

# ***WETLANDS REGULATION IN MINNESOTA***

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Note: When viewed electronically, this document contains [hyperlinks](#) to a variety of references and sources of additional information.



## **INTRODUCTION**

### **I. THIS IS A BASIC INTRODUCTION TO WETLANDS REGULATION IN MINNESOTA**

#### **A. Major Topics**

1. Overview of Wetlands And Wetlands Regulation.
2. Basic Features Of The Three Major Regulatory Programs In Minnesota, Including Recent Developments Under Amended Statutes And Rules.
3. Obtaining A Permit Through The Combined Application Process.

#### **B. Simplified Summary Only**

The statutes and rules pertaining to wetlands regulation are highly detailed and contain many requirements and exceptions that cannot be discussed here. Consult the statutes and rules to determine the requirements that apply in any actual case. Minnesota statutes are available at: <http://www.leg.state.mn.us/leg/statutes.asp>. Minnesota rules are available at: <http://www.revisor.leg.state.mn.us/forms/getrule.shtml>. Applicable federal regulations and statutes can be found at: <http://www.epa.gov/owow/wetlands/regs.html>.



## **OVERVIEW OF WETLANDS AND WETLANDS REGULATION IN MINNESOTA<sup>1</sup>**

### **I. WHAT ARE WETLANDS?**

#### **A. Variety of Wetlands**

Wetlands include a great variety of areas, ranging from the classic duck pond fringed by cattails to areas that look quite different and may even have no surface water for all or part of the year.

#### **B. Three Factors**

Each regulatory program has its own specific regulatory definition of wetlands. However, generally speaking, wetlands are identified by three factors:

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<sup>1</sup> This section is based in part upon, and includes language from, materials prepared by the Minnesota Board of Water and Soil Resources, available at <http://www.bwsr.state.mn.us/wetlands/publications/index.html>.

1. **Soils.** Wetlands have mostly hydric soils. These are soils that developed in wet conditions.
2. **Hydrology.** Wetlands have standing water or saturated soil for at least part of the growing season.
3. **Vegetation.** Wetlands have vegetation adapted to wet soil conditions.

### C. Wetland Types

Wetlands are classified into different types. There are two main classification systems in use in Minnesota regulatory programs:

1. **Circular 39.** The Circular 39 system, developed by the U.S. Fish and Wildlife Service in 1956, divides wetlands in Minnesota into eight types. See [Wetlands of the United States, U.S. Fish and Wildlife Circular 39 \(1971 ed.\)](#). See also Minn. Stat. § 103G.005, subd. 17b.
2. **Cowardin et al.** The Cowardin classification, developed by the U.S. Fish and Wildlife Service in 1979 is more precise than Circular 39 and can be used to classify sub-portions of a wetland. See Lewis M. Cowardin et. al., [Classification of Wetlands and Deepwater Habitats of the United States](#), U.S. Fish and Wildlife Service (1979).

### D. Wetland Boundaries

A wetland delineation is a determination of the jurisdictional boundary of a wetland. Under the Minnesota Wetland Conservation Act and the Corps of Engineers Section 404 Program, delineations are conducted using the 1987 United States Army Corps of Engineers [Wetland Delineation Manual](#) (caution: large file). Delineations using this manual are prepared on the basis of field work, taking into account the three parameters of soils, hydrology, and vegetation. Under the DNR Public Waters Permit Program, the jurisdictional boundary of a wetland is the Ordinary High Water Level (OHWL). Information on determining the OHWL can be found in "[Guidelines for Ordinary High Water Level \(OHWL\) Determinations](#)," Minn. Department of Natural Resources (1993).

## II. WHY ARE WETLANDS PROTECTED?

### A. Benefits

Wetlands provide a variety of benefits, including the following:

1. **Water Quality.** Wetlands filter and absorb polluted surface water runoff before it enters lakes and rivers downstream.
2. **Flood Control And Low Flow Augmentation.** Wetlands serve as holding areas for water. When rainfall is heavy, wetlands slow the waters, reducing flood

damage and soil erosion downstream. During drought, water stored in wetlands maintains stream flows and may help recharge groundwater.

3. **Fish And Wildlife Habitat.** Wetlands provide homes and feeding areas for many species of fish and wildlife.
4. **Education And Recreation.** Wetlands offer opportunities for education and recreation.
5. **Commercial Benefits.** Wetlands are used for development of specialty products such as vegetable farming, peat mining, sod farming, minnow harvesting, and timber harvesting.

#### **B. Legislative Findings**

The Minnesota Legislature found that wetlands provide public value and adopted a policy of promoting no net loss of wetlands. See Minn. Stat. § 103A.201, subd. 2(b).

#### **C. Regulations**

Federal and state regulatory agencies have adopted regulations that specify the important public functions served by wetlands. See 33 C.F.R. § 320.4(b)(2) (Corps of Engineers regulations on functions important to the public interest served by wetlands); Minn R. 8420.0103 (Board of Water and Soil Resources rules on wetland functions for determining public values).

#### **D. Courts**

Minnesota appellate decisions recognize the importance of wetlands and the strong state policies in favor of wetland protection. See, e.g., Application of Christenson, 417 N.W.2d 607, 615 (Minn. 1987) (“[v]anishing wetlands require . . . protection and preservation”); County of Freeborn by Tuveson v. Byrson, 243 N.W.2d 316, 322 (Minn. 1976) (wetlands “are something to protect and preserve”); Application of Central Baptist Theological Seminary, 370 N.W.2d 642, 649 (Minn. Ct. App. 1985) (“[w]etlands provide a unique natural ecosystem because they are capable of supporting a greater diversity of life than other habitats”).

### **III. WHAT IS THE EXTENT OF WETLANDS IN MINNESOTA TODAY?**

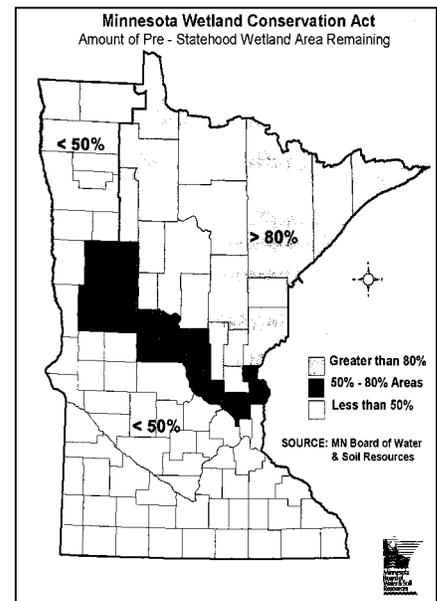
#### **A. Wetland Loss**

Prior to statehood, about 18.6 million of Minnesota’s 53.6 million acres were wetlands. Today, only about half of Minnesota’s pre-statehood wetlands remain. In some counties, almost all of the pre-statehood wetlands have been drained.

#### **B. Three Types Of Areas**

The Wetland Conservation Act divides Minnesota counties and watersheds into three types:

1. **Less Than 50 Percent Area.** A county or watershed with less than 50 percent of the presettlement wetland area intact. See Minn. R. 8420.0110, subp. 29a; Minn. R. 8420.0545.B.
2. **50 percent To 80 percent Area.** A county or watershed with at least 50 percent but less than 80 percent of the presettlement wetland area intact. See Minn. R. 8420.0110, subp. 18a; Minn. R. 8420.0545.C.
3. **Greater Than 80 Percent Area.** A county or watershed with more than 80 percent of the presettlement wetland area intact. See Minn. R. 8420.0110, subp. 20a; Minn. R. 8420.0545.A.



### C. Maps

National Wetland Inventory (“NWI”) maps prepared by the U.S. Fish and Wildlife Service show many of the wetlands within the state but are not deemed to be complete and do not accurately depict wetland boundaries. Nonetheless, the NWI maps are a very useful source of information and may provide a general indication of whether a wetland is or may be present on a site. The NWI maps are available at [http://www.nwi.fws.gov/mapper\\_tool.htm](http://www.nwi.fws.gov/mapper_tool.htm) and can also be obtained from Minnesota’s Bookstore (toll free 1-800-657-3757; metro 651-297-3000).

## IV. THREE (AND MORE) REGULATORY PROGRAMS WITH OVERLAPPING JURISDICTION

### A. Overlapping Jurisdiction

Wetlands in Minnesota are regulated under a variety of local, state, and federal programs. Oftentimes two or more of these programs cover the same wetland. In some cases, various portions of the same wetland will be regulated by different programs.

### B. Three Major Programs

The three major wetland regulatory programs of statewide importance are the Department of Natural Resources Public Waters Work Permit Program, the Wetland Conservation Act, and the federal Section 404 permit program administered by the United States Army Corps of Engineers. These programs are discussed in greater detail below.

## C. And More

There are a variety of additional laws relating to wetlands that may be highly important depending upon the circumstances. Even if approval is obtained under the three major programs described in this outline, additional approvals may be required under other programs. Some of the important additional laws include, but are not limited to the following:

### 1. Federal.

- a. Food Security Act of 1985, as amended (“Swampbuster”), 16 U.S.C. §§ 3821-24.
- b. Endangered Species Act, 16 U.S.C. § 1536.
- c. National Environmental Policy Act (“NEPA”), 42 U.S.C. § 4321, et seq.

### 2. State.

- a. Minnesota Environmental Policy Act (“MEPA”), Minn. Stat. ch. 116D.
- b. Minnesota Environmental Rights Act (“MERA”), Minn. Stat. ch. 116B.

### 3. Local.

- a. Watershed District Rules, see Minn. Stat. ch. 103D.
- b. Shoreland and Floodplain Ordinances, see Minn. Stat. ch. 103F.
- c. Municipal Wetlands Ordinances.



## **DEPARTMENT OF NATURAL RESOURCES PERMITS**

### I. OVERVIEW – MINNESOTA DNR PUBLIC WATERS PERMIT PROGRAM (MnDNR PWPP)

#### A. Public Waters Regulation

Work in public waters has been regulated by the Minnesota Department of Natural Resources (“DNR”) or its predecessor the Department of Conservation since 1937. See generally Application of Christenson, 417 N.W. 2d 607, 609 (Minn. 1987).

#### B. Public Waters Wetlands

In 1979, the legislature expressly identified “public waters wetlands” as a category of public waters. See 1979 Minn. Laws ch. 199, § 3. See generally Application of Christenson, 417 N.W.2d 607, 609 (Minn. 1987).

**C. Basic Rule**

The basic rule is that a public waters work permit must be obtained from the DNR for work affecting the course, current, or cross-section of public waters, including public waters wetlands. See Minn. Stat. § 103G.245, subd. 1(2). This would include, for example, work involving the draining, filling, excavating, and placing structures in public waters wetlands. See id.; Minn. R. 6115.0190, .0200, .0210.

**D. Statutes and Rules**

The statutes pertaining to public waters work permits are found in Minn. Stat. ch. 103G. DNR’s administrative rules for the program are found in Minn. R. ch. 6115.

**E. “Public Waters Wetlands” vs. “Wetlands”**

In reading Minn. Stat. ch. 103G, it is important to distinguish between those provisions that refer to “public waters wetlands” which are regulated as public waters under DNR’s public waters permits program and those provisions that refer to “wetlands” which are regulated under the Wetland Conservation Act.

**II. REGULATED WETLANDS -- MNDNR PWPP**

**A. 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 Service 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.

**B. Inventory 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. See generally Application of Christenson, 417 N.W.2d 607, 609 (Minn. 1987). These maps do not show precise wetland locations or boundaries. The maps are filed with the auditor of each county and can be viewed at:

[http://www.dnr.state.mn.us/waters/watermgmt\\_section/pwi/download.html](http://www.dnr.state.mn.us/waters/watermgmt_section/pwi/download.html)

Hard copies are available from Minnesota’s Bookstore (toll free 1-800-657-3757; metro 651-297-3000).

- 1. Reclassification.** Under new authority, DNR now has the ability to reclassify public waters wetlands as public waters or as Wetland Conservation Act wetlands. See Minn. Stat. § 103G.201(b)-(d).

### **C. Boundary Determinations**

Pursuant to Minn. Stat. § 103G.005, subd. 14, the boundary of public waters, including public waters wetlands, is the ordinary high water level (OHWL), defined 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.

Information on determining the OHWL can be found in “[Guidelines for Ordinary High Water Level \(OHWL\) Determinations](#),” Minn. Department of Natural Resources (1993).

## **III. ACTIVITY NOT REQUIRING A PERMIT -- MNDNR PWPP**

### **A. Statutes**

A permit is not required for certain work relating to public drainage systems. See Minn. Stat. § 103G.245, subd. 2.

### **B. Rules**

DNR’s rules authorize a variety of activities that may be conducted in public waters without a permit. For example, a boat dock is allowed without a permit under specified conditions. See Minn. R. 6115.0210, subp. 4.A. For each category of activity (e.g., filling into public waters, excavation of public waters, structures in public waters, etc.), consult the rules to determine work that does not require a permit. See, e.g., Minn. R. 6115.0190, .0200, .0210.

## **IV. PERMIT STANDARDS -- MNDNR PWPP**

### **A. Statutes**

Minnesota Statutes provide that DNR will grant the permit “if the plans of the applicant are reasonable, practical, and will adequately protect public safety and promote the public welfare.” Minn. Stat. § 103G.315, subd. 3.

### **B. Rules**

DNR’s rules specify general and specific standards that apply to the evaluation of permits for each type of activity. See Minn. R. 6115.0190-.0232, 0270-.0280.

### **C. Prohibited Activities**

DNR’s rules specify certain activities that are prohibited and for which a permit will not be granted. For example, DNR’s rules on filling prohibit the filling of public waters wetlands to create upland areas, except in the very limited circumstances where expressly provided. See Minn. R. 6115.0190, subp. 3.B.

## V. DNR WAIVER OF PERMIT REQUIREMENT FOR PROJECTS REGULATED BY LOCAL GOVERNMENT UNIT -- MNDNR PWPP

### A. Waiver Authority

Under new authority granted by the Legislature in 2000 and expanded in 2001, DNR may waive the requirement of a public waters work permit for projects within public waters wetlands that will be regulated under Wetland Conservation Act standards. See Minn. Stat. § 103G.245, subd. 5(b). See also Minn. R. 6115.0250, subp. 5.D.

1. **Decision To Waive.** Within 15 days after receiving permit application, DNR decides if it will waive permit jurisdiction to the Wetland Conservation Act local government unit. See Minn. R. 6115.0250, subp. 5.D(1).
2. **Wetland Conservation Act Controls.** If DNR waives, the local government unit administering the Wetland Conservation Act regulates the impact under Wetland Conservation Act standards. See Minn. R. 6115.0250, subp. 5.D(1).
3. **Waiver Not Allowed.** DNR may not waive permit jurisdiction for certain categories of impacts:
  - a. activities that fall under a Wetland Conservation Act exemption, except the de minimis exemption;
  - b. activities in public waters wetlands assigned a shoreland classification;
  - c. activities in public waters wetlands classified as lacustrine or deep water habitats under the Cowardin system; or
  - d. activities in certain public waters wetlands where the state or the federal government has become the owner of a portion of the bed or the shore.

See Minn. R. 6115.0250, subp. 5.D(2).

### B. Public Roads

There are additional provisions pertaining to waiver of DNR permit jurisdiction in certain circumstances for work on public roads authorized by the Wetland Conservation Act. See Minn. R. 6115.0250, subps. 5.E, 6.

## VI. APPLICATION PROCESS -- MNDNR PWPP

### A. Combined Application Form

Apply by submitting application form to DNR Division of Waters at the local or regional office for the area where project is located. See Minn. R. 6115.0240, subp. 1. Use the Minnesota Local/State/Federal Application Forms for Water/Wetland Projects (“Combined Application Form”), available at: <http://www.dnr.state.mn.us/waters/forms.html>.

1. **All Necessary Information.** The application must include all information necessary to show basis for permit. See Minn. R. 6115.0240, subp. 3. Copies must be served on the city, watershed district, or soil and water conservation district if applicable. See id.

## **B. Review Of Application And Initial Decision**

The application is reviewed by the DNR Area or Regional Hydrologist. Generally, the initial decision on granting or denying a permit is made by Area or Regional Hydrologist, depending upon nature and scope of project. The initial decision by staff is usually made without a hearing, but there is authority for DNR to hold a contested case hearing prior to acting on a permit application in appropriate cases. See Minn. Stat. § 103G.311.

## **VII. ADMINISTRATIVE HEARINGS AND JUDICIAL REVIEW -- MNDNR PWPP**

### **A. Contested Case Hearing**

A contested case hearing may be demanded after the initial grant or denial of the permit by DNR staff. See Minn. Stat. § 103G.311, subd. 5.

1. **Standing.** A hearing may be demanded by the applicant, the managers of the watershed district, the board of supervisors of the soil and watershed district, or the mayor of the municipality. See Minn. Stat. § 103G.311, subd. 5.
2. **Timing.** The hearing must be demanded within 30 days after mailed notice of the order of the decision by DNR staff, and a bond is required unless the party demanding the hearing is a public authority. See Minn. Stat. § 103G.311, subsd. 5, 6.
3. **Hearing and Recommendation.** The hearing is conducted by an administrative law judge as a contested case hearing under Chapter 14 of Minnesota Statutes. See Minn. Stat. § 103G.311, subd. 1. The applicant for the permit has the burden of proving by a preponderance of the evidence that the permit should be granted. Minn. R. 1400.7300, subp. 5. Following the contested case hearing, the administrative law judge makes findings and conclusions and a recommendation to the Commissioner of Natural Resources on granting or denying the permit.
4. **Final Agency Decision.** The final agency decision is made by the Commissioner on the basis of the record.

### **B. Judicial Review**

Judicial review of the final DNR permit decision is in the Court of Appeals. See Minn. Stat. § 14.63.

1. **Standard Of Review.** The Commissioner's findings will be upheld if supported by substantial evidence in view of the entire record. See Minn. Stat § 14.69. In determining whether the Commissioner's findings are supported by substantial evidence, appellate courts grant deference to the Commissioner. See Application of Central Baptist Theological Seminary, 370 N.W.2d 642, 648 (Minn. Ct.

App. 1985) (“[w]e recognize an agency decision enjoys a presumption of correctness and we should defer to its expertise”).

## VIII. ENFORCEMENT -- MNDNR PWPP

### A. Criminal Prosecution

Work affecting public waters without a permit is a misdemeanor. See Minn. Stat. § 103G.141, subd. 1.

### B. Restoration Order

The Commissioner may issue a restoration order to require the restoration public waters altered without or in violation of a permit. Minn. Stat. § 103G.251, subd. 2.

1. **Finality.** The Commissioner’s order is final unless demand for hearing filed within 30 days after service. See Minn. Stat. § 103G.251, subd. 2(e).
2. **Hearing.** The hearing is conducted as a contested case in same manner as hearing on grant or denial of a permit. Minn. Stat. § 103G.251, subd. 2(c)-(d).
3. **Civil Action.** A restoration order is enforced by action for injunction in district court. See Minn. Stat. § 103G.135.

### C. Cease And Desist And Restoration Or Replacement Order Procedure

Under a new enforcement mechanism authorized by the Legislature in 2000, DNR conservation officers and other peace officers may issue cease and desist and restoration or replacement orders for illegal activity adversely affecting public waters. See Minn. Stat. § 103G.2372, subd. 1; Minn. R. 6115.0255, subps. 3-4.

1. **Violation A Misdemeanor.** Violation of a cease and desist or restoration or replacement order is a misdemeanor. See Minn. Stat. § 103G.2372, subd. 2. The court may require a person convicted of violating a cease and desist or restoration or replacement order to restore or replace the public waters. See Minn. Stat. § 103G.2372, subd. 3.
2. **Recording Restoration and Replacement Orders.** Restoration or replacement orders may be recorded or filed in the office of the county recorder or registrar of titles, as appropriate, in the county where the real property is located by the commissioner of natural resources, conservation officers, or peace officers as a deed restriction on the property that runs with the land and is binding on the owners, successors, and assigns until the conditions of the order are met or the order is rescinded. See Minn. Stat. § 103G.2372, subd. 1.



# **WETLAND CONSERVATION ACT DETERMINATIONS**

## **I. OVERVIEW – WETLAND CONSERVATION ACT (WCA)**

### **A. Wetland Conservation Act of 1991**

The Minnesota Legislature adopted the Wetland Conservation Act (WCA) in 1991 to protect wetlands not protected under DNR’s public waters permit program and provide no net loss of Minnesota’s remaining wetlands. See 1991 Minn. Laws ch. 354, as amended.

### **B. Statutes and Rules**

The WCA is codified as amended at Minn. Stat. §§ 103G.222-.2372 and in other scattered sections. Rules adopted by the Minnesota Board of Water and Soil Resources (BWSR) appear in Chapter 8420 of Minnesota Rules.

### **C. Basic Rule**

The basic requirement is that “[w]etlands must not be drained or filled, wholly or partially, unless replaced by restoring or creating wetland areas of at least equal public value under a[n approved] replacement plan.” Minn. Stat. § 103G.222, subd. 1(a).

- 1. Excavation.** As a result of legislation adopted in 2000, the WCA also applies to excavation in permanently and semipermanently flooded areas of types 3, 4, and 5 wetlands. See Minn. Stat. §103G.222, subd. 1.

### **D. “Wetlands” vs. “Public Waters Wetlands”**

In reading Minn. Stat. ch. 103G, it is important to distinguish between those provisions that refer to “wetlands” which are regulated under the WCA and those provisions that refer to “public waters wetlands” which are regulated as public waters under DNR’s Public Waters Permit Program (see II.A. on page 6).

### **E. Shared Responsibility**

Responsibility for administration of the WCA is shared by both local and state government. The local government unit (“LGU”) is responsible for making the initial regulatory determinations for the program. BWSR promulgates administrative rules for the program, provides training to LGUs, participates on technical evaluations panels, hears appeals from local government determinations, and assures proper implementation by LGUs. DNR conservation officers issue enforcement orders. For projects on state land, the agency with administrative responsibility for the land is responsible for administering the WCA.

### **F. “Determinations” Not “Permits”**

No “permits” are required under the WCA. Instead, the landowner applies for and receives a formal “determination” by the LGU:

1. **Replacement Plan Determination.** Determination whether proposed replacement plan is acceptable. See Minn. Stat. § 103G.2242, subd. 1; Minn. R. 8420.0230. See Minn. R. 8420.0230.
  - a. If replacement is required, the landowner must obtain prior approval for a replacement plan from the LGU. See Minn. R. 8420.0230.
2. **Exemption Determination.** Determination whether proposed activity is exempt from the WCA's replacement requirements. See Minn. Stat. § 103G.2242, subd. 4; Minn. R. 8420.0210.
  - a. If an activity is exempt, the landowner may proceed without first obtaining an exemption determination, but obtaining a prior determination is advisable in many cases. See Minn. R. 8420.0210.
3. **No-Loss Determination.** Determination whether activity will result in no loss of wetlands. See Minn. Stat. § 103G.2242, subd. 4; Minn. R. 8420.0220.
  - a. If an activity will result in no loss of wetlands, the landowner may proceed without first obtaining a no-loss determination. However, a no-loss determination may be helpful if there is potential for dispute over whether a project is in or affects wetlands. See Minn. R. 8420.0220.
4. **Wetland Boundary Or Type Determination.** Determination of boundary or type of wetland. See Minn. Stat. § 103G.2242, subd. 2a; Minn. R. 8420.0225.
5. **Banking Determination.** Determination whether restored or created wetland may be deposited in state wetland bank to provide wetland banking credits. See Minn. Stat. § 103G.2242, subd. 4.

## II. REGULATED WETLANDS -- WCA

### A. All Wetlands That Are Not Regulated by DNR

The WCA applies to all wetlands, 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).

### B. Calcareous Fens

Calcareous fens, a rare type of wetland, are regulated under the WCA but the responsibility for their regulation is assigned to the DNR. Any alteration to a calcareous fen must be approved by the commissioner as specified in a management plan. See Minn. R. 8420.1010 – 1070.

### C. Definition

“Wetlands” regulated under the WCA are defined in Minn. Stat. § 103G.005, subd. 19:

“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) be inundated or saturated by surface water 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 hydrophytic vegetation.

#### **D. Not Mapped**

In contrast to public waters wetlands regulated under the Public Waters Permits Program, there is no comprehensive inventory or map of wetlands regulated by the WCA, although the [NWI maps](#) prepared by the U.S. Fish and Wildlife Service provide some general indication of the location and type of many wetlands.

#### **E. Boundaries**

Boundary determined by delineation in accordance with the 1987 United States Army Corp. of Engineers [Wetland Delineation Manual](#) (caution: large file). See Minn. R. 8420.0110, subp. 52.D.

### **III. EXEMPTIONS -- WCA**

#### **A. Ten Categories**

The WCA specifies 10 categories of exempt drain and fill activities. See Minn. Stat. § 103G.2241; Minn. R. 8420.0122.

- 1. Examples.** Notable exemptions include exemptions for certain agricultural activities, maintenance of existing public and private drainage systems (with some restrictions), public utilities, public road maintenance, etc.

#### **B. De Minimis**

There is a “de minimis” exemption for activities impacting 400 square feet or less of wetlands. See Minn. Stat. § 103G.2242, subd. 9(a); Minn. R. 8420.0122, subp. 9.A. There are other de minimis exemptions ranging from 2,000 to 10,000 square feet depending upon wetland type and location. See Minn. Stat. § 103G.2242, subd. 9(a); Minn. R. 8420.0122, subp. 9.A.

#### **C. Appellate Decisions**

The Minnesota Court of Appeals has construed WCA exemptions in a number of decisions. Most of these cases have involved issues of agricultural drainage. See [Zaluckyj v. State of Minnesota, Dept. of Natural Res.](#), 639 N.W.2d 70 (Minn. Ct. App. 2002) (federal approvals and drainage exemptions); [Minnesota Ctr. for Env'tl. Advocacy v. Big Stone County Bd. of Comm'rs](#), 638 N.W.2d 198 (Minn. Ct. App. 2002)

(federal approvals and drainage exemptions); Hentges v. Minnesota Bd. of Water and Soil Res., 638 N.W.2d 441 (Minn. Ct. App. 2002) (federal approvals and drainage exemptions); Drum v. Minnesota Bd. of Water and Soil Res., 574 N.W.2d 71 (Minn. Ct. App. 1998) (incidental wetlands and drainage exemptions); McLeod County Bd. of Comm'rs v. Minnesota Dept. of Natural Res., 549 N.W.2d 630 (Minn. Ct. App. 1996) (drainage exemption).

#### IV. REPLACEMENT PLAN STANDARDS -- WCA

##### A. Replacement Plan Required

If an activity is not exempt, the impacted wetlands must be replaced under a replacement plan approved by the LGU.

##### B. Sequencing

The replacement plan applicant must demonstrate compliance with “sequencing.” See Minn. R. 8420.0520. Specifically, the applicant must demonstrate that:

1. **Avoid.** Wetland impacts have been avoided as much as possible.
2. **Minimize.** To the extent wetland impacts cannot be avoided, the impacts have been minimized.
3. **Replace.** Unavoidably impacted wetlands have been replaced by restoring or creating wetlands of equal or greater public value.

See generally Board Order, Kells (BWSR) v. City of Rochester, 597 N.W.2d 332 (Minn. Ct. App. 1999) (landowner failed to demonstrate compliance with WCA sequencing requirements).

##### C. Replacement Plan Requirements

The rules contain numerous specific requirements as to the location, size, and type, etc. of replacement wetlands. See Minn. R. 8420.0540-.0550. In brief summary, some of the major requirements include the following:

1. **Type.** Replacement may be provided by wetland restoration or creation. Restoration is preferred over creation. See Minn. R. 8420.0540, subp. 2.A.
2. **Location.** On-site is preferred over off-site replacement. If not, on-site, then the replacement site typically must be in the same or adjacent watershed or county, with some exceptions for impacts in “greater than 80% areas” (page 4) and for public transportation projects. See Minn. R. 8420.0543.A.
3. **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.
4. **Size.** The minimum replacement ratio is generally two acres of replacement wetland for each acre of impacted wetland. See Minn. R. 8420.0546. For

wetlands on agricultural land or in counties where 80% or more of presettlement wetlands exist, the minimum replacement is one acre of replacement wetland for each acre of impacted wetland. See id.

5. **Public Value Credit.** Establishment or preservation of upland buffer areas contiguous to replacement wetlands, restoration of partially drained wetlands, and creation of stormwater detention areas may receive “public value” credit under certain circumstances and be used for the portion of replacement required above a one-to-one ratio. See Minn. R. 8420.0541, subp. 6.

**D. Local Comprehensive Protection and Management Plans.**

When approved by BWSR, a LGU may make replacement plan determinations on the basis of a local comprehensive wetland protection and management plan. See Minn. R. 8420.0650. The plan is implemented by local ordinance and provides alternative standards to BWSR’s rules. See id.

**V. APPLICATION PROCESS - WCA**

**A. Combined Application Form**

Use the Combined Application Form, available at: <http://www.bwsr.state.mn.us/wetlands/wca/updatedforms/index.html>. Applicant must provide all supporting data. See Minn. R. 8420.0530.

**B. Technical Evaluation Panel**

The technical evaluation panel (“TEP”) will typically make technical findings and recommendations to the LGU. See Minn. R. 8420.0240. The TEP consists of three technical professionals appointed by the LGU, BWSR, and the local soil and water conservation district. See Minn. R. 8420.0240. For projects impacting or adjacent to public waters or public waters wetlands, the TEP also includes a technical professional employee of the DNR. Id.

**C. Delegation**

The LGU may delegate authority for exemption, no-loss, wetland boundary and type, replacement plan, and wetland banking determinations to LGU staff, provided there is a procedure for appeal with a public hearing at the local level. Minn. R. 8420.0200, subp. 2.B.

**D. Time Limit For Decision**

The LGU’s determination must be made in accordance with Minn. Stat. § 15.99, which typically requires a decision within 60 days of receipt of a complete application unless extended. See Minn. Stat. § 103G.2242, subd. 4. See generally Hentges v. Minnesota Bd. of Water and Soil Res., 638 N.W.2d 441 (Minn. Ct. App. 2002) (watershed district decision in compliance with Minn. Stat. § 15.99).

## **VI. ADMINISTRATIVE APPEALS AND JUDICIAL REVIEW - WCA**

### **A. Appeal To BWSR**

The LGU determination is final if not appealed in writing to BWSR within 30 days of mailing of notice of decision. Minn. Stat. § 103G.2242, subd. 9; Minn. R. 8420.0250, subp. 1.

### **B. Standing**

The parties eligible to appeal are the landowner, any of those required to receive notice of the decision, or 100 residents of the county. See Minn. R. 8420.0250, subp. 1. See generally Hentges v. Minnesota Bd. of Water and Soil Res., 638 N.W.2d 441 (Minn. Ct. App. 2002) (civic and environmental groups could participate in appeal from watershed district's decision); Board Order, Kells (BWSR) v. City of Rochester, 597 N.W.2d 332 (Minn. Ct. App. 1999) (TEP member who was an employee of BWSR had standing to appeal the city's decision).

### **C. Decision To Accept Appeal And Stay**

BWSR may deny a petition for appeal on a variety of grounds, including failure to exhaust local administrative remedies. See Minn. R. 8420.0250, subp. 3. The board or its executive director may stay the LGU decision until the appeal is resolved. See id.

### **D. Review On Record**

BWSR reviews local government determination on the basis of the LGU record. See Minn. R. 8420.0250, subp. 3. See generally Board Order, Kells (BWSR) v. City of Rochester, 597 N.W.2d 332 (Minn. Ct. App. 1999) (upholding BWSR's appeal procedures, including use of five-member dispute resolution committee to review city's decision).

### **E. Standard Of Review**

The standard for review of LGU determinations is stated in Minn. R. 8420.0250, subp. 3. BWSR will affirm the LGU's findings of fact if not clearly erroneous. See id.

### **F. Judicial Review**

BWSR's decision is subject to review in the Court of Appeals by writ of certiorari under Minn. Stat. §§ 14.63-.69. See Minn. Stat. § 103G.2242, subd. 9; Minn. R. 8420.0280. Exhaustion of administrative remedies is required before pursuing judicial review. See Zaluckyj v. State of Minnesota, Dept. of Natural Res., 639 N.W.2d 70 (Minn. Ct. App. 2002), rev. denied, (Apr. 16, 2002).

## VII. ENFORCEMENT - WCA

### A. Cease And Desist And Restoration or Replacement Orders

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.

- 1. Rescission.** Cease and desist and restoration or replacement orders will be rescinded if landowner obtains a no-loss, exemption, or replacement plan determination from the LGU. See Minn. R. 8420.0290, subps. 2-3.
- 2. Violation A Misdemeanor.** Cease and desist and restoration or replacement orders are not criminal charges; however, violation of a cease and desist or restoration or replacement order is a misdemeanor. See Minn. Stat. § 103G.2372, subd. 2; Minn. R. 8420.0290, subp. 5. See generally State v. Drum, No. CX-92-922, 1998 WL 170118 (Minn. Ct. App. Apr. 14, 1998) (unpublished decision) (upholding conviction for violation of WCA cease and desist order). The court may order restoration or replacement of the wetland as part of the sentencing. See Minn. Stat. § 103G.2372, subd. 3.
- 3. Recording Restoration and Replacement Orders.** Restoration or replacement orders may be recorded or filed in the office of the county recorder or registrar of titles, as appropriate, in the county where the real property is located by the commissioner of natural resources, conservation officers, or peace officers as a deed restriction on the property that runs with the land and is binding on the owners, successors, and assigns until the conditions of the order are met or the order is rescinded. See Minn. Stat. § 103G.2372, subd. 1.
- 4. Civil Enforcement.** Cease and desist and restoration or replacement orders may also be enforced civilly by action for injunction in district court. See Minn. Stat. § 103G.135.

## VII. WETLAND BANKING - WCA

### A. Overview

Rather than providing for the restoration or creation of a wetland to mitigate the impacts of the project, a replacement plan may provide for the use of credits from the state wetland bank operated by BWSR. Credits may be purchased from holders of accounts in the bank.

### B. Wetland Banking Plan

In order to be deposited in the state wetland bank, a wetland must be restored or created under a wetland banking plan approved in advance by the LGU. See Minn. R. 8420.0740, subp. 1. Upon completion of the required work, the LGU determines the number and type of credits to be received. See id. Additional requirements for deposit

include the recording of a perpetual conservation easement against the property where the wetland has been restored or created. See Minn. R. 8420.0720, subp. 8.

**C. Credits**

Generally, one wetland banking credit is accorded per acre of restored or created wetland. Each credit will be of a specific type, depending on the type of wetland that is restored or created. See Minn. R. 8420.0740, subp. 1.K(4). Credits may provide either new wetland credit or public value credit. See id.

**D. Transactions**

Replacement plan applicants may purchase the required banking credits from account holders. See Minn. R. 8420.0740, subp. 2.E. The price is determined through negotiation between the buyer and seller. The use of wetland banking credits to provide replacement in connection with a particular project must be approved by the LGU as part of the replacement plan. See Minn. R. 8420.0740, subp. 2.G. An agreement for the purchase of credits may be contingent upon approval of a replacement plan.

**E. Holding For Later Use Or Resale**

An individual or entity may buy and hold wetland banking credits for later use or resale. See Minn. R. 8420.0740, subp. 2.I. Transfer must be accomplished through use of a BWSR transfer form and reflected in the records of the state wetland bank. See id.



## **UNITED STATES ARMY CORPS OF ENGINEERS PERMITS**

**I. OVERVIEW – CORPS OF ENGINEERS (COE) SECTION 404**

**A. Permit Required**

A permit must be obtained from the United States Army Corps of Engineers for non-exempt discharges of dredged or fill material into waters of the United States, including jurisdictional wetlands. The program is administered in conjunction with United States Environmental Protection Agency.

**B. Statutes and Rules**

Statutory authority is provided by Section 404(a) of the Clean Water Act (“CWA”), 33 U.S.C. § 1344(a) (requirement to obtain permit from Secretary of Army) and Section 10 of the Rivers and Harbors Act, 33 U.S.C. § 403. The Corps of Engineers Wetlands Regulations appear at 33 C.F.R. pts 320-31. Applicable federal regulations and statutes can be found at: <http://www.epa.gov/owow/wetlands/regs.html>

## II. REGULATED WETLANDS – COE SECTION 404

### A. Wetlands Adjacent to Waters

Section 404(a) of the Clean Water Act requires a permit for discharges into “navigable waters.” See CWA § 404(a), 33 U.S.C. §1344(a). Section 502(7) of the Clean Water Act defines “navigable waters” as “waters of the United States.” See CWA § 502(7), 33 U.S.C. § 1362 (7). Under Corps of Engineers regulations, “waters of the United States” include “wetlands adjacent to waters.” 33 C.F.R. § 328.3(a)(7).

### B. Definition

Corps of Engineers regulations, 33 C.F.R. §328.3(b), 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.

### C. Boundaries

The Corps of Engineers uses the 1987 edition of the federal [Wetland Delineation Manual](#) (caution: large file) to determine wetland boundaries.

### D. SWANCC And Isolated Wetlands

In a landmark decision, the United States Supreme Court recently addressed the issue of whether the Clean Water Act extends to non-navigable, isolated, intrastate wetlands. See Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers, 531 U.S. 159 (2001) (“SWANCC”). The Court found that jurisdiction would not extend to an isolated wetland solely because it provided habitat for migratory birds. the Corps of Engineers and Environmental Protection Agency issued a joint legal opinion on SWANCC and its impact on the definition of “waters of the United States” in agency regulations. See Memorandum from Gary S. Guzy and Robert M. Anderson, available at <http://www.spk.usace.army.mil/pub/outgoing/co/reg/SWANCC.pdf>. The Corps and EPA have also proposed to revise federal regulations to incorporate the SWANCC decision and have published interim guidance to field staff for determining federal jurisdiction. These can be viewed at:

<http://www.usace.army.mil/inet/functions/cw/cecwo/reg/ANPRMwaters.pdf>

## III. EXEMPTIONS – COE SECTION 404

### A. No Permit Required

Section 404(f)(1) of the Clean Water Act, 33 U.S.C. §1344(f)(1), specifies a number of activities that are not regulated and for which no Corps of Engineers permit is necessary. These exemptions are for normal farming activities, temporary sedimentation basins on construction sites, forest roads, and other listed activities. The courts construe the exemptions narrowly.

## **B. Recapture Exception**

Under the “recapture clause,” CWA § 404(f)(2), 33 U.S.C. § 1344(f)(1), the exemptions do not apply if the purpose of the activity is to bring an area into a use to which it was not previously subject.

## **IV. PERMIT STANDARDS – COE SECTION 404**

### **A. Regulations**

Corps of Engineers and Environmental Protection Agency regulations specify the standards that are used for evaluating permit applications. See Corps of Engineers Wetland Regulations, 33 C.F.R. § 320.4; Environmental Protection Agency Section 404(b)(1) Guidelines, 40 C.F.R. §§ 230.01-80. Some of the key features of these regulations include the following:

1. **Public Interest.** The decision to issue a permit will be based on an evaluation of the impacts on the public interest. See 33 C.F.R. § 320.4(a)(1).
2. **Water Dependent.** There is a presumption against filling wetlands for projects that are not “water dependent.” See 40 C.F.R. § 230.10(a)(3).
3. **Alternatives.** 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).

## **V. GENERAL PERMITS AND LETTERS OF PERMISSION – COE SECTION 404**

### **A. Individual Permits Not Required**

An individual permit is not required if the activity qualifies for a nationwide or regional permit.

### **B. Nationwide Permits Replaced In Minnesota**

In Minnesota, general permits and a letter of permission process established by the St. Paul District of the Army Corps of Engineers replace Section 404 nationwide permits. See St. Paul District Website, <http://www.mvp.usace.army.mil/regulatory/>.

1. **St. Paul District’s Statewide General Permits and Letter of Permission Procedures Replacing Nationwide Permits, GP-LOP-98-MN.**
  - a. Implemented January 31, 2000.
  - b. Replaces nationwide permits in Minnesota with general permits and a letter of permission (“LOP”) evaluation process.
  - c. Letter of permission in lieu of a permit for many activities. Applicant applies to and receives letter of permission from Corps of Engineers before commencing activity.

- d. Four different categories of activities (LOP A, B, C, and D), each with different requirements to obtain letter of permission.
  - e. Selected provisions:
    - i. Authorizes minor discharges up to 400 square feet in many but not all cases, similar to WCA. No letter of permission required.
    - ii. Allows with letter of permission authorization activities impacting less than 2.0 acres of wetlands that are regulated under WCA and approved by the LGU under a Wetland Conservation Act replacement plan.
- 2. Statewide Programmatic General Permit for Certain Activities Permitted by DNR, GP-01-MN.**
- a. Applicant must submit permit application to DNR and provide copy to Corps of Engineers.
  - b. Corps of Engineers authorization becomes valid when DNR permit granted and Corps issues confirmation letter.
  - c. A variety of activities are excluded from the general permit, including activities that Corps or Engineers deems to have unacceptable adverse effects on navigation or on aquatic resources.
- 3. Proposed GP-02.**

If approved, will provide a general permit for projects impacting less than one acre of wetland under a Wetland Conservation Act replacement plan. BWSR must certify replacement plan. Corps issues authorization letter for project.

**VI. SECTION 401 STATE WATER QUALITY CERTIFICATION – COE SECTION 404**

**A. Certification Required**

A federal permit or license may not be issued without a certification from the state that the discharge complies with state water quality standards pursuant to Section 401 of the Clean Water Act, 33 U.S.C. §1341. In Minnesota, the Minnesota Pollution Control Agency (“MPCA”) is responsible for adopting state water quality standards and issuing Section 401 certifications.

**B. MPCA Waiver of Authority**

MPCA decided in 2001 to issue Section 401 waivers in most cases. [See Facts About MPCA Reductions to Clean Water Act Section 401 Certification Program](#) (Minnesota Pollution Control Agency, Nov. 2001). In order to obtain a final MPCA 401 decision, an application must still be sent the MPCA, utilizing the Combined Application Form. Even if certification is waived, a project must still meet state water quality standards.

## **VII. APPLICATION PROCESS – COE SECTION 404**

### **A. Combined Application Form**

Apply in writing to Corps of Engineers regulatory office. Offices are located in St. Paul, Brainerd, Two Harbors, and La Crescent. Use Combined Application Form, available at <http://www.bwsr.state.mn.us/wetlands/wca/updatedforms/index.html>.

### **B. Initial Decision**

Initial decision on grant or denial of individual permit is made by the district engineer or a person designated by district engineer. See 33 C.F.R. § 325.2(a)(6); 33 C.F.R. §325.8(b). The Corps' policy is to issue a decision within 60 days after receipt of a complete application, if possible.

## **VIII. ADMINISTRATIVE APPEALS AND JUDICIAL REVIEW – COE SECTION 404**

### **A. Corps Of Engineers Administrative Appeals Process**

- 1. Appeal.** Permit decisions may be appealed by permit applicant to division engineer within 60 days. See 33 C.F.R. § 331.6(a).
- 2. Standard of Review.** The initial decision will be reversed if it was “arbitrary, capricious, an abuse of discretion, not supported by substantial evidence in the administrative record, or plainly contrary to a requirement of law, regulation, an Executive Order, or officially-promulgated Corps policy guidance.” See 33 C.F.R. § 331.9(b).

### **B. Judicial Review**

Judicial review is in federal district court. Review is usually on the administrative record.

## **IX. ENFORCEMENT – COE SECTION 404**

### **A. Corps Of Engineers Orders**

Corps of Engineers administrative orders for compliance with permits and cease and desist orders. See 33 U.S.C. § 1344(s).

### **B. Environmental Protection Agency Orders**

Environmental Protection Agency administrative orders to stop unpermitted fill activities.

### **C. Penalties**

Civil penalties up to \$25,000 per day may be awarded by court. See 33 U.S.C. § 1319. Administrative penalties may also be assessed by the Corps of Engineers and the Environmental Protection Agency. See id.



## **SOURCES FOR FURTHER INFORMATION**

### **I. TREATISE**

William L. Want, Law of Wetlands Regulation (1989 and updates through 2002), The Clark Boardman environmental law series, New York.

### **II. WEB SITES**

Minnesota Board of Water and Soil Resources: <http://www.bwsr.state.mn.us>

Minnesota Department of Natural Resources: <http://www.dnr.state.mn.us>

Minnesota Pollution Control Agency: <http://www.pca.state.mn.us/>

Corps of Engineers, St. Paul District: <http://www.mvp.usace.army.mil/>

Corps of Engineers, Regulatory Headquarters:  
<http://www.usace.army.mil/inet/functions/cw/cecwo/reg/hq0100.htm>

U.S. Environmental Protection Agency: <http://www.epa.gov/OWOW/>