



Executive Order 12-04

Supporting and strengthening implementation of the state's wetland policy

Local Government Sector Meeting Association of MN Counties, St. Paul, MN

Meeting Notes September 18, 2012

Dave Weirens began the meeting by asking everyone in attendance to introduce themselves. He then reviewed the origination of Executive Order 12-04, its contents, and the process that is being used to comply with it. Mark Lindquist began the discussion of the Order's issues by surveying those in attendance on their priority issues to discuss.

There was discussion on the content of the power point questions that was used to survey the attendees. The concern is how the questions should or could be interpreted.

The group's top three priorities for discussion are:

- Issue #3: Consistent Review, Approval and Implementation;
- Issue #1: De minimis Exemption; and
- Issue #5: Costs and Benefits of Wetland Mitigation Targeted to Specific Watershed.

The other issues contained in the Order will be discussed if there is time. The discussion of these issues is summarized below.

Issue #1: De minimis Exemption.

- The De minimis Exemption is too complicated and is difficult to implement in the northern counties.
- Local governments are looking for more flexibility, particularly in shoreland areas. Exempt amount could be gradation as move further from shore. Consider increasing de minimis in northern counties to ½ acre.
- Maintaining the 10,000 sq. ft. exemption is critical for counties with more than 80% of their presettlement wetlands remaining. 10,000 square feet was and is the agreement and we are not seeing a negative impact, yet WCA exemptions are under a constant assault.
- De minimis originated in the old Corps Nationwide Permit program, where everyone had the right to some amount of fill. That amount used to be 1 acre.
- De minimis is not contributing to wetland loss in northern counties. One commenter used an example, where Koochiching County has over 240,000 acres of wetlands and even at 5 acres a year it would take 48,000 years to fill them all.
- A smaller de minimis amount takes away opportunities to negotiate. Local government staff will always work with a landowner to try to reduce the size of their project and still accomplish their goals – reducing the amount too much takes away that ability to negotiate. Using de minimis as a tool to negotiate helps avoid wetland impacts.

- Replacement requirements for smaller impacts should be streamlined by combining with de minimis.
- Comprehensive Wetland Plans can address flexibility but requires Corps approval (which is difficult or impossible achieve). Counties can also work with other local governments within the same watershed in a “one watershed, one plan” approach.
- De minimis is too complicated and too prescriptive for the legislature to do via statute. De minimis should be changed to justify outcomes, and not specify amounts in law. Allow counties to have flexibility and determine de minimis under local plans that set goals and report periodically on outcomes. The TEP can help determine the standards.
- Leave WCA rule alone for a while to improve consistency.
- Remove wetland type from the exemption. One possible exception could be white cedar/tamarack, but that could be accomplished through local plans.
- No net loss should be looked at from a programmatic/statewide approach, not on individual site-specific projects.
- Most of the wetlands filled under de minimis are marginal with low function and value. We should be looking at wetland functions and public value.
- It’s the *Wetland Conservation Act*, not the *Wetland Preservation Act*.

Issue #2: Alignment of Pre-Settlement Zones on Watershed Boundaries.

- Pre-Settlement zones should follow bank service area (generally major river basin) boundaries. However, WCA is a regulatory program implemented along county boundaries so bank service areas and pre-settlement zones should be rectified along county lines (match bank service areas to the “nearest county boundary fit).

Issue #3: Consistent Review, Approval and Implementation.

- The US Army Corps of Engineers lack of processing permits and making decisions in a timely manner is a problem. One person commented that the Corps held up a project for 2 years unnecessarily and asked if the State can be an effective liaison with the federal government. Another questioned why the Corps is even involved when we have BWSR.
- The State and/or Governor should discuss issues with the Corps and encourage the Corps to work more with the State. The State should study the possibility of 404 assumption. Minnesota does more to protect wetlands than any other state – the Corps should go where they are needed.
- Project eligibility in the Local Government Road Wetland Replacement program undercuts the authority of the county engineer.
- There is a lack of coordination between state agencies (DNR and BWSR), and state and federal agencies (Corps).
- Inconsistency from one local government or technical evaluation panel (TEP) to another (or, is local flexibility good or bad?). TEPs always look to State (BWSR) for direction and sometimes the TEP may not feel empowered to make the decision. Make sure the TEP is the “County’s TEP” and it is the County’s responsibility to make that happen, make the decisions, etc.
- There is inconsistency between BWSR staff.
- Some consensus that TEPs are very beneficial in the process.
- The MPCA Clean Water Act Section 401 certification process is not well coordinated or timely. MPCA has radically different requirements with no apparent rationale and we can’t get them to participate early – they come in at the last minute and that affects the cost of projects.

- Concern was raised about mining issues, particularly regarding permit to mine and accountability and whether these permits are complying with WCA standards. Local governments should have some involvement in the decision making but currently are not included in that process. Mining replacement sites are approved by a different agency than other projects, and they are held to a different standard. Mining replacement sites should meet the same standards and WCA rule requirements as other projects.
- There needs to be consistency among agencies themselves. Do we need every agency involved on every wetland issue? Too many players are often at the table, creating redundancies. In the metro area, townships and cities implement WCA and all of them do it differently. Meanwhile the Corps is asking about a wetland bank site that was completed 14 years ago but they have yet to approve all the credit. There is too much government overseeing government. It would be more efficient to make the decisions locally.
- WCA should be more like the State Shoreland Standards with implementation through local ordinances.
- Wetland banking paperwork and process needs to be revised and simplified, and use current technology to streamline (accept faxes, non-original signatures, etc.).
- Townships are uncertain of what they need to do or where to start, so they often just move ahead with the project. They need better information on where to go for advice and direction.
- This project should be coordinated with the Water Permit Streamlining that MnDOT is leading. BWSR should explore/study 404 Assumption.

Issue #4: Adequacy of Wetland Bank Program Funding.

No comments were made on this issue.

Issue #5: Costs and Benefits of Wetland Mitigation Targeted to Specific Watershed.

- From a public policy perspective – if we are really trying to replace the functions and public value of a wetland, then on-site and in-place wetland mitigation doesn't make sense in northern counties. Mitigation should take place in areas where it can do the most good and produce the most value.
- Reduce or eliminate penalties for going outside of the bank service area. Reduce the replacement ratio to 1:1 or less for impacts in a greater than 80% county if replaced in southwestern MN (or other areas that have experienced significant wetland loss). However, one commenter suggested caution about a replacement ratio lower than 1:1 and said it is not likely to happen.
- Economic issue – mitigation generally occurs where it's the cheapest (need incentives if it can be possible to replace northern MN impacts in other parts of the state).
- Look at flood damage reduction projects to generate additional wetland replacement credits.
- Tax base value concerns with wetland mitigation – one township/county may lose tax base while others gain. Townships/counties should be reimbursed for loss of tax base as a result of converting land to wetland mitigation credits.
- If we could do an In Lieu Fee wetland mitigation program and get the Corps to sign off, it would make it easier for everyone. Base payment rates on a county-by-county basis according to value (not acres), and then have BWSR be responsible for providing replacement with the fee revenue. BWSR should be in charge of where the mitigation goes and can put it where it will do the most good. Would the BWSR Board be willing to implement an in lieu fee program? An In Lieu Fee program makes more sense than the current banking system.
- Need to address issues with the COE's process (unwillingness to allow impacts to be replaced into other bank service areas).

- Create a statewide wetland management plan/strategy that targets mitigation to specific areas.
- Eliminate wetland type as a consideration in wetland replacement requirements (in addition to de minimis), especially in the north. Wetland type can be dealt with under local plans. Also consider allowing an impact to a high priority wetland in one county to be replaced with a high priority wetland in another county, regardless of the type (type does not equal function and value).
- Look at high value replacement outside greater than 80 percent areas.
- Eliminate the penalty for going outside a bank service area if no banks are available within the bank service area where the impact occurs.
- Public value should have a statewide vs. a site specific approach.

Issue #6: Strategic Use of Funding Sources to Achieve Continued Restoration of Drained Wetlands.

- There are lost mitigation opportunities when public funds are spent for conservation programs (i.e. Conservation Reserve Program and on public lands such as DNR and US Fish and Wildlife Service lands).

Other Issues.

- Various MnDOT Manuals need to be considered in future rule revisions.
- There is no rational way to compare road safety improvements and mobility with wetland impacts.
- Concerns were raised over BWSR's administration of the Local Government Road Wetland Replacement Program - that it is too restrictive on eligible impacts/activities/design aspects; and how on-site mitigation requirements are determined for local road projects. The public road authority should determine what is eligible and necessary. If the local road authority has to obtain some credits for themselves, then the program is not meeting local needs.
- Minimum impacts/withdrawals from the Local Government Roads Wetland Replacement Program issues: the commenter indicated that withdrawals are only down to 1/10 ac. Is the amount of replacement being provided exceeding impacts, and if so by how much?
- Moratorium on the ability of road authorities to purchase credits from BWSR (lack of available credits tied to COE approval).
- A perpetual easement within the road right of way would be a concern.
- Flexibility in mitigation should be allowed (i.e. x amount of rock rip rap equals x amount of wetland).
- What does no net loss look like? A lot of wetland impacts are marginal; will a stormwater plan achieve the same goals?
- Wetland requirements are *continually* being addressed and changed. We want consistency, not constant change.