

**Minnesota Board of Water and Soil Resources
Dispute Resolution Committee
520 Lafayette Road North
St. Paul, Minnesota 55155**

In WCA Appeal of a Notice of Decision for a No-Loss Determination, Kittson County

**FINDINGS OF FACT,
CONCLUSIONS OF LAW,
AND ORDER**

BWSR File No. 21-1

This matter came to the Board of Soil and Water Resources for a final order from an appeal concerning the denial of a no-loss determination. The petitioners are Glen Brazier and Wagon Wheel Ridge, Inc (collectively “Wagon Wheel”). The respondent is the Kittson County Soil and Water Conservation District (the “Kittson District”).

On May 3, 2021, Wagon Wheel applied for a no-impact determination from the Kittson District, seeking a determination that Wagon Wheel’s excavation of a ditch and pond to create a firebreak (the “Project”) had or would have no impact on a surrounding wetland regulated under the Wetlands Conservation Act (“WCA”). Wagon Wheel completed the ditch prior to seeking the no-impact determination, leading to the issuance of a restoration order covering this and other issues. In its no-loss application, Wagon Wheel also proposed to extend the ditch and add a connected pond.

On July 16, 2021, the Kittson District issued a decision denying Wagon Wheel’s request for a no-impact determination, finding that the completed and proposed actions impacted the Type 2/Type 3 wetland through which the project was constructed (or proposed to be constructed).

Wagon Wheel timely appealed the Kittson District’s no-impact determination to BWSR pursuant to Minn. R. 8420.0905. The parties submitted briefs, and the matter was referred to BWSR’s Dispute Resolution Committee for hearing, which was held on August 31.

STATEMENT OF ISSUES AND RESOLUTION

1. Wagon Wheel has constructed a ditch through a Type II / Type III wetland, and proposes to extend the ditch and add a connected pond.

Should the Kittson District's decision to deny a no-loss determination for this Project be affirmed?

- a. The Kittson District determined that the constructed ditch and additional proposed excavations had impacted or would impact a WCA wetland because of the direct impacts of the excavations and because of the ability of the resulting ditch to drain the wetlands. The Kittson District found that these were impacts within the meaning of Minn. R. 8420.0111, subps. 22, 32.
 - b. The Dispute Resolution Committee voted 4-0 to recommend that BWSR affirm the Kittson District's no-loss determination, finding that it was not clearly erroneous.
 - c. The BWSR Board unanimously adopted the Dispute Resolution Committee's August 31, 2022 recommendation by roll call vote, approving this Order that affirms the Kittson District's no-loss decision, finding that it was not clearly erroneous.
2. After this appeal was filed, Wagon Wheel proposed that the record be expanded to include materials concerning certain negotiations between the parties, and materials concerning how certain boring tests were conducted by the Kittson District. Wagon Wheel alleges the discussion documents are relevant to show the Kittson District failed to consult certain other government entities while negotiating with Wagon Wheel. Wagon Wheel alleges that the borings were conducted without Wagon Wheel's required permission, and that evidence from the borings should therefore be excluded.

Should the materials Wagon Wheel submitted concerning the negotiations and borings be admitted into the record?

- a. The Kittson District did not consider the additional materials, which were not submitted prior to its decision, and opposes inclusion of the materials into the record.
- b. The Dispute Resolution Committee voted 3-1 to recommend admission of the additional materials into the record on the basis that there was no prejudice to the Kittson District. The Dispute Resolution Committee determined that while the materials were not relevant to the no-loss determination before it, admitting the records was preferable to potentially remanding the case back to the Kittson District for further proceedings in light of these materials.
- c. The BWSR Board unanimously adopted the Dispute Resolution Committee's August 31, 2022 recommendation by roll call vote, admitting the additional materials into the record.

D. FINDINGS OF FACT

1. Glen Brazier is the principal and owner of Wagon Wheel, Inc. (R57.) Wagon Wheel owns connected parcels of land near Karlstad adjacent to Minnesota Highway 11, which is the site of the Project. (R57.) Among other things, Wagon Wheel holds an annual concert/event called “Kick’n Up Kountry Music Festival” at the Project site. (R58.)

2. In 2012, a large wild-fire impacted Kittson County near to Karlstad and the Project site. (R61-62.)

3. In 2018¹, Wagon Wheel constructed a ditch running roughly north/south as a firebreak², and a road making a loop through a portion of the Project suite to facilitate firefighting access. (R62-63.) The ditch and road are depicted in the aerial photograph below (R10):³

¹ The exact dates of construction of various elements of the project are not revealed from the record, but in its brief, Wagon Wheel states that the ditch was constructed in December of 2018. The record generally suggests the constructions activities occurred in 2018. For purposes of this appeal, the exact dates are not relevant.

² Wagon Wheel contends the ditch and road were constructed for firebreak purposes. For purposes of this appeal, it is not necessary for BWSR to determine the purpose the ditch and road. The purpose of the ditch and road could conceivably be relevant to wetland replacement plan application, where the necessity of the impact is a factor. *See* Minn. R. 8420.0520. But for a no-loss determination, the only question is whether the activities impacted a wetland, not whether that impact can be justified. For purposes of the appeal, BWSR assumes without deciding that the ditch and proposed pond were built (or would be built) for firebreak purposes.

³ The photograph contains a notation added by the Kittson District: “Current location of Wagon Wheel Ridge in 2019. This photo shows the scope of the violation.” BWSR reproduces the photograph here only for the purposes of the photograph itself, not the notation.



4. In addition to the ditch and road, Wagon Wheel also placed certain structures on the Project site, including a “UFO Display” and aircraft fuselage as site attractions. (R49, 51.)

5. The Project site contains a mix of wetlands regulated by different authorities. (R103-114). The road and the northern portion of the ditch were constructed in Type 2/Type 3 wetlands regulated under the Wetlands Conservation Act. (R103-104.) The Kittson District is the local unit of government with jurisdiction over these wetlands. (*Id.*) The southern portion of the

ditch was constructed through a State public waters wetlands. (R105-114.) The Department of Natural Resources has jurisdiction over these wetlands. (*Id.*)

6. On July 15, 2019 representatives of the DNR and the Kittson District met with Mr. Brazier and conducted a site inspection of the Project site. (R103.)

7. On August 23, 2019, the Kittson District issued a restoration order to Mr. Brazier. (R103-104.) The Kittson District determined that the road and ditch were constructed through a Type 2/Type 3 wetlands in violation of the Wetlands Conservation Act. (*Id.*) The Kittson District restoration order required Mr. Brazier to restore the wetlands by filling the ditch and removing the road in conformance with certain instructions. (*Id.*) Alternatively, the restoration order allowed Mr. Brazier to submit a complete wetland replacement plan, exemption, or no-loss application within 30 days of the order. (*Id.*)

8. On October 11, 2019, the DNR issued a restoration order to Mr. Brazier for the public waters portion of the Project. (R105-114.) The DNR determined that these portions of the ditch were constructed through a public water wetland. (R105.) The DNR restoration order required that the ditch be filled, and certain structures removed in accordance with certain instructions. (R110.)

9. Mr. Brazier did not appeal either restoration order. He did submit an application to the Kittson District for an exemption that appears to be timely.⁴ The application was, however, incomplete. (R78.) Among other things, it failed to identify the basis in statute or rule for an exemption. (*Id.*) The Kittson District concluded that elements of the application could potentially

⁴ The application does not appear to be dated, but a letter dated November 22, 2019 from the Kittson District to Mr. Brazier informing him the application was incomplete supports a finding that application was submitted within 30 days of Wagon Wheel's receipt of the October 19 Kittson District restoration order. (R78.) For purposes of this appeal, the timeliness of the initial application is not relevant.

be construed as a request for a no-loss determination, but that the application was deficient for those purposes as well. (*Id.*)

10. From April 2020 to August 2021, there was a long period of correspondence between Mr. Brazier and his attorney on the one hand, and the Kittson District on the other. (R115-185.) The purpose of this correspondence, among other things, was to see if Wagon Wheel and the Kittson District could reach an agreement on the resolution of the Kittson District restoration order. (*Id.*) This included a discussion of whether Wagon Wheel could resolve the restoration order through wetlands replacement, as well as the possibility of a no-loss application. (*Id.*)

11. Wagon Wheel submitted the application that underlies this appeal on May 3, 2021. In the application, Wagon Wheel sought a no-loss determination on three elements of the project only:

- a. A no-loss determination as to the already constructed portions of the ditch that ran through the WCA wetlands (R26).
- b. A no-loss determination as to a proposed pond to be constructed and connected to the ditch. (R26, 45.)
- c. A no-loss determination as to a proposed extension of the ditch. (R26, 47.)

12. In its application, Wagon Wheel did not contest that the existing ditch had been constructed through a Type 2/Type 3 wetland, or that the proposed pond and ditch extension would be constructed through a Type 2/Type 3 wetland. The record also fully supports the Kittson district's determination that these elements of the Project were constructed or proposed to be constructed in a wetland covered by the WCA and subject to the Kittson District's jurisdiction. (R196-197.)

13. Wagon Wheel contested whether the ditch and proposed pond and extension would have an impact on the wetlands. (R29.) Wagon Wheel argued that the excavations could improve the wetlands by removing invasive cattails and improving waterfowl habitat. (*Id.*) These

arguments appear to be unsupported by any evidence. The Kittson District concluded that the ditch and proposed additional excavations were impacts within the meaning of the WCA because they directly impacted the wetlands through their construction, and also altered the hydrology of the wetland by conveying and draining water from it. (R4.)

14. BWSR concludes that the record fully supports the Kittson District's determination that the completed ditch and proposed additional excavations would directly impact the associated wetlands, and would further impact them by changing the hydrology of the wetlands by carrying water away from the wetlands.

15. In general, the no-loss application makes an argument for an equitable exemption from the WCA based on the nature of the property, risk of fire, and Wagon Wheel's use of the site. BWSR makes no findings on these issues, which might be relevant to an after-the-fact replacement plan. These issues are not relevant to a determination of whether the actual and proposed ditch and pond excavations have had or will have an impact on the wetlands in question. BWSR concludes that the actual and proposed ditch and pond excavations unquestionably would impact on the wetlands in question.

16. After this appeal was filed, Wagon Wheel proposed adding seven additional exhibits into the record in this case:

- a. An order issued by BWSR holding this appeal in abeyance while settlement discussions took place between the parties (Exhibit 1);
- b. A aerial photograph exchanged between the parties concerning settlement proposals (Exhibit 2);
- c. A transcript of a recording of a meeting between Mr. Brazier and representatives of the Kittson District, BWSR, and DNR related to the July 15, 2019 site inspection (in three parts – Exhibits 3, 4, 5);
- d. Notes prepared BWSR employee Matt Johnson concerning the July 15, 2019 site visit (Exhibit 6);

- e. An e-mail dated July 17, 2019 from DNR employee Stephanie Klamm to other DNR employees concerning the July 15 site inspection and other issues concerning the site (Exhibit 7).

17. The Matt Johnson notes (Wagon Wheel additional Exhibit 6) were included in the record. (R197-198.)

18. The Kittson District objected to the inclusion of the other exhibits on the basis that they were not considered by the Kittson District as part of its review of the case. The record confirms that the exhibits were not submitted to the Kittson District or considered by it as part of its denial of Wagon Wheel's no-loss determination. Exhibits 1-2 also post-date the decision.

19. Wagon Wheel argues that its proposed Exhibits 1-2 show that the Kittson District made proposals in settlement allegedly without consulting with other government entities. Wagon Wheel argues that its Exhibits 3-7 support its argument that Kittson District employee Justin Muller conducted borings on the Project site during the July 15, 2019 site visit without permission to do so.

20. The Kittson District limited its objection to Exhibits 1-2 to timeliness and relevance, without conceding in any way the argument by Wagon Wheel as to what the records did or did not show. With respect to Exhibits 3-5 and 7, the Kittson District similarly objected on the basis of timeliness and relevance. The Kittson District also disputed that the borings were conducted without permission and whether such permission was necessary.

21. For purposes of this appeal, BWSR concludes that Wagon Wheel's additional proposed exhibits are irrelevant to the no-loss determination.

22. Wagon Wheel failed to develop its arguments concerning Exhibits 1 and 2. At points in its briefing, Wagon Wheel seems to contend that it has been treated differently than other nearby landowners, or that it took various actions in response to requests from other regulators. But Wagon Wheel failed to articulate how this is relevant to the discrete issue in this appeal – did

Wagon's Wheels actual or proposed ditch excavations impact the wetlands in question. BWSR sees no relevance of the proposed Exhibits 1 and 2 to these issues.

23. With respect to Exhibits 3-5 and 7, Wagon Wheel concedes, and the evidence fully supports, that the borings were conducted in connection with the road, not the ditch or the proposed additional ditch and pond excavations. The purpose of the boring was to determine the character of the soil under the road, as part of a determination as to whether the road was constructed in a wetland. Because Wagon Wheel did not apply for a no-loss determination as to the road, the borings are not relevant to this appeal.

CONCLUSIONS OF LAW

1. BWSR has jurisdiction to hear this appeal pursuant to Minn. Stat. § 103G.2242, subd. 9 and Minn. R. 8420.0905, subp. 4.

2. The Wetlands Conservation Act and associated rules allow a party to seek a no-loss determination from the regulating local unit of government that activities in or adjacent to a wetland will not have an impact on them. Minn. Stat. § 103G.2242, subd. 2; Minn. R. 8420.0410.

3. The criteria for a no-loss determination are set forth in rule. Minn. R. 8420.0415. In general, the rule sets forth certain types of excavations that will have only a temporary or allowable impact, and permits a no-loss determination as to these activities. Minn. R. 8420.0115(B-H). In the absence of a specific exemption, the burden is on the applicant to show that excavations within a covered wetland will not impact the wetland. Minn. R. 8420.0115(A).

4. Minn. R. 8420.0111, subp. 32 defines "impact" as follows:

"Impact" means a loss in the quantity, quality, or biological diversity of a wetland caused by draining or filling of wetlands, wholly or partially, or by excavation in the permanently and semipermanently flooded areas of type 3, 4, or 5 wetlands, as defined in subpart 75, and in all wetland types if the excavation results in filling, draining, or conversion to nonwetland.

5. Minn. R. 8420.011, subp. 22 defines “drain” as follows:

“Drain” or “drainage” means any method for removing or diverting waters from wetlands. Methods include, but are not limited to, excavation of an open ditch, installation of subsurface drainage tile, filling, diking, or pumping.

6. Minn. R. 8420.011, subp. 25 defines “excavation” as:

“Excavation” means the displacement or removal of substrate, sediment, or other materials by any method.

7. The Kittson District’s conclusion that Wagon Wheel’s existing excavated ditch impacted a Type 2/Type 3 wetland is not clearly erroneous. The record as a whole shows that the excavation itself, and the ability of the resulting ditch to convey water and thereby drain the wetland, impacted a WCA regulated wetland.

8. The Kittson District’s conclusion that Wagon Wheel’s proposed additional extension of the ditch and construction of a connected pond would impact a Type 2/Type 3 wetland is not clearly erroneous. The record as a whole shows that these additional excavations would further impact the wetlands through the excavations themselves, and ability to drain the wetlands.

9. BWSR concludes that it has the power to admit the additional exhibits proposed by Wagon Wheel, and orders they be included in the record. BWSR recognizes that the Kittson District has the better of the argument as to whether under normal circumstances the additional materials should be admitted into the record. The applicable rules provide the BWSR generally conducts an on-the-record review of the local unit of government’s decision, using the same record materials. Minn. R. 8420.0905, subp. 4(F). However, the rules also allow BWSR to remand a matter back to the local unit of government if “the local unit of government’s record is not adequate.” Minn. R. 8420, subp. 4(C). BWSR concludes that the record is adequate to evaluate whether Wagon Wheel is entitled to a no-loss determination, but also notes that there is no prejudice to the Kittson District in admitting the additional materials. The Kittson District has

successfully argued that the materials are not relevant to the no-loss determination issues before BWSR, because they either relate to the road, or to issues not germane to the no-loss determination for other reasons. On this basis, BWSR elects to admit the materials into the record rather than take up the issue of whether a remand of this matter to the Kittson District for consideration of these materials is warranted.

10. Any Finding of Fact more appropriately deemed a Conclusion of Law, or the reverse, should be deemed as such.

ORDER

The Board hereby affirms the Kittson District decision issued on July 16, 2021 denying Wagon Wheel's no-loss application.

Dated: 9-28-2022

By: Gerald Van Amburg
Gerald Van Amburg, Chair
Board of Water and Soil Resources



BOARD ORDER

**Fiscal Year 2023 Environmental and Natural Resources Trust Fund Watershed and Forest Restoration:
What a Match! Project Grants**

PURPOSE

Authorize grants for the Watershed and Forest Restoration: What a Match! Project

RECITALS /FINDINGS OF FACT

- 1. Laws of Minnesota 2022, Chapter 94, Sec. 2, Subd 8. (j), appropriated \$3,318,000 the second year from the trust fund to the Board of Water and Soil Resources, in cooperation with soil and water conservation districts, the Mille Lacs Band of Ojibwe, and the Department of Natural Resources, to accelerate tree planting on privately owned, protected lands for water-quality protection and carbon sequestration.
- 2. On June 27, 2022 the Legislative-Citizen Commission on Minnesota Resources (LCCMR) approved the workplan for this program, which included key goals of bringing together 14 SWCDs and the Mille Lacs Band of the Ojibwe with BWSR and DNR Forestry Cooperative Forest Management Unit to significantly expand the capacity of tree planting to private landowners in three priority watersheds – Rum, Long Prairie and Redeye.
- 3. The Grants Program and Policy Committee, at their September 26, 2022 meeting, reviewed the proposed allocations and recommended approval to the Board.

ORDER

The Board hereby:

- 1. Approves the allocation of funds listed in the attached allocation table.
- 2. Authorizes staff to approve work plans and enter into grant agreements in an amount up to \$557,500.
- 3. Authorizes staff to enter into interagency agreements with DNR Forestry Cooperative Forest Management Unit in an amount up to \$1,112,500.

Dated at St. Paul, Minnesota, September 28, 2022.

MINNESOTA BOARD OF WATER AND SOIL RESOURCES

Gerald Van Amburg, Chair
Board of Water and Soil Resources

Date: 9-28-2022

**FY2023 Watershed and Forest Restoration: What a Match!
Project Grants Allocations**

East Otter Tail Soil and Water Conservation District	\$164,500
Todd Soil and Water Conservation District	\$164,500
Mille Lacs Soil and Water Conservation District	\$164,500
Mille Lacs Band of the Objive	\$64,000
Total	\$557,500

m BOARD OF WATER
AND SOIL RESOURCES

Board Resolution # 22-43

Board of Water and Soil Resources

Proposed 2023 meeting dates

January 25

February – no meeting

March 22

April 26

May 24

June 28

July – no meeting

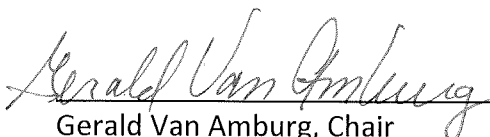
August 23-24 (Wed-Thurs) – Tour and meeting

September 27

October 25

November – no meeting

December 14 (second Thursday)



Gerald Van Amburg, Chair
Board of Water and Soil Resources

Date: 9-28-2022