

Wetland Conservation Act (WCA) Topic of the Week

Violations and Restoration/Replacement Orders

October 15, 2020

WCA topics of the week are a series of informal fact sheets that provide practical information on WCA program implementation in a question and answer format. They are intended to better clarify and summarize certain aspects of WCA implementation and should be considered as supplemental to WCA statutes, rules and any associated BWSR guidance and policy. Information in these fact sheets are subject to change over time.

Question: How are WCA rules enforced?

Answer: WCA rules give the authority to issue enforcement orders to Department of Natural Resources (DNR) conservation officers and other peace officers (local police, sheriff, state police, etc.). Most WCA enforcement orders are issued by DNR conservation officers as they are specifically trained in natural resource enforcement. Local Government Units (LGUs) may enforce wetland regulations via rules adopted under their own local authorities that incorporate the provisions of WCA.

Question: What are the different types of enforcement orders?

Answer: There are three types of enforcement orders: cease and desist, restoration, and replacement orders. Cease and desist orders are issued when there is probable cause that an activity is being or will again be conducted that impacts a wetland (provided the activity does not qualify for a WCA exemption/no-loss provision and has not otherwise been approved by an LGU decision). A restoration or replacement order is issued if the party responsible for the violation has not applied for a WCA decision within three weeks of the issuance of a cease and desist order, or if the project that impacted the wetland in violation of WCA has been completed and a cease and desist order was not issued. DNR enforcement also issues Resource Protection Notices (RPN's), but these are not "orders" that require compliance.

Question: What is the difference between a restoration and replacement order, and who determines which is appropriate?

Answer: A restoration order requires the impacted wetland to be restored to its pre-altered condition. A replacement order requires the wetland to be replaced in accordance with WCA replacement requirements. A restoration order must be issued for a violation unless the Technical Evaluation Panel (TEP) determines that the restoration of the wetland is not possible or prudent. The TEP can also determine that a combination of restoration and replacement is appropriate for the situation.

Question: Who prepares the restoration or replacement order?

Answer: The soil and water conservation district (SWCD) is specifically tasked with preparing the order. The SWCD must consult with the LGU and enforcement authority, and they can ask for assistance from the TEP. In some instances the LGU may take the lead in preparing the order depending on the circumstances of the violation and if agreed to by the SWCD. Even though the order is prepared by the SWCD, the order itself is an

order of the enforcement entity (typically DNR). Only an enforcement authority can issue, extend, or modify an enforcement order.

Question: How long does a person have to comply with an order?

Answer: A minimum of 30 days. However, this is also the timeframe in which the order can be appealed. Typically, individuals are given from 60 to 120 days to comply with the order depending on the situation. Compliance with the order may depend on weather conditions, complexity, and contractor availability - all important considerations when specifying a compliance date. If the individual is cooperative, the SWCD, LGU, or TEP may discuss and negotiate a reasonable compliance date.

Question: Can order compliance deadlines be extended?

Answer: Yes. The SWCD and TEP should consider any extenuating circumstances (weather events, equipment breakdowns, etc.) that may affect the ability of the individual to comply with the order, particularly if he/she is making a good faith effort to comply. Within reason, orders may be extended, often in 30 or 60-day increments as warranted. The SWCD can send a request to the enforcement officer to extend the order. Such extensions are often accompanied by a TEP recommendation that justifies the extension.

Question: Who keeps track of order deadlines and compliance?

Answer: DNR keeps track of orders and may notify the TEP when orders have expired. The SWCD and/or LGU should ideally be in communication with the individual on progress toward compliance - offering advice, assistance, and inspections along the way. This is only possible when individuals are cooperative and earnest about complying. Often, the TEP will meet periodically to discuss the status of order compliance and next steps.

Question: What happens if an order is appealed?

Answer: The order is stayed until BWSR makes a determination on the appeal. Since BWSR has 60 days to make a decision on the appeal, it is often necessary to extend the order's compliance date to account for the time period associated with the appeal proceedings (unless the order is rescinded on appeal). BWSR works closely with the TEP to keep everyone informed of the appeal process.

Question: What happens if someone doesn't comply with an order?

Answer: Failure to comply with a restoration order is a misdemeanor prosecuted by the County Attorney. The DNR has other enforcement options that they can employ such as recording a deed restriction on the property until the order is complied with.

Question: What is the most important aspect of the enforcement process?

Answer: Communication. There are multiple people and entities involved in enforcement actions including the LGU, SWCD, BWSR, the enforcement officer (typically DNR), the landowner/individual who is the subject of the order, and sometimes their consultant or attorney. Individuals subject to an enforcement order may appeal the order or may submit a WCA application to the LGU to gain compliance. It is important that all parties know the status of submittals, appeals, compliance progress, and order deadlines. Communication is important as each entity has a different, but related role in the process.