

# **WETLANDS BASICS**

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**4th Annual Minnesota CLE Environmental Institute  
April 2008**

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## **I. INTRODUCTION.<sup>1</sup>**

- A. Wetlands in Minnesota are regulated by multiple and overlapping federal, state, and local regulatory programs:
  - 1. The Department of Natural Resources (“DNR”) permit program for public waters wetlands.
  - 2. The Wetland Conservation Act (“WCA”) program, which is administered by the Board of Water and Soil Resources (“BWSR”) and local government units, and applies to all other wetlands in the state.
  - 3. The United States Army Corps of Engineers permit program for federally protected wetlands.
- B. The standards for these programs continue to evolve. Important recent developments include but are not limited to:
  - 1. Legislative amendments to WCA in 2007 and a process that is currently underway to develop new administrative rules;
  - 2. Ongoing discussion of the reach of the jurisdiction of the federal program in the wake of decisions by the United States Supreme Court; and
  - 3. New regulations for compensatory mitigation under the federal program.
- C. Today’s presentation will provide a basic overview of wetlands and the three major regulatory programs.

## **II. MINNESOTA WETLANDS.**

- A. Wetlands encompass a great variety of areas, ranging from ponds with open water at the center to areas that might just appear to be fields.
  - 1. Circular 39, issued by the U.S. Fish and Wildlife Service in 1956, divides wetlands in Minnesota into eight basic types. *See Wetlands of the United States*, U.S. Fish and Wildlife Circular 39 (1971 ed.).
  - 2. Wetlands are also classified under the Cowardin System.

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<sup>1</sup> This outline is a condensed and updated version of an outline of the regulatory programs that the author prepared in 2002 while serving as a member of the Minnesota Attorney General’s Office. The complete 2002 outline with graphics, internet links, and a number of additional editorial changes added by state regulatory staff is available online at <http://www.bwsr.state.mn.us/wetlands/publications/MNRegulations.pdf>.

- B. Generally speaking, wetlands include specific soils, hydrology (*i.e.*, water conditions), and vegetation that characterize them as wetlands and distinguish them from uplands.
- C. Each regulatory program has its own definition of wetlands and means for defining wetlands boundaries.
  - 1. DNR public waters program uses ordinary high water level.
  - 2. WCA and the United States Army Corps of Engineers programs use 1987 federal manual.
- D. “Delineation” is the process of finding the boundary.
- E. Why are wetlands protected?
  - 1. Water quality — filter runoff before it reaches lakes and rivers
  - 2. Flood control and low flow augmentation — “nature’s sponge”
  - 3. Fish and wildlife habitat
  - 4. Education and recreation
  - 5. Commercial benefits — specialized farming, development amenity, other uses
- F. The story of wetlands in Minnesota is a story of wetlands loss and changing public policy.
  - 1. Prior to statehood, about 18.6 million of Minnesota’s 53.6 million acres were wetlands.
  - 2. For most of the state’s history, public policy encouraged the drainage of wetlands for agriculture.
  - 3. Today, only about half of Minnesota’s pre-statehood wetlands remain.
  - 4. In some counties, almost all of the pre-statehood wetlands have been drained. WCA divides the state into three kinds of areas:
    - a. Less than 50 percent Area — County or watershed with less than 50 percent of presettlement wetland area intact
    - b. 50 to 80 percent area — County or watershed with at least 50 percent but no more than 80 percent of presettlement wetland area intact

- c. Greater than 80 percent area — County or watershed with more than 80 percent of presettlement wetland area intact
5. Public policy, in recent years, has been aimed at preserving and ensuring no net loss of the state’s remaining wetlands. In addition to the three major programs discussed below, it is also important to keep in mind other potentially applicable laws and programs, including:
- a. Municipal and watershed district ordinances and rules, imposing additional requirements
  - b. Federal programs such as “Swampbuster”
  - c. Minnesota Environmental Policy Act, Minnesota Environmental Rights Act, and other programs

**III. DEPARTMENT OF NATURAL RESOURCES PUBLIC WATERS WORK PERMITS.**

- A. Overview. The oldest regulatory program for the protection of wetlands in Minnesota is the DNR’s public waters work permits program. Generally speaking, this program regulates the bigger and “wetter” wetlands.
- B. Permit Requirement. A public waters work permit must be obtained from the DNR for work in public waters, including public waters wetlands. *See* Minn. Stat. § 103G.245, subd. 1(2).
- C. Public Waters Wetlands Definition. Public waters wetlands are defined in Minn. Stat. § 103G.005, subd. 15a as follows:
- “Public waters wetlands” means all types 3, 4, and 5 wetlands as defined in United States Fish and Wildlife Circular No. 39 (1971 edition), not included within the definition of public waters, that are ten or more acres in size in unincorporated areas or 2-1/2 or more acres in incorporated areas.
- D. Maps. Public waters wetlands, along with other public waters, have been inventoried by DNR and are shown on DNR’s map of public waters and wetlands for each county. *See* Minn. Stat. § 103G.201. These maps only show the general locations of public waters wetlands and do not show precise boundaries.
- E. Boundaries. The boundary of a public waters wetland must be determined in the field, based on the ordinary high water level. Minn. Stat. § 103G.005, subd. 14 defines the ordinary high water level as follows:

the ordinary high water level is 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.

- F. Permit Standards. DNR's rules specify general and specific standards that apply to permits for each type of activity. *See* Minn. R. 6115.0190-.0232, .0270-.0280.
- G. Application and Decision Process. Apply for a permit by submitting an application form to the DNR Division of Waters at the regional office where the project is located. Generally, the decision on the grant or denial of the DNR permit is made by the DNR Area or Regional Hydrologist.
- H. Administrative Hearings and Judicial Review.
  - 1. If the permit is denied, the applicant may apply within 30 days for a contested case hearing before an administrative law judge. *See* Minn. Stat. § 103G.311, subds. 5, 6.
  - 2. The Commissioner of Natural Resources reviews the administrative law judge's findings and recommendations and makes the agency's final decision.
  - 3. Judicial review of the final DNR permit decision is in the Court of Appeals. *See* Minn. Stat. § 14.63.
- I. Enforcement.
  - 1. Work affecting public waters wetlands without a permit is a misdemeanor. *See* Minn. Stat. § 103G.141, subd. 1.
  - 2. The Commissioner of Natural Resources may issue an order for restoration of public waters wetlands altered without a permit. *See* Minn. Stat. § 103G.251, subd. 2.
  - 3. DNR conservation officers and other peace officers may issue cease and desist and restoration or replacement orders for illegal activity affecting public waters wetlands. *See* Minn. Stat. § 103G.2372, subd. 1; Minn. R. 6115.0255, subps. 3-4. Violation of these orders is a misdemeanor. *See* Minn. Stat. § 103G.2372, subd. 2.

#### IV. THE WETLAND CONSERVATION ACT.

- A. Overview. The Minnesota Legislature originally adopted WCA in 1991 to regulate all wetlands in the state that were not already regulated by the DNR as public waters wetlands. *See* 1991 Minn. Laws ch. 354. The goal of WCA is to ensure no net loss of Minnesota’s remaining wetlands. WCA is administered at the local level by the local government unit (“LGU”), typically the city, county, or watershed district. BWSR promulgates administrative rules for the implementation of WCA (codified in Chapter 8420 of Minnesota Rules) and hears appeals from local government determinations. DNR conservation officers enforce WCA.
- B. Exempt Rules and Development of new Permanent Rules. In 2007, the legislature amended WCA and authorized BWSR to adopt amended rules that are exempt from the rulemaking provisions of Chapter 14 of Minnesota Statutes. The exempt rules are now in effect and shall remain applicable for up to two years. *See* 2007 Minn. Laws, ch. 57, art. 1, § 166. BWSR is currently in the process of developing permanent rules to replace the exempt rules and has established a Rule Advisory Committee. *See* <http://www.bwsr.state.mn.us/wetlands/wca/rulemaking.html>.
- C. Basic Requirement. WCA requires that “[w]etlands must not be drained or filled, wholly or partially, unless replaced by restoring or creating wetlands of at least equal public value under a replacement plan.” Minn. Stat. § 103G.222, subd. 1(a). Excavation in types 3, 4, and 5 wetlands is also regulated. *See* Minn. Stat. § 103G.222, subd. 1.
- D. Wetlands Definition. WCA applies to all wetlands in the state, except public waters wetlands shown on DNR’s inventory maps. *See* Minn. R. 8420.0110, subp. 52.C; *Drum v. Minnesota Bd. of Water and Soil Res.*, 574 N.W.2d 71 (Minn. Ct. App. 1998). Wetlands are defined in Minn. Stat. § 103G.005, subd. 19(a) as follows:
- “Wetlands” means lands transitional between terrestrial and aquatic systems where the water table is usually at or near the surface or the land is covered by shallow water. For purposes of this definition, wetlands must have the following three attributes:
- (1) have a predominance of hydric soils;
- (2) are inundated or saturated by surface or ground water at a frequency and duration sufficient to support a prevalence of hydrophytic vegetation typically adapted for life in saturated soil conditions; and
- (3) under normal circumstances support a prevalence of such vegetation.
- E. Maps. In contrast to public waters wetlands, wetlands protected by WCA are not officially mapped.

- F. Boundaries. Boundaries are determined in accordance with the 1987 United States Army Corps of Engineers *Wetland Delineation Manual*. See Minn. R. 8420.0110, subp. 52.D. This manual looks at the three parameters of soils, hydrology, and vegetation.
- G. Exemptions. WCA defines ten categories of exempt drain and fill activities. See Minn. Stat. § 103G.2241; Minn. R. 8420.0122. Exempt activities may be conducted without prior approval or the need to replace impacted wetlands. There is a “de minimis” exemption. The de minimis square footage depends on the type of wetland that will be impacted and the location in the state. See Minn. Stat. § 103G.2241, subd. 9(a); Minn. R. 8420.0122, subp. 9.A.
- H. Replacement Plan Standards.
1. If an activity is not exempt, the impacted wetland must be replaced under a replacement plan approved by the LGU.
  2. The replacement plan applicant must show compliance with “sequencing.” See Minn. R. 8420.0520:
    - a. Avoidance. Wetland impacts must have been avoided as much as possible.
    - b. Minimization. To the extent wetland impacts cannot be avoided, the impacts must have been minimized.
    - c. Replacement. Unavoidably impacted wetlands must have been replaced by restoring or creating wetlands of equal or greater public value.
  3. The rules include numerous specific requirements for replacement wetlands. See Minn. R. 8420.0540-.0550. Some of the basic requirements include the following:
    - a. Type. Replacement may be provided by wetland restoration or creation. Restoration is preferred over creation. See Minn. R. 8420.0540, subp. 2.A.
    - b. Location. Generally speaking, replacement on site or in the same minor watershed is preferred. But there are special location requirements for wetland banking, public transportation projects, the metropolitan area, and other regions of the state. See Minn. R. 8420.0543.A.

- c. Project Specific Replacement or Banking Credits. Replacement may be provided on a project-specific basis or by the application of previously established wetland banking credits. For more on wetland banking, see below.
- d. Size. The minimum replacement ratio is generally two acres of replacement wetland for each acre of impacted wetland. The minimum ratio drops to one to one for wetlands located on agricultural land or in greater than 80 percent areas. *See* Minn. R. 8420.0546. However, the minimums are adjusted upwards based on considerations such as whether the replacement is considered “in-place,” “in type,” and “in time.” *See* Minn. R. 8420.0549, subp. 4c.
- e. Public Value Credit. Establishment or preservation of upland buffer areas contiguous to replacement wetlands, may receive “public value” credit under certain circumstances and be used for the portion of replacement above a one-to-one ratio. *See* Minn. R. 8420.0541, subp. 6.

I. Application and Decision Process.

- 1. Landowners may apply to the LGU for a number of determinations, including replacement plan, exemption, no-loss, wetland boundary or type, and banking determinations. *See* Minn. Stat. § 103G.2242; Minn. R. 8420.0210-.0230.
- 2. The technical evaluation panel (“TEP”) will typically make technical findings and recommendations to the LGU. *See* Minn. R. 8420.0240. The TEP consists of technical professionals appointed by the LGU, BWSR, and the local soil and water conservation district. *Id.*
- 3. There may be procedures at the local level for delegation of decision making and administrative appeals.
- 4. The LGU’s determination must be made in accordance with Minn. Stat. § 15.99, which generally requires a decision within 60 days of a complete application unless extended. *See* Minn. Stat. § 103G.2242, subd. 4.

J. Administrative Appeals and Judicial Review.

- 1. The LGU’s final decision may be appealed to BWSR within 30 days. Minn. Stat. § 103G.2242, subd. 9; Minn. R. 8420.0250, subp. 1.
- 2. BWSR reviews the decision on the basis of the record made before the LGU and will grant deference to the LGU’s findings of fact. *See* Minn. R. 8420.0250, subp. 3.

3. BWSR's decision is subject to review in the Court of Appeals. *See* Minn. Stat. § 103G.2242, subd. 9; Minn. R. 8420.0280.
- K. Enforcement. DNR conservation officers and other peace officers may issue cease and desist and restoration or replacement orders. *See* Minn. Stat. § 103G.2372, subd. 1; Minn. R. 8420.0290, subps. 2-3. Violation of such an order is a misdemeanor. *See* Minn. Stat. § 103G.2372, subd. 2; Minn. R. 8420.0290, subp. 5. The court may order restoration or replacement of the wetland as part of the sentencing. *See* Minn. Stat. § 103G.2372, subd. 3. Under new authority granted by the legislature in 2007, BWSR may now issue administrative penalty orders "requiring violations to be corrected and administratively and assessing monetary penalties of up to \$10,000 per violation. *See* Minn. Stat. 103B.101, subd. 12.
- L. Wetland Banking. Wetland banking is the restoration or creation of wetlands to provide replacement for future wetland impacts. The holder of a wetland banking account receives "credits" that can be applied to future replacement. One credit is awarded for each acre of restored or created wetland. Public value credit will also be awarded in appropriate cases.
1. The state wetland bank was created by WCA and is administered by BWSR. *See* Minn. Stat. § 103G.2242; Minn. R. 8420.0700-.0760. BWSR tracks the deposit, withdrawal, and transfer of credits.
  2. In order to be deposited in the state wetland bank, a wetland banking project must be conducted in accordance with a wetland banking plan approved by the LGU and the credits must be certified for deposit.
  3. The applicant for a wetland banking project must have a fee or easement interest in the wetland bank site. *See* Minn. R. 8420.0740, subp. 1.D. If the applicant has only an easement interest, the fee owner must join in the perpetual conservation easement required to enroll the wetlands in the bank. *See* Minn. R. 8420.0720, subp. 8.
  4. The wetland banking plan must be approved by the LGU before the wetlands are restored or created. *See* Minn. R. 8420.0740, subp. 1.B.
  5. Wetland banking credits may not be deposited in the state wetland bank until the wetlands are established. *See* Minn. R. 8420.0740, subp. 1.I.
  6. The use of wetland banking credits to replace drained or filled wetlands requires approval of a replacement plan by the LGU where the impacted wetland is located.

7. Wetland banking credits deposited in BWSR's bank established under WCA may be deemed eligible to provide mitigation for wetland impacts under the DNR's public waters permit program or the Corps of Engineers program under Section 404 of the federal Clean Water Act ("CWA"). Use of credits for this purpose is subject to approval by the DNR or the Corps of Engineers.

## V. UNITED STATES ARMY CORPS OF ENGINEERS PERMITS.

- A. Overview. Under Section 404(a) of the CWA, a permit must be obtained from the Corps of Engineers for non-exempt discharges of dredged or fill material into "navigable waters." See 33 U.S.C. § 1344(a). "Navigable waters" are defined as "waters of the United States." See 33 U.S.C. § 1362(7) Under Corps of Engineers regulations, "waters of the United States" include "wetlands adjacent to waters." See 33 C.F.R. § 328.3(a)(7).
- B. Jurisdiction. The reach of federal jurisdiction over wetlands has been litigated in two recent and important United States Supreme Court cases:
  1. *Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers*, 531 U.S. 159 (2001) ("SWANCC") (federal jurisdiction did not extend to a non-navigable, isolated, intrastate wetland merely because it provided habitat for migratory birds).
  2. *Rapanos v. United States* 126 S. Ct. 2208 (2006) (highly divided Court vacated and remanded two Michigan cases for determination of whether the wetlands are waters of the United States)
    - a. *Plurality (Scalia, Roberts, Thomas, Alito):* Two findings are necessary for federal jurisdiction: "First that the adjacent channel contains ... a relatively permanent body of water connected to traditional interstate navigable waters . . . and second, that the wetland has a continuous surface connection with that water, making it difficult to determine where the 'water' ends and the 'wetland' begins." 126 S. Ct. at 2227.
    - b. *Concurring in the judgment to vacate and remand (Kennedy):* Federal jurisdiction "depends on the existence of a significant nexus between the wetlands in question and navigable waters in the traditional sense." Furthermore, "wetlands possess the requisite nexus . . . if the wetlands, either alone or in combination with similarly situated lands in the region, significantly affect the chemistry, physical, and biological integrity of other covered waters more readily understood as 'navigable.'" 126 S. Ct. at 2248.

3. Corps of Engineers and Environmental Protection Agency joint guidance provides that jurisdiction will be found if either the plurality's two part or Justice Kennedy's significant nexus test is met. *See Clean Water Act Jurisdiction Following the U.S. Supreme Court's Decision in Rapanos*, [http://www.usace.army.mil/cw/cecwo/reg/cwa\\_guide/cwa\\_guide.htm](http://www.usace.army.mil/cw/cecwo/reg/cwa_guide/cwa_guide.htm).
- C. Wetlands definition. Corps of Engineers regulations, 33 C.F.R. § 328(3) define "wetlands" as follows:
- The term "wetlands" means those areas that are inundated or saturated by surface or ground water at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs, and similar areas.
- D. Boundaries. As in the case of WCA, wetland boundaries are determined in accordance with the 1987 United States Army Corps. of Engineers *Wetland Delineation Manual*, taking into account the three parameters of soils, hydrology, and vegetation.
- E. Exemptions. Activities for which no permit is required are listed in Section 404(f)(1) of the CWA, 33 U.S.C. § 1344(f)(1).
- F. Permit Standards. Standards for the issuance of permits are found in Corps of Engineers and Environmental Protection Agency regulations. *See* 33 C.F.R. pts. 320-32; 40 C.F.R. §§ 230.01-.80. Among other requirements, a discharge will be prohibited "if there is a practicable alternative to the proposed discharge that would have less adverse impact on the aquatic ecosystem." 40 C.F.R. § 230.10(a).
- G. General Permits and Letters of Permission. The St. Paul District of the Corps of Engineers has adopted general permits and a letter of permission process for various projects in Minnesota. These general permits and the letter of permission process replace Corps of Engineers nationwide general permits in Minnesota. *See* St. Paul District website, <http://www.mvp.usace.army.mil/regulatory/>.
- H. New Federal Rule on Compensatory Mitigation. The Corps of Engineers and the Environmental Protection Agency issued revised regulations on compensatory mitigation on March 31, 2008. The rule adopts a "mitigation hierarchy," favoring (in order of preference) wetland banking credits, in lieu fee program credits, on-site and in-kind mitigation, and finally off-site/out-of-kind mitigation. *See* Compensatory Mitigation for Losses of Aquatic Resources, 73 Fed. Reg. 19,594 (April 10, 2008).
- I. Application and Decision Process. Apply in writing to the Corps of Engineers regulatory office. The initial decision is made by the district engineer or a person designated by the district engineer.

- J. Administrative Appeals and Judicial Review. Permit decisions may be appealed administratively to the district engineer. *See* 33 C.F.R. § 331.6(a). Judicial review is in federal district court and is typically conducted on the administrative record.
- K. Enforcement. The Corps of Engineers and the Environmental Protection Agency have authority for a variety of administrative orders and penalties. *See* 33 U.S.C. §§ 1319, 1344(s). Civil penalties of up to \$25,000 per day may be available in judicial proceedings. *See* 33 U.S.C. § 1319. Criminal enforcement is also a possibility.

**VI. SOURCES FOR ADDITIONAL INFORMATION.**

- A. DNR: <http://www.dnr.state.mn.us/permits/water/index.html>
- B. BWSR: <http://www.bwsr.state.mn.us/wetlands/index.html>
- C. Corps of Engineers, St. Paul District: <http://www.mvp.usace.army.mil/regulatory/>