WCA Exemption Quick Reference – BWSR Academy

WCA 101 – Session I

October 28, 2013

General Information

The WCA exemptions are permanent impacts that are exempt from WCA replacement, they are NOT activities exempt from WCA regulation. Activities that are not regulated by WCA are covered in the Scope section (8420.0105) and should be addressed with a no-loss decision rather than an exemption approval.

The WCA exemptions have been available since WCA's inception, but they represent a loss of wetland with replacement of the public value. The use of exemptions makes WCA's no-net-loss purpose more difficult to achieve. For this reason, BWSR wants to make sure that exemptions are used appropriately.

A landowner does not need to apply for, or receive, LGU approval for an exemption to be valid. However, a landowner who does not receive approval may be subject to enforcement if they did not meet the exemption criteria. If a landowner requests an exemption decision from the LGU, the landowner must identify the specific exemption being claimed and submit the proof necessary to show qualification for the exemption.

Although there may be no formal application or approval required, some WCA exemptions require notification to the LGU, a determination from the TEP, or that documentation be submitted by the landowner. Also, any contractor draining, filling, or excavating in a wetland must submit a completed Landowner Statement and Contractor Responsibility form to the LGU prior to starting the work.

Standard Exemption Conditions

The following standard exemption conditions apply to all WCA exemptions. A landowner conducting an exempt activity must ensure that:

- Appropriate erosion control measures are taken to prevent sedimentation of the wetland or of any receiving waters;
- The activity does not block fish activity in a watercourse, unless done purposely with a recommendation from DNR; and
- The activity is conducted in compliance with all other Local, State, and Federal requirements including Best Management Practices (BMPs).

If any of the above standard conditions are not met, then the activity cannot be considered exempt from WCA replacement, even if the project meets a specific exemption's requirements or standards.

Prohibited Use of Exemptions

There are situations where no exemption can be used on a particular project. Specifically, no exemptions apply to:

- Calcareous fens;
- Wetland banks;
- Replacement wetlands; and
- Wetlands partially impacted to gain an exemption on the remainder.

Exemptions cannot be combined on a "project". For WCA purposes, "project" means a specific plan, contiguous activity, proposal, or design necessary to accomplish a goal as defined by an LGU. A project may not be split into components or phases to gain additional exemptions. This means that the LGU defines what the "project" is and the LGU may need to track a specific property from landowner to landowner or track a property as it is divided or split into new parcels.

WCA Exemptions

Agricultural Activities:

- Type 1 or 2 wetlands planted with annually seeded crops, or in a rotation, in ***six of the last ten years*** prior to January 1, 1991.
- Type 1, 2, or 6 wetlands on ***agricultural pasture land*** (type 2 or 6 wetlands must be less than two acres in size, not the impact but the size of the entire wetland).
- ***Soil and water conservation practices*** that minimize impacts and are certified by the SWCD.
- Fill to accommodate ***wheeled irrigation booms***, but cannot impede normal drainage.
- ***Aquaculture*** activities when authorized by the Corps of Engineers.
- ***Wild rice production*** activities when authorized by the Corps of Engineers.
- The new ***MOU*** exemption with NRCS and the farm program.

Drainage:

- ***Public drainage maintenance*** projects that do not drain types 3, 4, or 5 wetlands smaller than they were 25 years earlier. The drainage authority may install structures, realign a ditch, construct dikes, or make other modifications necessary to prevent drainage of a wetland.
- ***Private drainage maintenance*** projects that do not drain any wetlands smaller than they were 25 years earlier.

For any ***drainage maintenance*** project, the landowner must provide documentation that impacted wetlands have not existed for more than 25 years.

- Draining a wetland on agricultural land that was planted before July 5 or in a rotation in ***eight of ten years*** most recent years. Land enrolled in conservations programs can qualify if they met the eight of ten planting requirement before enrollment.
- Draining any amount of type 1 wetland or up to five acres of type 2 or 6 wetland in an unincorporated area on lands ***assessed benefits*** for a public drainage system IF between January 1 1972 and January 1 1992:
  - There was an expenditure from the drainage account for the public system;
  - The public system was repaired or maintained as approved by the drainage authority; or
  - No repair or maintenance was required as determined by the drainage authority.

  Wetlands drained using the ***assessed benefits*** exemption cannot be converted to platted lots; planned unit, commercial, or industrial developments; or any development with more than one residence per 40 acres. Drained wetlands must be replaced if converted to a prohibited use within 10 years of being impacted.

For **any** drainage exempt project, spoil must be placed and stabilized to minimize wetland impacts, without jeopardizing stability of the ditch or contributing to degradation of downstream water quality.

Federal Approvals:

Impacts authorized by the ***Corps of Engineers*** under Section 404 of the Clean Water Act or Section 10 of the Rivers and Harbors Act that meet minimum state standards. Minimum state standards must be agreed to and approved by BWSR, Department of Agriculture, DNR, and MPCA. There is currently no such agreement; therefore, this exemption is currently unavailable.

Restored Wetlands:

- Draining a wetland ***restored, or created, under a contract or easement*** for conservation purposes when the contract or easement allowed the wetland to be returned to its pre-project condition. The landowner must provide a copy of the contract or easement for verification.
- Impacting a wetland ***restored, or created, by a landowner*** without any assistance or financing from a public agency or any other private entity. The landowner must provide a contract, billing statements, or other evidence for verification. The landowner must also provide information to

confirm that the area was not wetland before the restoration or creation activity.

Utilities:

- Impacts resulting from installation, maintenance, repair, or replacement of ***utility lines, including pipelines***, if:
  - Impacts have been avoided and minimized and
  - Impacts total less than one half acre.
- Repair or updating of ***existing SSTS*** necessary to comply with local, state, and federal regulations. This exemption does not apply to SSTS expanded to accommodate increased use.

Work of an emergency nature may proceed as necessary and impacts will be addressed by the LGU after the emergency work has been completed.

Forestry:

Roads and crossings solely constructed for, and primarily used for, providing ***access for forestry activities***. To qualify for this exemption, construction must:

- Limit the impact on the hydrologic and biologic characteristics of the wetland;
- Not result in the road becoming a dike, drainage ditch, or tile line;
- Avoid impacts wherever possible; and
- Not drain any wetland.

Because roads and crossings must be solely constructed for, and primarily used for, access for forestry activities, multiple use trails or roads that may be used for forestry activities do not qualify for this exemption. Impacts for temporary roads and crossings are covered as a No-Loss.

De minimis:

The de minimis exemption is intended for minor impacts that the legislature has determined are too small to warrant replacement. The de minimis exemption is often described as confusing or complicated, but in reality it isn't that difficult to decipher. Table 1 on the opposite page will guide you to the correct base de minimis for a given project anywhere in the state. If you are dealing with a project in a given county, base de minimis is even simpler to determine. The challenge with the de minimis exemption comes with interpreting Item C of the exemption. Item C is intended to apply to situations where the landowner does not own the entire wetland proposed to be impacted. When the wetland has more than one landowner, the de minimis amount is limited to the ***lesser*** of:

- The base de minimis amount from Item A, or
- 5 percent of the landowner's portion, down to a minimum of 400 square feet.

This is not exactly how the exemption is written, but this is the intent…

If multiple wetlands are impacted, then the smallest applicable de minimis amount is applicable to the "project" as a whole.

For wetlands larger than 40 acres in size, wetland type may be defined as the deepest water regime within the wetland and within 300 feet of the impact.

The 11-county metro area within the de minimis exemption includes Anoka, Carver, Chisago, Dakota, Hennepin, Isanti, Ramsey, Scott, Sherburne, Washington, and Wright.

Wildlife Habitat:

Impacts associated with a project for the primary purpose of ***wildlife habitat improvement*** when:

- Impacts are limited to one-half acre or 5% of the wetland, whichever is smaller;
- The project has no adverse effect on any species designated as endangered or threatened under state or federal law; and
- The SWCD or TEP certifies that the project will provide wildlife habitat improvement.

And of course, "duck blinds".

Table 1: Base de minimis exemption amounts for all of Minnesota

Non-Shoreland Areas	Types 1, 2, 6, 7 ***(excluding white cedar and tamarack wetland and any Type 7 wetland in a < 50% metro county)***	10,000 ft^2 in all > 80% counties
		5,000 ft^2 in non-metro 50-80% counties
		2,500 ft^2 in metro 50-80% counties
		2,000 ft^2 in non-metro < 50% counties
		1,000 ft^2 in metro < 50% counties
	Types 3, 4, 5, 8, and white cedar and tamarack wetland ***(excluding any Type 7 wetland in a < 50% metro county)***	100 ft^2
Within Shoreland, but beyond structure setback	Types 1, 2, 6, 7	400 ft^2 *(1,000 ft^2)
	Types 3, 4, 5, 8, and white cedar and tamarack wetland	100 ft^2
Within Shoreland and structure setback	All wetland types	20 ft^2 *(100 ft^2)

*Increased amounts shown in parenthesis may be allowed if wetland is isolated from the public water, or if permanent water runoff retention or infiltration measures are established in proximity to the impact and approved by the shoreland management authority.

NOTE – There is **NO** de minimis exemption for Type 7 wetlands outside the shoreland wetland protection zone in < 50% metro counties.