 1 permits and individual permits are Tier 2. The statute does not establish any consequences for failing to meet the specified goals.

Appendix

- Sample written agreement for waiver from WCA Local Government Unit to the DNR
- Guidance and Procedures for Waiving DNR Permitting Authority

Agreement for Waiving Wetland Conservation Act (WCA) Authority to the Minnesota Department of Natural Resources

Under Minnesota Rules Chapters 8420.0105, Subp. 2.E.(2) and 6115.0250, Subp. 7, for projects affecting both public waters and WCA-regulated wetlands, a local government unit (LGU) administering the WCA may, by written agreement with the Minnesota Department of Natural Resources (DNR) waive the requirement for a replacement plan, no-loss, or exemption decision if a public waters work permit is required and the DNR includes the appropriate WCA provisions in the public waters work permit.

Project Name:

Project Location:

Public Waters ID:

Project Description:

Agreement:

{LGU Name}, as the LGU responsible for administering WCA within the project area, hereby waives the requirement for a WCA decision for wetlands that may be affected by the above-named project and the DNR Division of Ecological and Water Resources agrees to:

- 1) incorporate the applicable WCA requirements in any public waters work permit issued for the above project, and/or;
- 2) in the case of a restoration order, incorporate requirements to restore or replace the WCA jurisdictional wetlands.

In addition, {LGU Name} agrees to assist the DNR should appeals be brought against the DNR based on the WCA Decision incorporated in the public waters work permit.

{LGU Authorized Representative} date
{LGU Name}

{DNR Authorized Representative} date
Minnesota Dept. of Natural Resources

Guidance for Waiving DNR Permitting Authority, by Type of Public Water

Initial requirements -- permitting authority can only be waived to WCA if all of the following apply:

- The project affects both public waters and WCA wetlands
- The impact is regulated under WCA
- No WCA exemption other than the de minimis exemption will be applied. Note: Public waters wetlands and the “Wetland areas of public waters” should generally correspond to Type 3, 4 or 5 wetlands, for which the WCA de minimis exemption is 100 sq. ft. (Minn. Statutes 103G.2241, Subd. 9.) As a DNR policy matter, DNR regulatory authority should not be waived if, for any reason, more than 0.10 acre of a public water would be impacted without replacement.

If all of the requirements above are met, refer to the following guidance for the various categories of public waters.

Type of Public Water	Waiver Guidance
<p>Public Waterbasins (P’s on PWI maps)</p>	<p>DNR can issue a discretionary waiver if <u>both</u> of the following apply:</p> <ul style="list-style-type: none"> • The impact is associated with a public road project¹ which the road authority has submitted for replacement under the BWSR Local Road Wetland Replacement Program² or for which wetland replacement will be provided under a WCA wetland replacement plan. • Affects only the “wetland areas of the public waterbasin” (areas contiguous with and below the ordinary high water level and that generally exhibit emergent vegetation). Note: Permitting authority for impacts to “deep water” portions of public waterbasins cannot be waived. <p>Otherwise, DNR permitting authority for public waterbasins cannot be waived.</p>
<p>Public Waters Wetlands (W’s on PWI maps) – eligible to be reclassified as a Public Waterbasin³</p>	<p>See the section above on “Public Waterbasins”</p>
<p>Public Waters Wetlands (W’s on PWI maps) – not eligible to be reclassified as a Public Waterbasin³</p>	<p>DNR permitting authority is automatically (categorically) waived if all of the following apply:</p> <ul style="list-style-type: none"> • Impact is associated with a public road project that has been submitted by the road authority for replacement under the Board of Water and Soil Resources’ Local Road Wetland Replacement Program or has been similarly noticed by MnDOT and will be replaced using established wetland bank credits (see footnotes 1 and 2, but note that for the <i>categorical</i> waiver, bike/pedestrian trail impacts can only be waived to the extent that the impacts will be replaced under the BWSR Local Road Wetland Replacement Program). • The impact to the public waters wetland is less than 10,000 square feet <p>DNR can issue a discretionary waiver for all other types and sizes of impacts to public waters wetlands (not eligible to be reclassified as a public waterbasin) provided that the initial requirements (top of page) are met.</p>
<p>Public Watercourses</p>	<p>DNR permitting authority cannot be waived.</p>

Procedures:

For discretionary waivers, make the appropriate selection in MPARS to generate a waiver notice (email) to the applicable LGU or, in the case of public road projects, the public transportation authority within 15 days of receiving the application.

For categorical waivers, it is technically not required to send a waiver notice since they are automatically waived by rule. However, it is still recommended to generate a waiver notice through MPARS to the applicable road authority.

Note that under state Environmental Review rules, an Environmental Assessment Worksheet (EAW) is mandatory for projects that affect one acre or more of a public water or public waters wetland (M.R. 4410.4300, Subp. 27). The local government is the “Responsible Government Unit” for such projects, charged with preparing the EAW. **When waiving DNR Public Waters permitting authority for such projects, DNR staff should alert the appropriate local government on the need for an EAW.**

¹ Minn. Rules 6115.0250, Subp. 6 authorizes waivers for “public road activities.” Public Waters Permit Program managers have determined that this may include bike/pedestrian trails when constructed as an integral part of a public road project, provided there is a demonstrated public need for the trail, especially for safety reasons, and there are no practicable alternatives that avoid impacts to the public water.

² For impacts associated with the repair, rehabilitation, reconstruction, or replacement of currently serviceable existing public roads [M.R. 6115.0250, Subp. 6.D.(2)].

³ A public waters wetland is eligible for reclassification as a public waterbasin if any of the following apply:

- Assigned a shoreland classification;
- Classified as a lacustrine wetland or deepwater habitat according to Cowardin, et al. Lacustrine wetlands exhibit all of the following characteristics: (1) situated in a topographic depression or a dammed river channel; (2) lack trees, shrubs, persistent (rooted) emergent vegetation, emergent mosses or lichens with 30 percent or greater areal coverage; and (3) have a total area of at least 8 hectares (ha) (20 acres), or if less than 8 ha., have an active wave-formed or bedrock shoreline feature that makes up all or part of the boundary, or the water depth in the deepest part of the basin equals or exceeds 2.5 m (8.2 ft.) at low water. Deepwater habitats are areas within a basin having water depths that exceed 2.5 m (8.2 ft.) at low water or, if emergent (rooted) plants are present at depths exceeding 2.5 m, the area beyond the deepwater edge of the plants.
- The state or federal government has become titleholder to any of the beds or shores of the public waters wetlands, subsequent to the preparation of the public waters inventory maps on file with the auditor of the county and where the responsible state or federal agency declares that the water is necessary for purposes of public ownership.