

# 2012 WCA STATUTE CHANGES

## Summary of Key Changes with Explanations - Effective July 1, 2012

From Laws of MN 2012, Chapter 272 – WCA Provisions (H.F. No. 2164, Conference Committee Report)

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### **103G.222, Subdivision 1 (Requirements), Paragraphs c and d.**

(c) If a wetland is located in a cultivated field, then replacement must be accomplished through restoration only without regard to the priority order in paragraph (b), provided that ~~a deed restriction is placed on the altered wetland prohibiting~~ is not converted to a nonagricultural use for at least ten years.

(d) If a wetland is replaced under paragraph (c), or drained under section 103G.2241, subdivision 2 , ~~paragraphs paragraph (b) and or (e),~~ the local government unit may require a deed restriction that prohibits nonagricultural use for at least ten years ~~unless the drained wetland is replaced as provided under this section.~~ The local government unit may require the deed restriction if it determines the wetland area drained is at risk of conversion to a nonagricultural use within ten years based on the zoning classification, proximity to a municipality or full service road, or other criteria as determined by the local government unit.

**Effect of Change:** This change removes the requirement that a deed restriction be placed on wetlands impacted for agricultural use and replaced at 1:1 without regards to sequencing. However, the requirement that the land remain in agricultural use for a minimum of 10 years remains in place regardless of whether the deed restriction is recorded or not. Under the new language, a deed restriction is only required when the local government unit deems a risk of conversion from agricultural use to another use within ten years. The deed restriction language is now consistent for all agricultural wetland impacts (both wetlands impacted and replaced for agricultural use, and wetlands impacted under the agricultural exemption without replacement).

**103G.2241, Subdivision 1 (Agricultural activities), Clause 7.** A replacement plan for wetlands is not required for:

(7) agricultural activities on agricultural land that is subject to the swampbuster provisions of the federal farm program restrictions that meet minimum state standards under this chapter and sections 103A.202 and 103B.3355 and that have been approved by the Board of Water and Soil Resources, the commissioners of natural resources and agriculture, and the Pollution Control Agency consistent with a memorandum of understanding and related agreements between the board and the United States Department of Agriculture, Natural Resources Conservation Service.

**Effect of Change:** This language does not affect the current implementation of WCA on agricultural lands. It does, however, provide statutory authority for BWSR to establish an MOU with USDA-NRCS in the future should opportunities for exemptions be identified. This will assure that State standards for wetland protection on ag-land remain unchanged, and will prevent any future ties to potential “Swampbuster” changes at the federal level. The existing language was not viable because it did not connect to the federal agency (USDA-NRCS). WCA local governments and other stakeholders will be notified if exemptions are identified and agreed upon by the agencies under this provision.

**103G.2241, Subd. 9. De minimis.** (a) Except as provided in paragraphs ~~(b) and (c)~~ (d), (e), (f), (g), (h), and (i), a replacement plan for wetlands is not required for draining or filling the following amounts of wetlands as part of a project outside of the shoreland wetland protection zone:

~~(1) 10,000 square feet of type 1, 2, 6, or 7 wetland, excluding white cedar and tamarack wetlands, outside of the shoreland wetland protection zone in a greater than 80 percent area;~~

~~(2) 5,000 square feet of type 1, 2, 6, or 7 wetland, excluding white cedar and tamarack wetlands, outside of the shoreland wetland protection zone in a 50 to 80 percent area, except within the 11-county metropolitan area;~~

~~(3) 2,000 square feet of type 1, 2, or 6, or 7 wetland, outside of the shoreland wetland protection zone excluding white cedar and tamarack wetlands, in a less than 50 percent area, except within the 11-county metropolitan area; or~~

~~(4) 100 square feet of type 3, 4, 5, or 8 wetland or white cedar and tamarack wetland types not listed in clauses (1) to (3) outside of the building setback zone of the shoreland wetland protection zones in all counties;~~

(b) Except as provided in paragraphs (e), (f), (g), (h), and (i), a replacement plan for wetlands is not required for draining or filling the following amounts of wetlands as part of a project within the shoreland wetland protection zone beyond the shoreland building setback zone:

~~(5) (1) 400 square feet of type 1, 2, 6, or 7 wetland types listed in clauses (1) to (3), beyond the building setback zone, as defined in the local shoreland management ordinance, but within the shoreland wetland protection zone; or~~

(2) 100 square feet of type 3, 4, 5, or 8 wetland or white cedar and tamarack wetland.

In a greater than 80 percent area, ~~the local government unit may increase~~ the de minimis amount allowed under clause (1) may be increased up to 1,000 square feet if the wetland is isolated and is determined to have no direct surficial connection to the public water or if permanent water runoff retention or infiltration measures are established in proximity as approved by the shoreland management authority.

(c) Except as provided in paragraphs (e), (f), (g), (h), and (i), a replacement plan for wetlands is not required for draining or filling up to 20 square feet of wetland as part of a project within the shoreland building setback zone, as defined in the local shoreland management ordinance. The amount in this paragraph may be increased to 100 square feet if permanent water runoff retention or infiltration measures are established in proximity as approved by the shoreland management authority.

~~To the extent that a local shoreland management ordinance is more restrictive than this provision, the local shoreland ordinance applies;~~

~~(6) up to 20 square feet of wetland, regardless of type or location;~~

(d) Except as provided in paragraphs (b), (c), (e), (f), (g), (h), and (i), a replacement plan is not required for draining or filling amounts of wetlands as part of a project:

~~(7) (1) 2,500 square feet of type 1, 2, 6, or 7 wetland, excluding white cedar and tamarack wetlands, outside of the shoreland wetland protection zone in a 50 to 80 percent area within the 11-county metropolitan area; or~~

~~(8) (2) 1,000 square feet of type 1, 2, or 6 wetland, outside of the shoreland wetland protection zone in a less than 50 percent area within the 11-county metropolitan area.~~

For purposes of this ~~paragraph~~ subdivision, the 11-county metropolitan area consists of the counties of Anoka, Carver, Chisago, Dakota, Hennepin, Isanti, Ramsey, Scott, Sherburne, Washington, and Wright.

~~(b)~~ ~~(e)~~ The amounts listed in ~~paragraph paragraphs~~ (a), ~~clauses (1) to (8)~~, ~~(b)~~, and ~~(c)~~ may not be combined on a project.

~~(c)~~ ~~(f)~~ This exemption no longer applies to a landowner's portion of a wetland when the cumulative area drained or filled of the landowner's portion since January 1, 1992, is the greatest of:

- (1) the applicable area listed in paragraph (a), ~~(b)~~, or ~~(c)~~, if the landowner owns the entire wetland;
- (2) five percent of the landowner's portion of the wetland; or
- (3) 400 square feet.

~~(d)~~ ~~(g)~~ This exemption may not be combined with another exemption in this section on a project.

~~(e)~~ ~~(h)~~ Property may not be divided to increase the amounts listed in paragraph (a).

(i) If a local ordinance or similar local control is more restrictive than this subdivision, the local standard applies.

**Effect of Change:** The de minimis exemption language has been re-organized, but the exemptions remain at the same level for all but a very few Type 7 (forested) wetlands in the <50% areas of the state. Specifically, the de minimis for Type 7 wetlands outside of shoreland in <50% areas outside of the 11-county metro area is increased from 100 to 2,000 square feet, while the de minimis for Type 7 wetlands in <50% areas outside of shoreland within the 11-county metro area is eliminated (reduced from 100 square feet to zero). Additionally, the new language allows for moderate increases to certain de minimis impacts within the shoreland building setback zone when permanent water runoff retention or infiltration practices are installed and approved by the shoreland management authority.

**103G.2242, Subd. 3. Replacement completion.** Replacement of wetland values must be completed prior to or concurrent with the actual draining or filling of a wetland, ~~or unless an irrevocable bank letter of credit or other security acceptable to the local government unit must be or the board is given to the local government unit or the board to guarantee the successful completion of the replacement.~~ The board may establish, sponsor, or administer a wetland banking program, which may include provisions allowing monetary payment to the wetland bank for impacts to wetlands on agricultural land, for impacts that occur in greater than 80 percent areas, and for public road projects. The board shall coordinate the establishment and operation of a wetland bank with the United States Army Corps of Engineers, the Natural Resources Conservation Service of the United States Department of Agriculture, and the commissioners of natural resources, agriculture, and the Pollution Control Agency.

**Effect of Change:** The primary effect of this language is to provide BWSR with clear statutory authority to implement an in-lieu fee wetland replacement program for certain locations/types of projects. In-lieu fee wetland mitigation is already specifically allowed under the federal mitigation rule. BWSR intends to independently pursue federal approval of an in-lieu fee program for the Minnesota Local Government Roads Wetland Replacement Program, and is also currently working with public and private sector interests to explore the possibility of utilizing in-lieu fee programs for mining and agriculture to obtain more cost-effective and ecologically beneficial wetland replacement/mitigation. A coordinated sector-specific approach could supplement the current ad hoc wetland banking option. Until an in-lieu fee program is established and approved, however, this statute change has no effect on the day-to-day implementation of WCA.

**103G.2375. ASSUMPTION OF SECTION 404 OF FEDERAL CLEAN WATER ACT.**

Notwithstanding any other law to the contrary, the Board of Water and Soil Resources, in consultation with the commissioners of natural resources, agriculture, and the Pollution Control Agency, may adopt or amend rules establishing a program for regulating the discharge of dredged and fill material into the waters of the state as necessary to obtain approval from the United States Environmental Protection Agency to administer, in whole or part, the permitting and wetland banking programs under section 404 of the federal Clean Water Act, United States Code, title 33, section 1344. The rules may not be more restrictive than the program under section 404 or state law.

**Effect of Change:** The State (BWSR) can now pursue greater coordination with federal wetland protection standards through complete or partial assumption of Clean Water Act section 404. Under state assumption, the Corps and EPA would certify that all or parts of the state (WCA) standards are consistent with Section 404 and a separate permit from the Corps would no longer be needed for qualifying projects. The law does not compel this approach, but sets the stage for improved coordination via alignment of resource protection, public service, and budget factors. It would require a comprehensive state proposal and a federal response/decision. This would take a few years to accomplish unless there were federal changes allowing it to take place sooner. The 404 assumption effort has been wholly in place in Michigan and New Jersey for 10-20 years and both have very strong programs. Recently, there have been considerations to establish a partial assumption option (e.g. Wetland Banking) which could be an option for MN if it were to be allowed. While there currently is no plan to pursue 404 assumption, the language does open the door for it as an option in the future. Until then, this statute change has no effect on the day-to-day implementation of WCA.