MWPCP Regional Training

Day One
WCA Crash Course

- Wetland Regulatory Programs 101
- LGU Duties & TEP Procedures
- Application Procedures
- Enforcement Procedures

- Basic Decisions
- Replacement Plans
- Wetland Banking
- Q/A & Quiz

[bwrs.state.mn.us/minnesota-wetland-professional-certification-program]

Wetland Regulatory/Compliance Programs in Minnesota

- Public Waters Work Permit Program (PWWPP)
- Section 404 of the Clean Water Act (404)
- Swampbuster provisions of the Food Security Act (FSA)
- Minnesota Wetland Conservation Act (WCA)

Jurisdiction
Public Waters Work Permit Program (PWWPP)

Overview

Regulates: changes to "course, current or cross-section"

Administered by: DNR – Area Hydrologists

Authorities: M.S. 103G; M.R. Chapter 6115

Jurisdictional boundary: “Ordinary High Water Level”

Review standards: Public interest; reasonable/practical, Riparian rights, Availability of feasible & prudent alternatives, Compensatory mitigation

Appeals: Contested case hearing

Enforcement: DNR Conservation Officers; cease & desist, restoration orders

Application: on-line via "MPARS"

Program Element | WCA | PWWPP
--- | --- | ---
Basis of Authority | Mn Rules Chapter 8420 and associated statutes | Mn Rules Chapter 6115 and associated statutes
Regulated Waters | Wetlands except incidental and wetland areas of Public Waters (unless waived) Public Waters and Public Waters Wetlands (which includes deepwater habitats, streams and wetlands) | 
Jurisdictional boundaries | Wetland Delineation per ‘87 Manual | OHWL
Regulated Actions | Fill, drain, excavate (semi-perm. Flooded areas of type 3, 4, 5) Changes in course, current or cross-section | 
Program Administration | US/implementation, BWSR oversight, DNR enforcement | DNR implementation
Type of Approvals | WCA decisions Permit authorizations | 
Applying for Approval | WCA application or request for decision MPARS online application | 

Clean Water Act Section 404

Regulates: Discharges of dredged or fill material, including redeposited material

Administered by: U.S. Army Corps of Engineers – St. Paul District


Review Standards: Sequencing, public interest, adequate compensatory mitigation

Appeals: COE administrative appeal

Enforcement: COE and USEPA; administrative orders

Application: Joint Application Form for Activities Affecting Water Resources in Minnesota

Program Element | WCA | 404
--- | --- | ---
Basis of Authority | State statutes and rule (Mn Rules Chapter 8420) | Clean Water Act
Regulated Waters | Wetlands except incidental and wetland areas of Public Waters (unless waived) Waters of the U.S. (WOTUS) | 
Regulated Actions | Fill, drain, excavate (semi-perm. Flooded areas of type 3, 4, 5) Discharges of dredged or fill material | 
Program Administration | US/implementation, BWSR oversight, DNR enforcement Corps Districts implement, EPA oversight | 
Type of Approvals | WCA decisions Permit authorizations via IPs, GPs, NWPs | 
Applying for Approval | WCA application or request for decision Pre-Construction Notification (PCN) for GPs/NWPs, Application for IP | 
Mitigation for Impacts | Replacement Compensatory Mitigation |
Food Security Act (Wetland Conservation Provisions)

How Does NRCS Evaluate Compliance?

Primarily through Certified Wetland Determination (CWD).

Involves identifying wetlands and then assigning a label that has implications for compliance. For example, if producer drains a wetland for crop production, that would result in a label change that could result in producer being ineligible.

CWD does not relate to WCA jurisdiction!

Wetland Conservation Act (WCA)

Overview

• Regulates: draining, filling, some excavation
• Administered by: Local Government Units, SWCDs, Watershed Districts
• Oversight by: MN Board of Water and Soil Resources
• Authorities: M.S. 103A, 103B, 103G; M.R. Chapter 8420
• Jurisdictional boundary: 1987 Corps of Engineers Wetland Delineation Manual
• Review standards: Avoid, minimize, replace (sequencing)
• Enforcement: DNR Conservation Officers; cease & desist, restoration orders
• Application: Joint Application Form for Activities Affecting Water Resources in Minnesota

What is it?

• Series of laws passed in 1991
• Major component – wetland regulatory provisions, Minnesota Rules Chapter 8420.

Purpose?

• Maintain and increase the quantity, quality and biological diversity of Minnesota’s wetlands. (QQB)
• Avoid wetland impacts from activities that negatively affect quantity, quality and biological diversity.
• Replace wetland values where avoidance is not feasible and prudent.
• The sequence of avoid, minimize and then replace for wetland impacts is referred to as Sequencing in WCA rules.
What does WCA regulate?

- **Wetland Impacts** are defined in WCA rule.
- **Wetlands** are identified and their boundaries determined by 87 Manual.
- Two exceptions:
  - Incidental wetlands
  - Wetland areas of DNR public waters and public waters wetlands unless regulatory jurisdiction waived by DNR to WCA.

Incidental Wetlands

- Wetlands created in naturally non-wetland areas not on purpose.

WCA Wetlands vs Public Waters

- DNR public waters regulated by the DNR Public Waters Work Permit Program (PWWPP) are generally pre-determined (they are on a map).
- WCA wetlands are identified and determined via the 87 Manual on a case-by-case basis.

Implementation Structure

- Local Government Units (LGUs) are primarily responsible for implementing WCA.
- BWSR provides oversight and assistance to LGUs. BWSR implements certain limited provisions of WCA.
- DNR has an enforcement role in WCA.

Implementation by LGUs

- LGU can be:
  - County, City/Town
  - Township (in certain 7-county metro areas only)
  - Watershed district, management organization or commission
  - State agency on state owned or administered lands
  - For projects that require a Permit to Mine under state law, DNR’s Division of Lands and Minerals administers the provisions of the WCA under their Permit

Applications and Decisions

- In general, applicants demonstrate through their application submittal that they are compliant with WCA.
- An LGU’s decision to **approve, deny or approve with conditions** is saying if the project complies with WCA or not.
- An LGU can take the WCA decision process and fold it into a permit that they issue for a project. This is optional, but common among watershed districts and counties that issue permits for various other things.
- In general, LGUs can have more restrictive local requirements, but not less restrictive requirements.
WCA Decision Types and Application Requirements

<table>
<thead>
<tr>
<th>Decision Type</th>
<th>Application Requirement</th>
</tr>
</thead>
<tbody>
<tr>
<td>Wetland Boundary/Type</td>
<td>Application required</td>
</tr>
<tr>
<td>Exemption or No-Loss Provision</td>
<td>Application not required (unless LGU has more restrictive local requirement)</td>
</tr>
<tr>
<td>Replacement Plan</td>
<td>Application required</td>
</tr>
<tr>
<td>Banking Plan</td>
<td>Application required</td>
</tr>
</tbody>
</table>

Technical Evaluation Panel

- Plays a key role in implementation.
- Representative from LGU, SWCD, BWSR and DNR (if project effects public waters and/or in shoreland zone).
- Primary role is to advise LGU on decisions. Some decisions depend on TEP recommendation/concurrence.
- TEPs often advise landowners/applicants during pre and post application reviews.

Key Roles in WCA Implementation

- **LGU** – make WCA decisions, leads Technical Evaluation Panel
- **SWCD** – serve on TEP, write restoration plans for violation orders
- **BWSR** – serve on TEP, hear appeals, administer wetland bank, oversee and train LGUs.
- **DNR** – serve enforcement orders and coordinate/collaborate with TEP, LGU and SWCD on enforcement process.

How many jurisdictions?

WCA 101

- **Purpose**
- **Method**
- **Scope**
WETLAND CONSERVATION ACT (WCA)

State Law passed in 1991

MN Statute 103G and parts of 103A,B,E,F

MN Rule Chapter 8420

https://bwsr.state.mn.us/wetlands-regulation-minnesota

WETLAND CONSERVATION ACT (WCA) OF 1991

Bipartisan Bill
- Passed in 1991
- Effective 1992

MN Statutes 103G and parts of 103A,B,E,F

MN Rule 8420
- Statute changes
- Guidance Documents

WCA Authority on Tribal Lands?

- Tribes have legal status as sovereign nations
- Many tribes have enacted their own environmental regulations
- Federal regulatory environmental laws apply on Tribal Lands
- Tribal lands are composed of Trust lands, allotted trust lands, fee lands

- WCA does not have jurisdiction on Trust lands
- Fee lands are held by an owner (tribal member or not)
- Authority of state environmental laws on tribal land is limited to fee lands held by a non-tribal owner

PURPOSE

- No Net Loss
- Increase quantity, quality, diversity
- Avoid impacts
- Replace

SCOPE

Regulates:
- Draining
- Filling
- Excavation

- All types
- Type-specific

3, 4, 5

All types

Does NOT Regulate:
- Waste disposal
- Certain mining
- Stormwater treatment
- Runoff management
- Wastewater treatment
What Does WCA Regulate?

- Draining or filling of wetlands (wholly or partially)
- Excavation of wetlands (under certain conditions)

Excavation

WCA regulates excavation in permanently and semi-permanently flooded areas of Type 3, 4, or 5 wetlands and in all wetland types if the excavation results in conversion to nonwetland (i.e., deepwater habitat which is defined as average water depth of 8.2 feet or greater).

What is permanently and semi-permanently flooded?

- The use of wetlands for pasture or cropland
- Normal farming practices (plowing, seeding, timber harvesting, etc.)
- Control of noxious weeds
- Impacts to created (non-natural) wetlands (ditches, ponds, etc. created in upland areas)

WCA Does NOT regulate

- DNR Public Waters & PWW
  - DNR can waive to WCA for public water wetlands
- Peat Mining
  - Subject to DNR permit to mine under MN Statue 93.44-93.51
  - WCA applies if project does not require DNR permit to mine

Where you are in the State matters

Different regulations apply depending on whether you are in a <50% area, 50 – 80% area, or >80% area.
Bank Service Areas

- Used in wetland mitigation siting

Watersheds

- Factored into project-specific replacement siting

Local Government Unit

Who is the LGU?

- Outside the 7-County Metro area – County or City
- Inside 7-County Metro – City, town, or WMO
Who is the LGU (cont.)

- In 7-County Metro, watershed plan will indicate LGU, but lacking an indication, LGU must be City or town.
- For activities on State land, the LGU is the State agency with administrative responsibility for the land (e.g. DNR, MnDOT). However, State agencies must coordinate with LGU that would otherwise have jurisdiction.

LGU’s can delegate some or all of their authority to another entity provided that both parties pass resolutions (see BWSR website for example resolutions).

- If project overlaps LGU jurisdiction, then the LGU is:
  - One with zoning authority over the project
  - If both have zoning authority, then the one in which the most impact occur.
  - Both LGUs can maintain separate jurisdiction if agreed upon.

Example

Scenario 1 – Cities agree that both review and approve application within their respective jurisdictions, and both administer LGU duties.

Scenario 2 – Cities agree to have Shakopee review entire application and be responsible for LGU duties (most impact).

BWSR Website

- WCA Contacts

LGU Duties

- Make Decisions
- Provide Staff
- May place decision authority with staff
- May use the TIP

- LGU Duties
Delegation of Decision-Making Authority to Staff

- Decision authority by default rests with the elected/appointed governing board (City Council, County Board, WMO Board, etc.)

- However, the LGU may, through resolution, rule, or ordinance, place decision-making authority with staff according to procedures it establishes.

Failure to Apply Law

If the LGU is not following WCA:
1) BWSR notify LGU in writing of its concerns
2) File Review spot check
3) Can then impose moratorium on making decisions

Local Wetland Ordinances

- WCA provides minimum standards
- Local governments may require more procedures and more wetland protection, but not less

TEP Roles

- Determine technical issues
- Generates findings Document specific evidence
- Makes recommendations to LGU
- Operate objectively, clearly, concisely, and timely

The TEP does not:
- Make decisions
- Perform LGU duties (notices, extensions, etc.)
Who can Request a TEP?

- LGU
- TEP member
- Landowner

TEP Meetings

- Step 1: Define purpose of TEP discussion/review (set a formal agenda)
- Step 2: Have an open discussion (there will be disagreements)
- Step 3: Summarize and agree to conclusions (find common ground)
- Step 4: Write Findings Report (be clear and concise)

TEP recommendations

- TEP may recommend approval, approval with conditions or denial
- LGU must consider TEP findings and recommendations
- TEP cannot make findings without having at least one member make a site visit
- Findings and recommendations must be endorsed by a majority of members

What if the LGU doesn’t agree with TEP?

- The LGU must provide detailed reasons for rejecting the [TEP] finding of fact or recommendation in its record of decision; otherwise, the LGU has not sufficiently considered the TEP report.

Detailed reasons for not following TEP recommendation?

"The Board felt that the TEP’s recommendation to deny the application was unreasonable and therefore we approve the application."

Reasons for not following TEP recommendation

"The Board finds that the TEP's recommendation to reject the application based on the availability of a reasonable and prudent alternative alignment to the proposed road (impacting less wetland) did not give due consideration to the decreased public safety associated with alternative alignments. The alternative alignments mentioned in the TEP's recommendation result in unsafe sighting distances at road intersections according to national safety standards. Therefore, the Board finds that there are no feasible and prudent alternatives and approves the application."
WCA Application Procedures

- LGU Roles
- Application Procedures
- Agency Action Deadlines
- Noticing Requirements
- Technical Evaluation Panel

Application Types and Procedures

- Determined Complete Application
  - Within 15 business days from the date of receipt (data stamp)
- Send Notice of Application
  - Within 15 business days from receipt of complete application
- Set Comment Period
  - Minimum 3 business days from the date of sending the Notice of Application
- Make a Decision
  - Within 45 calendar days from receipt of complete application
- Send Notice of Decision
  - Within 30 business days from date of decision

Timelines and deadlines
Now you've got yourself an application

You should receive:
1. A “Joint Application”
2. Applicable attachment(s)
3. Supporting documentation

Is the application complete?

• Application must contain sufficient/required information found on 1st page of application
• Consider what is being asked, where it fits in Rule, what information the Rule requires
• Local application requirements such as fees?

Application Review

• Use checklists/guidance
• Missing Information = Incomplete Application
• Notify applicant
  • Within 15 business days of receipt
  • Provide list of what is missing

It's Complete! Notice of Application

• Complete BWSR form
• Mark all decision types
• Specify comment Period (min 15 days)
• Decision time information
• Send to applicant, agent, TEP and others who requested notice

Summary of LGU Application Types

<table>
<thead>
<tr>
<th>Decision Type</th>
<th>Wetlands Regulated</th>
<th>Wetlands Unregulated</th>
</tr>
</thead>
<tbody>
<tr>
<td>Boundary or Type</td>
<td>Yes</td>
<td>Yes</td>
</tr>
<tr>
<td>Net Loss</td>
<td>No</td>
<td>Yes</td>
</tr>
<tr>
<td>Exemption</td>
<td>No</td>
<td>Yes</td>
</tr>
<tr>
<td>Sequestration</td>
<td>Yes</td>
<td>Yes</td>
</tr>
<tr>
<td>Replacement Plan</td>
<td>Yes</td>
<td>Yes</td>
</tr>
<tr>
<td>Back Plan</td>
<td>Yes</td>
<td>Yes</td>
</tr>
</tbody>
</table>
Notice of Decision (NOD) should include:

- Summarize the project: Decision type requested, proposed impact including wetland type and amount
- Clearly state the decision
- Applicable rule citation(s)
- TEP findings
- Conditions of approval
- Location map

LGU Decision

- Based on standards and procedures in WCA, TEP Findings, and Recommendation.
- Must occur within 60 day of complete application (or as extended)
- Requires a Notice of Decision within 10 days

General Appeal Process

- 30 day appeal window following NOD
  - Any work completed during this period may be at risk.
  - 30 days starts from postmarked date of mailing or date of electronic transmission
  - Extension possible by mutual agreement

Appeals

- Appeals may be made by
  - Landowner,
  - those required to be noticed (TEP/other), or
  - 100 residents in county where wetland is located.
- Appeal goes to BWSR.
- Heard by Dispute Resolution Committee with final decision by full BWSR Board.

Summary of LGU Review Process

- Discussion (pre-app meeting?),
- Review of application,
- On-site review,
- TEP meeting(s)/Rec.,
- Amendment(s)?
- more discussion....

**Don't forget to include our Army Corps of Engineers partners!**
WCA Application Procedures Review

LGU Roles

Application Procedures

Agency Action Deadlines

Noticing Requirements

Technical Evaluation Panel

WCA Enforcement

Enforcement Procedure Overview

8420.0900 Subp. 3.
Restoration and Replacement orders.

B. Promptly upon being informed by the enforcement authority or the local government unit of the need, a soil and water conservation district staff person must inspect the site and prepare a plan in consultation with the local government unit and the enforcement authority for restoring the site to its prealtered condition.

SWCD Role in a violation

- Landowner contact for CDO or RPN
- Site visit - gather information/evidence
- Prepare Restoration/Replacement Order
- Monitor restoration/ replacement site.
- Certificate of Satisfactory Completion
- Track the cases.

LGU Role in a violation

- Help Determine if site has permit for work or prior work done.
- Assist SWCD on Restoration/Replacement Orders
- Assist with gathering evidence
- Receive application from landowner for exemption, no-loss determinations, and replacement plans
- Track the cases
### BWSR’s Role in a violation

- Rule interpretation
- Bounce ideas back and forth (appropriate seed mixes)
- May contact more specialist BWSR staff to assist in difficult projects
- Assist SWCD/LGU in developing RO’s
- Assist in technical findings

### DNR Enforcement Role

- Landowner contact if Cease and Desist Orders
- Write Summary of information on violation
- Gather Evidence of the violation including contractors info
- Issue Restoration and Replacement Order
- Grant Extensions
- Initiate enforcement action
- Follow and track all violation cases
- Issue RPN for after the fact cases (not in progress)

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### Resource Protection Notices

**Who** – landowner and/or responsible party, contractor
- RO will go to all

**What** – type of disturbance or activity that occurred
- Useful for determining impact

**Why** – purpose of action? Were goals achieved? (i.e. some drainage is not effective...)

### Data Collection

**Who**

**What**

**Where** – Property location (critical), but also landscape position, slope, etc.

**When** – estimated time of activity occurrence
- Helpful in determining responsible party if ownership change has occurred
- Aerial photos/PID information
- Did the activity work?
Data Collection

• Maps
• Illustrations
• TEP Findings and Recommendation
• Discussions with landowner/responsible party
• Survey information
• You may only have one opportunity to be on site

The RO

Restoration Order Gives the Landowner Options

• Restore
• Apply for replacement, exemption, no-loss
• Appeal - w/in 30 days + $500 fee
• Court/Deed Restriction if no action is taken by landowner

After-the-fact replacement ratio must be twice the ratio otherwise required

The RO

Send RO to the Officer OR WREO ASAP Enforcement will serve the order (must be served in person or certified mail)

• Easy for everyone to track time line
• MAKE SURE YOU SIGN YOUR COPY BEFORE Sending it to CO OR WREO

Extensions are issued only by enforcement and if:
• The landowner has a good reason for not getting it done
• Has made some progress
• Maybe weather related (heavy rains, early freeze)
• Submitted application
• Filed an Appeal

Is a formal Restoration Order Always Required?

• No, voluntary restoration is allowed but should consider
  • Willingness to cooperate
  • Past history
  • Shortened timeframe for completion to allow for formal RO process
  • Some kind of written plan or agreement with deadlines
  • Communication and agreement with DNR Enforcement

Voluntary Restoration

Certificate of Satisfactory Restoration

Prepared and issued by the SWCD

97 98 99 100 101 102
The landowner does not comply with the RO. Now what?

- Enforcement will work with you!
  - CO Sends a Letter
  - CO Makes a Phone call
  - Deed restriction in some cases
  - Landowner Served a Criminal Citation
  - Court

Prior to working they:
- Must have obtained signed statement from landowner
- Mailed a copy to the LGU
- They do not need to verify if the landowner has a permit or not. Just have the signed form and mailed it.

- Landowner has 30 days to appeal Order
- RO must allow >30 days to comply with Order

- Definition Refresher
- Exemptions Basics
- Ag Related Exemptions

What is regulated by WCA?

What is considered Impact?
A loss in quantity, quality, or biological diversity of a wetland caused by draining or filling or by excavation in types 3, 4, or 5.
What is Drainage?

Any method for removing or diverting waters from a wetland

- Excavation of a ditch
- Tile Installation
- Filling
- Diking
- Pumping
- Diverted water
- Etc.

What is Fill?

Any solid material added or redeposited in a wetland

- Alters cross-section or hydrological characteristics,
- Obstructs flow patterns,
- Changes Boundary, or
- Converts to non-wetland.

Wetland Fill

- Does not include posts for walkways, bridges, powerline poles, etc.

- Does not include slash or woody vegetation as long as it originated from vegetation growing in the wetland and does not impair flow or circulation of water.

What is Excavation?

Removal of soil by any method if it results in an impact*.
Exemption Basics

An impact that is allowed without the landowner being required to replace the lost wetland.

In other words...
The activity is regulated but is allowed to be filled, drained, and/or excavated permanently without replacing the loss of functions/values IF it fits within one of the categories.

Typical Exemption Categories

- Agricultural Activities
- Drainage
- Federal Approvals
- Restored Wetlands
- Utilities; Public Works
- Forestry (roads)
- De Minimis
- Wildlife Habitat

General Exemption Requirements for ALL

- Only has to fit one; not disqualified if not exempt by another
- If impacts exceed max allowed = nothing is exempt
- Max may not apply to all situations or wetlands - very specific
- May not be combined on a project
- Must be stabilized to prevent sedimentation/erosion & can’t block fish activity.
- Can’t be combined on the same project.

General Information

- The activity is still regulated.
- Exemptions do not apply to: calcareous fens, wetland bank sites, project-specific replacement sites (8420.0420 Subp 1B)
- WCA does not REQUIRE an application; some LSU’s may.
- NOA or NOD is not a requirement but....

Application and Noticing

- WCA does not REQUIRE an application; Some LSU’s may
- NOA or NOD is not a requirement but...
  - LSU can seek TEP evaluation w/o NOD
  - LSU should push for application and notification when the project is Complex
  - Controversial
  - Likely to be denied
Agricultural Exemptions (Subp. 2)

Sub-Categories of Ag Exemptions

Impacts from Agricultural Activities
- 8420.0420 Subp 2
  (A) Type 1,2 Planted 6 of 10 prior to 1991
  (B) Agricultural pasture land, except bottomland hardwood type 1
  (C) SWCD conservation practices
  (D) Wheeled booms on irrigation
  (E) Aquaculture
  (F) Wild rice
  (G) Farm program MOU

Agricultural Exemptions (2A)

- Annually seeded crops or in rotation seeding with pasture grass/legume prior to Jan 1, 1991
- No size constraints, but must be Type 1 or 2 wetlands
- Does not require row crop to be successful/may be stressed
- Demonstrate that planting occurred
- USDA crop reporting or other records may be helpful

Ag 2A - Can the Landowner Tile?

1990 1989 1988

1987 1986 1985

1984 1983 1982
Is it exempt??

What items may be needed to demonstrate this exemption is met?
- FSA Slides (primary)
- FSA Crop History/Records
- Fertilizer records, seeding records, etc.
- Other sources (photos, NWI, Soils map, etc)

Where to Find Aerial Photos
- FSA Photos
- County Photos
- USGS Earth Explorer
- MHAPO
- Google Earth

Agricultural Exemption (2B) - Pastureland
- Must be existing pasture
- Must remain pasture
- Type 1, Seasonally Flooded basin or flat

Agricultural Exemption (2B cont.)
- Excludes Bottomland hardwood forest
- Type 2/6 (Fresh Wet Meadow/Shrub Swamp) if less than 2 acres in size
Agricultural Exemptions (2A)

What items may be needed?
- Demonstrated current pasture use
- FSA Slides (fencing, watering ponds, other infrastructure)
- Estimate of Wetland size if type 2/6 (NWI, Soils map, etc.)

Agricultural Exemptions (2C)

Impacts Resulting from Soil & Water Conservation Projects
- Must be certified by SWCD Technical Staff
- After TEP Review
- No specific guidance in rule, but must minimize adverse bio/hydro effects
  - TEP can/should consider alternative layouts where applicable
  - Projects are highly variable (i.e. Flood control Projects, Erosion Control Projects, manure storage areas, cattle crossing)

Agricultural Exemptions (2C) - Example

Fill for irrigation boom track

Agricultural Exemption (2D)

- Impacts from Aquaculture Activities
  - Includes Pond excavation, Access roads & dikes
  - In Accordance with Army Corps of Engineers Permit

Agricultural Exemption (2E)

- Impacts from Wild Rice Production Activities (dikes)
- Requires Army Corps Approval
Agricultural Exemption (2G)

- Impacts from Agricultural Activities for Farm and No-Farm Program Participants meeting certain criteria
- Process functions more like an exemption, but results function like replacement

Drainage Exemptions (Subp. 3)

Drainage Exemption (3B)

Public Drainage part (1)
No replacement for maintenance/repair of existing public drainage if:
- Authorized by the public drainage authority under MN 103E
- When the work does not drain type 3, 4, or 5 wetlands that have existed for more than 25 years prior to work

Private Drainage part (2)
No replacement for maintenance/repair of existing private drainage if:
- If work does not drain wetlands that have existed for more than 25 years

CONDITIONS:
- Spoil must be placed and stabilized to minimize impacts.
  - “Remove” place on existing spoil
  - “incorporate” side cast
- Ditch must be stable and not degrade water quality downstream.

Applying the rule is Not always Easy.
- When was it dug? Maintained?
- How much sediment is planned for removal?
- Do we have past records?
- Are there culverts/other hydro controls?
- Downstream conditions?
- Can the impacts be quantified?
Drainage Exemption (3C)

(1)(a)
• Must be on ag land
• Must demonstrate cropping in 8 of 10 most recent years
• Annually seeded prior to July 5
• Can be new drainage or other impact

Example
• New tile (red) discovered at time of LGU onsite
• Determined to be installed in 2011
• Demonstrated annual planting in blue polygon in past 9 of 10 prior to July 5th.

Exempt? Further Review?

(1)(b)
In crop rotation of pasture grass, cover crop, legumes or fallow.
• Also 8 of 10 most recent years

(1)(c)
• Allows review of earlier years if enrolled in state/federal conservation program (ex. CRP)

Drainage Exemptions, Subp. 3C (2) a. & b.
• Applies to Type 1 or up to 5 acres of Types 2 or 6
• Must be within an area where drainage benefits for a public system has been assessed
• Must be in an unincorporated area

AND...

• Expenditure from the public drainage account occurred 1972-1992
  OR
  • the system was repaired/maintained as approved by DA
  OR
  • the DA determined no repair/maintenance is required

AND - Wetlands cannot be impacted for conversion to
• Platted lots
• PUD, commercial or industrial
• Any development more than 1 residential per 40 acres unless Zoning allows
Resources for Drainage Project Evaluation

**Topic of Week**
- Summarizes drainage and things to consider when evaluating these types of projects.
- Provides an approach to assess these types of projects.
- Appendix provides a basic worksheet to assist in determining when/if the drainage exemption fits.

Resources for Drainage Project Evaluation

**Existing Conditions of the system**
- Drainage area/Watershed
- System features ditch, pump, tile, culvert
- Wetland type, proximity, and source of water
- Elevations and profiles
- Depth of sediment
- Control points

Drainage Project Evaluation

**Proposed Conditions & Past History**
- Elevations
- Depth of sediment to be removed
- Control point modifications?
- Spoil Locations proposed
- Prior maintenance details (when, where, and how much?)

Public Drainage Example

**Example – Existing Condition**
- Elevation profiles of ditches and tiles
- Elevation and slope
- Depth and location of sediment
- Culvert elevations
- Wetland type and location
Example – Proposed Condition

- Proposing Culvert lowering of 3 ft
- Proposing Spoil removal to ACSIC Adjusted Profile (1.25 ft - 2 ft of spoil removal proposed)

Proposed Culvert lowering

Not exempt

- Lowering culvert facilitates increased drainage; culvert no longer a control; Run-out elevation lower by 1.25 ft

Modified Scenarios

- What if the wetland were a Type 2 and more than 25 years old in the public drainage system?
- What if all the same applied but it is private drainage?
- Based on the example, what could the public ditch authority change to make it exempt?

Determining Impacts of Improved Drainage

- Wetland Delineation/Determination (Area?)
- Aerial Photo Review and Comparison (Has there been new drain tile inputs? Watershed changes? Has the wetland type changes over time?)
- Antecedent Precipitation (puts information into context)
- Downstream Controls (other culverts downstream?)
- Lateral Offset Calculations (often submitted with agent involved; setbacks tables can give some level of information but has limits)
- Watershed size (is it a large watershed and basin?)
- Site Visit & TEF Findings and Recommendation (complex and often in the "grey" – use the TEF process)
Knowns:
• Ditch exists today in some capacity
• Wetland is a Type 2/6 Sedge/Shrub area transitions to Type ½ Reed canary
• There are 2 culverts along the stretch to be maintained
• Outlets to public water course just east of road culvert.
• Not a public ditch or assessed drainage benefits

Limited cleanout based on conditions of onsite visit
• Wetland is approx. based on NWI/Soils
• Proposed 1.5 ft of sediment removal

Is it Exempt to allow the 1.5 ft sediment cleanout?

Additional Information is necessary to make the determination...
• Culvert Elevations/Fall; Is outlet restricted?
• Prior cleanout?
• Conditions of wetland 25 yrs ago or near last clean out time – comparison?
• Soil type and Estimated LE of additional 1.5 ft clean out?

Failed to demonstrate an exemption is met – however, consider if modifications can allow some maintenance to be exempt....

WCA rule is easy to interpret but can be difficult to apply on ditch maintenance projects.
• Every drainage project is incredibly unique and requires careful review of data - More information is frequently needed.
• When no consultant is involved, it may require more involvement of the LGU/TEP
Replacement Plan Applications

Subpart 1. Requirement.
A landowner proposing a wetland impact that requires replacement under this chapter must apply to the local government unit and receive approval of a replacement plan before impacting the wetland.

Preapplication Meeting

• Prior to preparation of an application;
• Meet with the LGU/TEP, provide basic information of the project;
• LGU/TEP inform the applicant of sequencing requirements and criteria to evaluate the replacement plan.

Application Contents

• Information necessary to be considered a complete application (a lot of this info can be pulled from the delineation report);
• For the impacted Wetland:
  1. The amount of wetland impact (in sq ft or acres) by type;
  2. Minor/Major watershed, County, and Bank Service Area (BSA);
  3. Soil survey of site, identify hydric soils;
  4. Hydrologic inlets and outlets, adjacent Public Waters (shoreland), floodplain;

Application Contents Continued...

5. Information pertaining to special considerations (8420.0515) (T & E, rare communities, cultural resources, etc.);
6. List of known local, state, and federal permits required for the activity;
7. Identify project purpose and need and alternatives considered;

Replacement

• C. for the replacement wetland when the replacement consists of wetland bank credits:
  1. the wetland bank account number;
  2. the minor watershed, major watershed, county, and bank service area;
  3. the amount of credits to be withdrawn in square feet;
  4. a completed application for withdrawal of wetland credits from the wetland bank in a form provided by the board or a purchase agreement signed by the applicant and bank account holder;
• D. a description of the required replacement as determined according to the proposed replacement actions and the replacement standards in part 8420.0522.
LGU MUST NOT approve a wetland replacement plan unless the LGU finds the project complies with sequencing.

Key Concepts

- Sequencing is a MUST for all replacement plans
- TWO avoidance alternatives
- Evaluate projects...can wetlands be avoided?
- Are impacts minimized?
- Long term effects

Sequencing

- Avoid
- Minimize
- Replace

How does applicant demonstrate sequencing?

- Clearly define the purpose of the project.
- Identify the physical, economic, and/or demographic requirements of the project.
- Justify why this project should or must go on this site.
- Show (concept plans, discarded grading plans, etc.) and describe other reasonable alternatives that were considered or could be considered.

Impact Avoidance

- If LGU finds that a Feasible and Prudent Alternative exists that avoids impacts, the application must be denied.

Alternatives Analysis

- LGU must determine if feasible and prudent alternatives are available that avoid wetland impact
Alternatives Analysis

What is feasible and prudent?

**WCA rule tells us (8420.0520 subp 3C(2)):**

- Can be done from an engineering perspective
- Is in accordance with accepted engineering standards and practices
- Is consistent with public health, safety, and welfare requirements
- Is environmentally preferable based on social, economic, and environmental impacts
- Would not create any truly unusual problems

Evaluating Alternatives (continued)

- LGU must consider (8420.0520 subp 3C(3)):
  - Could the size, configuration, or density of the project be modified to avoid wetlands?
  - Has the applicant made efforts to remove constraints (zoning restrictions, ordinance requirements, etc.) that are causing wetland impacts (i.e. request for variances, PUD, conditional use permit, etc.)?

What if an avoidance alternative DOES exist?

- If the LGU determines that a feasible and prudent alternative exist that avoids wetland impacts, it MUST DENY the replacement plan.

Sequencing - Offsite

- Offsite Analysis
  - Avoidance
    - 0 ft² impact
    - Did not accomplish purpose
    - Too small build site

Sequencing - Minimization

- Alternative
  - 70,000 ft² impact
- Preferred alternative
  - 40,000 ft² impact

Alternatives Analysis Continued...

Future considerations when reviewing a site and potential off-site impacts
Alternatives Analysis Continued…

• Direct and secondary impacts – A wetland may not be directly impacted (filled/drained/excavated) but can be impacted through loss of hydrology

What if an avoidance alternative does NOT exist?

• LGU evaluates:
  • Minimization
  • Rectification
  • Reduction/Elimination of impacts over time
  • Replacement

Impact Rectification

• Temporary impacts must be rectified by repairing, rehabilitating, or restoring the affected wetland to pre-project conditions

Reduction or Elimination of Impacts Over Time

• Once complete, further impacts must be reduced or eliminated and preserve or maintain wetland functions
  • Best Management Practices (BMP)
    • Silt fence
    • Storm-ponds
    • Buffers
    • Rip-Rap

Sequencing Flexibility

• Allowed at the discretion of the LGU if:
  1. Impacted wetland degraded;
  2. Avoidance results in severe degradation;
  3. Upland site of the project or replacement has greater function and value;
  4. Human health and safety is a factor.

Special Considerations

These factors must be considered by the applicant before submitting a replacement and by the LGU during the review:

1. Endangered and threatened species (DNR natural heritage/nongame)
2. Rare natural communities (DNR natural heritage)
3. Special fish and wildlife resources (fish spawning, water birds, waterfowl, deer wintering/wildlife corridor)
4. Archaeological, historic, or cultural resource sites (National Register of Historic Places, State Historical Preservation Office)
5. Groundwater sensitivity (Decorah edge, Geologic Sensitivity)
Special Considerations Continued...

6. Sensitive surface waters (trout stream)
7. Education or research use (Cedar Creek, Anoka Co)
8. Waste disposal site (former dump, superfund, TCAAW/VAWAT)
9. Consistency with other plans (watershed management, land use, planning and zoning)

Sequencing – Replacement

Final Review Step

LGU must evaluate if unavoidable impacts will be adequately replaced AND if correctly sited.

Adequate Replacement

- Must replace the functions and values at an equal or greater level than that which was lost.
- Uses wetland area as the unit of measurement (acreage or sq. ft.)

Replacement Siting

- Must follow a priority order:
  - Minor watershed
  - Major watershed
  - Same BSA
  - Another BSA

Replacement Ratios

- Must follow a priority order:
  - Minor Watershed
  - Major Watershed
  - Same BSA
  - Another BSA

Result?

A formal NOD document that summarizes the decision, is supported by technical findings and is valid for 5 years.

Application to withdraw wetland credits

193 194 195 196 197 198
The Minnesota Agricultural Wetland Bank: History, procedures and application review tips

Topics Covered

- Background – WCA and Banking
- The origins of the Ag Bank
- Agency roles in the Partnership
- How the Ag Bank works
- Things to watch out for

Opportunity for a Partnership

- MN Board of Water and Soil Resources (BWSR)
  - “WCA”
- USDA Natural Resources Conservation Service (NRCS)
  - “Swampbuster”

The BWSR-NRCS Partnership - Utilize Agency Strengths

- NRCS:
  - Working directly with agricultural producers.
  - Identifying wetland impacts on ag land.
- BWSR:
  - Established wetland banking program and procedures.
  - Wetland mitigation expertise.

The BWSR-NRCS Partnership - The Beginning of the Ag Bank

- 2009 MOU: Addressed wetland mitigation (and other issues).
- 2011 Contribution Agreement: Included establishment of the Ag Bank.
- 2013 MOU: Established joint Ag Bank criteria.
- 2014 Farm Bill: National Ag Banking Pilot.
- 2017 Grant Agreement: Continued Wetland Mitigation Bank Development.

The Minnesota Ag Bank - Some Key Roles in the Partnership

- NRCS: Process farm program participant requests for voluntary mitigation on ag land using the ag bank.
- BWSR: Process applications for ag bank establishment and administer the statewide bank, including all credit transactions.
- LGU: Review and process applications requesting use of the Ag Bank per the MOU (or notify applicant if not eligible).
Wetlands Eligible for AB credit replacement

1. Use of the Agricultural Wetland Bank:
   a. For farm program participants, the Agricultural Wetland Bank can be used to replace impacts to the following wetlands identified according to a certified wetland determination completed by NRCS:
      i. Farmed Wetland (FW)
      ii. Farmed Wetland Feature (FWF)
      iii. A Wetland (AW) impacted by an activity for which the landowner can provide evidence of a 50% reduction in flooding or erosion
      iv. Wetland (WF) less than five acres in size that is predominately bordered by land that has been cropped at least 20 years, or the wetland is degraded according to the NAWA Agricultural Wetland Evaluation Tool, or the wetland has been cropped for at least 20 years, or the wetland has been cropped for at least 20 years, or the wetland has been cropped for at least 20 years, or the wetland has been cropped for at least 20 years, or
      v. Converted Wetland (CW) that, prior to conversion, was classified under items one through four above as determined by NRCS staff.

Credit generation:
- Agricultural Wetland Bank (AWB): wetland restorations only (hydrology & vegetation restored). No creations.

Standards:

Fees:
- Agricultural Wetland Bank (AWB): Less than SWB fees. More than AWB fees.

Fees:

Credit Use:
- Agricultural Wetland Bank (AWB): Degraded wetlands on Ag land only (must remain in ag use for 10 years after replacement). No restrictions – any wetland impact.

Current Status
- 191 credits available.*
- 63 credits anticipated for release within the next 6-8 months
- 6 Ag Bank projects in the application process

*Available credit numbers can fluctuate daily (as of July 20, 2021).

How is the Ag Bank Different?
- Focus on agricultural areas of the state.
- Use of the ag bank limited to farmed wetlands and other degraded agricultural wetlands that remain in ag use.
- Flexibility on banking vegetative standards.
- Ensures compliance with both State and Federal (NRCS) requirements.
- Reduced redundancy for landowners.

Typical Ag Bank Wetland Replacement Process
1. The farmer (producer) initiates process with NRCS (or FSA via an AD 1026).
2. NRCS refers to the Certified Wetland Determination (CWD).
3. FFW (Farmland Wetland): any wetland is farmed wetland was converted and planted between December 31, 1995, and all these wetland credits. Those may be formed and maintained in the same manner as long as they are not degraded.
4. FWF (Farmland Wetland Feature): any wetland is farmed wetland was converted and planted between December 31, 1995, and the area of wetland credits. Those may be formed and maintained in the same manner as long as they are not degraded.

Public Interface – Bank Information
The website provides information relating to: Location, availability of credits, type of credits and contact info.
1. The farmer (producer) initiates process with NRCS (or FSA via an AD 1026)
2. NRCS refers to the Certified Wetland Determination (CWD)
3. If the CWD shows a "W", NRCS/consultant/LGU completes Ag Wetland Evaluation Tool assessment (AWET);
   - MNRAM based assessment – vegetative diversity, downstream water quality protection, flood water attenuation and wildlife habitat.
   - "Degraded" - a scoring of "Low" for vegetative diversity + "Low" for one other function, and no other score may be higher than "Medium"

Functional Assessment Tool
Evaluate potential ag bank sites and proposed wetland impacts.
Ensures functions gained > functions lost.

Wetlands Eligible for AB credit replacement

Application Process (Use of the Ag Bank)
Things to Watch For …

Are all wetlands identified?

• Delineation methods differ between Swampbuster & WCA
• NRCS evaluates the “best drained condition” of the wetland prior to Dec. 23, 1985
• Wetland had a ditch and 1-2 years of planting prior to Swampbuster, thus “prior converted”.
• For WCA, it hasn’t been planted for almost 35 years therefore not exempt.
• Lack of drainage maintenance isn’t an issue for NRCS

Things to Watch For …

Is wetland size accurate?

• Review the wetland polygon size using some representative imagery
• Review the wetland label
• Do you agree?

Things to Watch For …

Does the wetland extend beyond tract boundary?

• NRCS evaluates by tract – pay attention to tract boundaries!
• What if the property line is also a county boundary??
• You may need to work with another LGU!
Things to Watch For ...

Is the wetland bordered by land cropped 8 of the last 10 years?

• Review all wetland labels, but key into the “Ws”
• Remember Ws have a three-part eligibility criteria;
  • Confirm the acreage
  • Confirm the history of the land bordering the wetland
  • Confirm it is degraded per the Ag Wetland Evaluation Tool
• If not eligible for AB MOU replacement – **NOTIFY THE APPLICANT!!!!!!**
• MN Statute 15.99 timelines apply

Things to Watch For ...

Is the form signed by NRCS staff?

• This must be signed by NRCS **prior to your review and approval**.
• The only time an application may not be signed by NRCS is for non-farm program participants

The Minnesota Ag Bank
A "Win-Win" for Agriculture and our Natural Resources

Wetland Banking
Overview

- Purpose of Wetland Banking
- Types of Wetland Banks
- Actions Eligible for Credit
- Establishing a Wetland Bank
- Certification and deposit of credits
- Withdrawals and transfers
- Replacement for Public Road Projects

Banking-related topics covered in other sections:
- Restoration Construction Standards
- Monitoring and Corrective Actions

What is Wetland Banking?

- WCA rule: "The purpose of the state wetland banking system is to provide a market-based structure that allows for replacement of unavoidable impacts with pre-established replacement wetlands."
- Federal Mitigation Rule definition (33 CFR 332.2): "A mitigation bank sells compensatory mitigation credits to permittees whose obligation to provide compensatory mitigation is then transferred to the mitigation bank sponsor."

Purpose

Local Government Road Wetland Replacement Program

- WCA exempts certain local road projects from State wetland replacement requirements.
- BWSR is required to replace the associated wetland impacts so the local governments don’t have to.
- These wetland credits also satisfy Corps of Engineers’ Section 404 permit requirements

Wetland Bank Guidance and Information

- Private
- Standard: Landowners establish bank on private land to mitigate impacts on non-ag or transportation projects
- Agriculture: Credits can only be used for Ag projects
- In-lieu Fee (proposed):
  - Open to only government and NGOs, mitigation completed in advance, requires compensation planning framework
- Local Government Road Wetland Replacement Program:
  - Replaces impacts resulting from local transportation projects

Bank types

What projects Qualify?

- Repair, rehabilitation, reconstruction or replacement of currently serviceable existing State, City, County or Town public road.
  - Provided that:
    - Project minimizes impacts
    - Plans are provided to the LGU
- What doesn’t qualify?
  - New roads
  - Roads expanded solely for additional capacity lanes
Quick facts on Ag bank

Eligibility to USE the Ag Bank:
✓ The wetland must be proposed to be drained for agricultural use.
✓ The land must remain in agricultural use.
✓ The wetland must be a farmed wetland (FW) or otherwise degraded wetland on existing agricultural land.

Differences with Standard Bank:
• Credits can only be used for Ag projects
• Flexibility on Vegetation Standards
• Expired CRP sites could be eligible “as-is”

Establishing a Wetland Bank

State and Federal Review Process in Minnesota

<table>
<thead>
<tr>
<th>WCA</th>
<th>Corps</th>
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</thead>
<tbody>
<tr>
<td>Draft Prospectus (optional)</td>
<td>Draft Prospectus (required)</td>
</tr>
<tr>
<td>Prospectus (optional)</td>
<td>Prospectus (required)</td>
</tr>
<tr>
<td>Mitigation Plan (required)</td>
<td>Mitigation Plan (optional)</td>
</tr>
<tr>
<td>Easement Acquisition</td>
<td>Final Mitigation Plan (required)</td>
</tr>
</tbody>
</table>

Roles in Establishing a Wetland Bank

Types of Wetland Banks
- Standard
  - Private and Agriculture
  - In Lieu of Fee (proposed)
  - Local Road Program
- Replacement for Public Road Projects
  - Repair, rehabilitate, reconstruction of currently serviceable roads
- Actions Eligible for Credit
  - Restoration of drained wetlands, vegetation restoration, protection, ENRV, Preservation, upland buffer

Review

• Establishing a Wetland Bank
  - Draft Prospectus
  - Prospectus
  - Mitigation Plan
• LGU and TEP procedures for banking
• Construction Certification, deposit of credits, withdrawal of credits

Topics Covered

- Background – WCA and Banking
- The origins of the Ag Bank
- Agency roles in the Partnership
- How the Ag Bank works
- Things to watch out for
Minnesota Wetland Conservation Act (WCA)

- State law passed in 1991.
- Applies to all wetlands, including those on agricultural land.
- “Stand-alone” state law not dependent on federal programs.
- Provides authority for the State Wetland Bank (1993).
- Administered by BWSR and local governments.

Wetland Banking in Minnesota

- ~450 bank sites since inception
- ~400-800 annual withdrawals

Goals:
- Adequate credit supply
- High-quality wetlands
- Efficient
- Cost-effective

Opportunity for a Partnership

- MN Board of Water and Soil Resources (BWSR) • “WCA”
- USDA Natural Resources Conservation Service (NRCS) • “Swampbuster”

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      4. A Wetland (AW) less than five acres in size that is predominantly bordered by land that has been cropped or the last 10 years when the wetland is degraded according to the BLM Agricultural Wetland Evaluation Tool, or immediate (the tool assesses vegetative density, downstream water quality protections, riparian attenuation, and wildlife habitat; a wetland qualifies as degraded when the tool results in a ranking of 1 for vegetation and/or or more other functions, and no higher than medium for any function(s))
      5. Converted Wetland (CW) that, prior to conversion, qualified under item one through four above as determined by NRCS staff.

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Current Status

➢ 130 credits available*
➢ 92 credits = average annual demand (2013-2021)
➢ 11 existing or new Ag Banks in development - most expecting credit releases this year
➢ 2 new projects in application development with more potential projects under review

*Available credit numbers can fluctuate daily (as of April 22, 2022).

“Typical” Ag Bank Wetland Replacement Process

1. The farmer (producer) initiates process with NRCS (or FSA via an AD 1026)
2. NRCS refers to the Certified Wetland Determination (CWD)
3. Farm Wetland, if wetland was established before December 23, 1992, will all mean wetland criteria. There may be limited and maintained in the same manner as long as they are wetland.
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**The Minnesota Ag Bank**

A "Win-Win" for Agriculture and our Natural Resources

- a) Make decisions on applications made under the WCA
- b) Completely fill out a joint application for the landowner
- c) Coordinate TEP meetings when needed
- d) Provide knowledgeable and trained staff
Sometimes referred to as the “60 day Rule”, this Minnesota State Statute determines the agency action deadline for all WCA LGUs to make a decision on a wetland application:

a) MN Statute 8420  
b) MN Statute 15.99  
c) MN Statute 404  
d) MN Statute 103G

For a project in a shoreland area, the Technical Evaluation Panel consists of:

a) The LGU, Army Corps and DNR.  
b) The LGU, SWCD, BWSR and Army Corps.  
c) The LGU, SWCD, BWSR and DNR.  
d) The Army Corps and DNR.

An exemption is:

a) An activity that no matter how large of an impact requires replacement.  
b) A regulated activity that does not require replacement.  
c) An activity that requires an application everywhere in the State.  
d) An activity occurring in a calcareous fen.

During the review of a replacement plan application, LGUs must use this process to determine whether a project avoids, minimizes then replaces wetland impacts:

a) No-loss criteria  
b) Sequencing  
c) Exemption standards  
d) Replacement order

Which member of TEP is responsible for writing a WCA restoration Order?

a) LGU  
b) BWSR  
c) SWCD  
d) Army Corps