

WCA PERMANENT RULE ADVISORY COMMITTEE

MnDOT Training and Conference Center
Shoreview, Minnesota

May 22, 2008

Meeting Notes

Committee Members:

Agriculture

Mn Corn Growers Association-

Doug Albin.

X Warren Formo.

Mn Farm Bureau-

Chris Radatz.

Staci Bohlen.

Mn Farmers Union-

X Jim Tunheim.

Thom Peterson.

Mn Soybean Growers Association-

Lawrence Sukalski.

Mn Wheat Growers Association-

X Bruce Kleven.

Business

Builders Association of Mn-

X Lisa Frenette.

Stephanie Berklund.

Builders Assoc. of the Twin Cities-

X Drew Budelis.

X James Vagle.

Mn Association of Realtors-

Susan Dioury.

Mn Chamber of Commerce-

Keith Hanson.

Tony Kwilas.

Mn Forest Industries-

X Wayne Brandt.

Utilities –

Blake Francis.

Aggregate Ready-Mix Assoc. of Mn

Mike Caron.

Fred Corrigan.

Environment/Conservation

Audubon Mn –

Susan Solterman.

Izaak Walton League - Mn Division –

X Bill Barton.

X Dell Erickson.

Mn Center for Env. Advocacy-

Janette Brimmer.

Henry Van Offelen.

Mn Conservation Federation-

Gary Botzek.

Sierra Club - North Star Chapter-

X Mollie Dean.

Local Government

Association of Mn Counties-

Duanne Bakke.

Harlan Madsen.

Metropolitan Inter-County Assoc.-

Keith Carlson.

Mn Assoc. of SWCD –

X Sheila Vanney.

Mn Association of Townships –

X Dave Fricke.

Dan Greensweig.

Mn Assoc. of Watershed Districts-

X Roger Lake.

Mn County Engineers Association –

Doug Fischer.

X Tom Tri.

Mn Rural Counties Caucus-

X Todd Beckel.

Wade Pavleck.

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Others

Mn Viewers Association-

Jim Weideman.

Wetland Professionals Association-

Allyz Kramer.

Andi Moffat.

Minnesotans for Wetlands-

Mary Mueller.

Mike Whitt.

Mn Assoc of Professional Soil Scientists

Peter Miller.

X Kelly Bopray.

Federal Government

U. S. Army Corps of Engineers-

X Marita Valencia.

U.S. Fish and Wildlife Service-

Tony Sullins.

USDA Natural Res. Cons. Service –

X Sid Cornelius.

State Government

Department of Agriculture-

Joe Martin.

Department of Natural Resources-

Doug Norris.

Julie Ekman.

Department of Transportation –

Frank Pafko.

X Sarma Straumanis.

Pollution Control Agency-

X Dave Richfield.

Note: X = in attendance

Guests: Barbara Walther, Wetland Professionals Association; Leonard Binstock, Agricultural Drainage Management Coalition; Steve Commerford, Minnesota Soybean Growers Association; Chuck Lenthe, Oakwood Land Development; Greg Russell, DNR-Forestry; Kent Rodelius, Mn Land Improvement Contractors Association; Linda Runbeck, American Property Owners Coalition; and Ron Harnack.

Staff: Julie Klocker, Dale Krystosek, Les Lemm, Jeremy Maul, Ken Powell, and Dave Weirens.

Dave Weirens called the meeting to order at 9:10 a.m. All in attendance introduced themselves.

Review April 24, 2008 Meeting Notes.

Dave Weirens briefly reviewed the April 24, 2008 meeting notes.

Draft Actions Eligible for Credit.

Dale Krystosek, reviewed and led the discussion over the draft rule section.

Subp. 1 - Scope

Roger Lake asked what separation means as used in Scope on page 1? Dale Krystosek responded that it referred to the replacement area, and there can only be a connection for overflow purposes.

ACTION. Roger Lake suggested that separation be better defined.

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Ron Harnack suggested that PCA and BWSR should get together and decide how to address stormwater. Dale Krystosek referred to the text box on page 1. Dave Richfield followed by stating that the proposed WCA rule changes should simplify the complex regulations.

Ron Harnack stated that WCA should incorporate stormwater regulations. Dave Weirens responded that this cannot be done due to local government implementation of WCA. Ron Harnack followed by referring to a recent report adopted by the Stormwater Steering Committee. Barbara Walther said that they cannot be incorporated as all projects need to address stormwater issues, but not all projects need to address wetland issues.

Les Lemm said the changes do allow movement towards a single permit. Ron Harnack agreed with this.

Dave Richfield, referring to the report referred to in the textbox on page 1, said that research is being conducted that might result in the table being modified, the intent is to protect wetlands. Dale Krystosek handed out a table included in the above referenced report.

ACTION. Les Lemm suggested changing the reference to bounce to read, “bounce should be managed to preserve the function of the wetland.”

ACTION. Barbara Walther suggested changing “urban” to “stormwater”

ACTION. Tom Tri suggested defining “treatment”.

ACTION. Ron Harnack suggested deleting “indicated in guidance document” as it is unnecessary.

Drew Budelis suggested that the discussion over stormwater requirements should come under the water quality treatment provision. Barbara Walther and Les Lemm stated they thought it would be ok to include this language in Scope.

Ron Harnack suggested looking at the Red River Mediation TSAC report for information on bounce.

Dale Krystosek discussed the last sentence in Subp. 1, and that the initial discussion was for a sequencing type provision regarding use of the actions eligible for credit. Drew Budelis expressed concern over this language and added that most people will look for the easiest and cheapest way to address mitigation needs. Ken Powell said the amount of credit allowed is a reflection of preference.

ACTION. Delete the last sentence from Subp. 1.

Mollie Dean expressed concern over cost being the primary criteria for determining mitigation. Ron Harnack followed by stating the current order has no connection to quality

ACTION. Sarma Straumanis stated that the Scope section has three issues: (1) buffer; (2) water quality treatment areas; and (3) actions eligible for credit; all 3 need to be adequately addressed.

Subp. 2 – Buffer Areas.

Les Lemm reviewed some of the discussion at the technical advisory committee, where they said there should be one number for the buffer requirement. The committee also said that function should be a consideration in determining the required buffer area.

Todd Beckel asked what the tech committee wanted for a number, not less than 25 feet? James Vagle asked how to reconcile when 10 feet is sufficient. Ron Harnack suggested that 25 feet should be sufficient, and continued by stating that when it comes to habitat, more is better. But 25% credit is not enough incentive, the amount of credit given should be up to 1:1 with an ideal of 4:1.

Steve Commerford asked if the area requirement was 25 feet or an area average. Dale Krystosek responded that the rule currently addresses this as an average.

Ken Powell offered that studies suggest that 25 feet is at the lower end of state requirements, and this would serve as an appropriate minimum. Dell Erickson said the rule should look at the minimum amount, and should enlarge whenever possible.

Bill Barton expressed concern over practical/feasible, as an alternative, eliminate these words, but increase the credit ratio. Ken Powell said the intent of practical and feasible is to provide flexibility. Les Lemm said that it can be looked at in the context of minimum average. Ron Harnack said the involvement of the TEP increases his comfort with this language.

Dave Richfield said he is not clear on how the rule addresses wetland quality, and that the purpose should be to have a sustainable replacement wetland, which cannot be guaranteed by buffer.

Todd Beckel said he is concerned over the role of the TEP and agrees with Bill Barton.

Chuck Lenthe said we need to keep focused on what we are hearing, that one number is desirable, likely 25 feet, and keep the rest of the language.

Mollie Dean asked about where this is heading in a 1:1 replacement situation. Les Lemm referred the Committee to the buffer options handout that described three options for the buffer provision.

Todd Beckel asked what the chances are that there will be too much buffer? Dale Krystosek responded that this is unlikely due to changes in the replacement requirements.

Tom Tri expressed concern over departing from the BWSR-Corps MOU, and the problems with having two separate systems for determining credit. When WCA and the Corps conflict, then the applicant will only get what the Corps allows. Les Lemm responded that this discussion is part of the public opinion process, and that discussions will occur between BWSR and the Corps of this and other issues.

Drew Budelis said that this is not always an issue as the Corps does not have jurisdiction over all wetlands. Marita Valencia responded that the Corps does regulate most wetland impacts.

Dale Krystosek identified the issue of upland mitigating wetland impacts. Ron Harnack followed by stating that the rule should look at function and value, wetland without buffer has less function and value.

Bill Barton said that option 3 will not be the preferred option with high land values. Dell Erickson followed that there is the increased assumption that the wetland will be sustained under option #3.

Dave Richfield said that there should not be replacement where the wetland cannot be sustained. Steve Commerford said that over time ecology changes, what management would be required for sustainability, property line boundaries can affect wetland sustainability.

ACTION. Ron Harnack suggested allowing landowners to square off property, for practicality reasons.

ACTION. Need to clarify the amount of credit if buffer extends upland.

ACTION. Barbara Walther suggested adding “from the replacement wetland” after “upstream” in A on page 2.

Les Lemm asked how the rule should determine the right amount of credit – function and value? Acres? Examine no net loss project by project or on a program basis?

Subp. 3 – Restoration of completely drained or filled areas.

Ken Powell said that this provision would only provide credit for hydrologic and vegetative restorations, not for buffer.

ACTION. Clarify that the actions eligible for credit are additive/cumulative in Subd. 1

Leonard Binstock asked about removing fill. Dale Krystosek said this has been allowed, but rarely used.

Ron Harnack asked about the relevancy of the last sentence? Les Lemm said this was to ensure the wetland would fit the area with an increased likelihood of long term sustainability.

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Subp. 4 – Rehabilitation of partially drained or filled wetland areas.

Marita Valencia and Les Lemm discussed the WCA and Corps terms for wetland activities.

Drew Budelis said that there is no mention of soils, when this is one of the three wetland parameters. Les Lemm said this due to the vegetation and hydrology generally define wetland function and value.

Ron Harnack asked why the credit is limited to 90%, there should be an allowance for up to 100%. Les Lemm responded by saying that there should be a balance of the area receiving credit to the existing wetland area. Drew Budelis said that the 90% figure is arbitrary.

Todd Beckel said that farming can eliminate the wetland, why less than 100%? Les Lemm responded that A and B in this subpart both address farming history, while C includes none. The amount of credit is a reflection of remaining wetland function.

Steve Commerford said this provision is a total disincentive to private landowners, if the land is considered prior converted, then allowable credit should be 100%.

ACTION. A and B should be combined.

ACTION. Change restored to rehabilitated wherever it appears in this subpart.

Subp. 5 – Vegetative Rehabilitation of farmed wetlands.

Drew Budelis asked how often is it that cropland is not cropped every year. Several people responded that this can be quite common, especially in the north.

Steve Commerford asked how cropping history should be addressed. Ron Harnack followed by stating that there is an inconsistency in how cropping history is addressed.

ACTION. Ron Harnack suggested combining A and B, up to 90% credit, not restrict 100% credit to only bank service areas 2, 3, and 4 under C.

Dale Krystosek suggested allowing up to 75% statewide.

Todd Beckel and Warren Formo asked about land tenure issues, and said that the minimum time period should be established, and then allocate up to 100% credit. Warren Formo followed by stating that cropping history may not reflect suitability for restoration.

Dave Weirens stated that 100% credit cannot be allocated for all actions, the proposal needs to be internally consistent, and strive to be consistent with Corps policy.

ACTION. Credit up to 100% should be possible for a 20 out of 20 cropping history.

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ACTION. Ron Harnack suggested adding the prairie pothole area to C.

ACTION. Change restored to rehabilitated wherever it appears in this subpart.

Ron Harnack stated that he liked the Corps approach of 50-100% based on cropping history.

ACTION. Subparts 4 and 5 should both allow up to 100% based on cropping history, 20 out of 20 years.

Subp. 6 - Exceptional natural resource value projects.

Drew Budelis commented that not having numbers leaves less for the Committee to talk about.

Subd. 7 – Protection of wetlands previously restored via conservation easements.

Ron Harnack said that the MOU allows up to 75% credit, this is not enough incentive.

ACTION. Drew Budelis said the draft rule should clarify the application of subparts 3, 4, and 5 in the context of up to 75%.

Steve Commerford said that only allowing up to 75% is a taking, what difference does this amount make? What incentive does this offer to landowners.

ACTION. The amount of credit should be based on the inputs necessary to use the area as a mitigation site.

Steve Commerford expressed concern over changing the rules after the fact, and this affect on landowners.

Tom Tri asked about the affect of fees on leaving the area a wetland. Les Lemm said that if the area cannot generate enough revenue to, at a minimum, pay the banking fees, then the banking project should not be undertaken.

ACTION. Allow more credit if upgrades/improvements are made to vegetation, structures, etc.

ACTION. Add “to site conditions” after “applied”.

Restoration of wetland vegetation.

Tom Tri asked if enhancement is allowed or not? It is under the Northeast Strategy. Les Lemm responded that it would not as an independent action.

Subd. 8 – Wetland creations.

Barbara Walther commented that the draft rule language is a disincentive to do creations. Ron Harnack followed by stating that creations have done better than restorations in some cases.

ACTION. Insert the MOU language regarding creations.

Bill Barton said that anything artificial is not as good as natural. Ron Harnack suggested being cautious with concern over artificial as the Agassiz National Wildlife Refuge has many created wetlands.

Dell Erickson said that isolated creations are less successful than connected ones. Les Lemm said that care must be taken when expanding a wetland to not affect the existing functions and values.

Tom Tri said that restorations cost less than creations; creations require an incentive. Chuck Lenthe asked if the credit allocation affects the replacement ratio. Kelly Bopray followed by stating that a 1 acre impact can require 5.25 acres of land.

Mollie Dean said that it had been spoken here that the amount of credit given allows the “up to” amount. Bill Barton expressed concern that peat destroyed cannot be replaced by a creation.

ACTION. The entire system needs to be held accountable, including monitoring and oversight.

Drew Budelis asked about the mineral extraction activity language. Dale Krystosek said the area must have been upland prior to the mining activity. Drew Budelis followed by asking if the wetland was incidentally created by the mining. Dale Krystosek responded by saying yes, and that with modifications could meet replacement standards.

Ron Harnack referred to the stormwater treatment provision in statute, and the need to ensure consistency between the Subp. 1 and this Subp. Dave Richfield is concerned over confusion between the stormwater regulations and if people will be able to keep their projects straight.

Drew Budelis asked if nutrient removal is a function of a wetland. Les Lemm and Dave Weirens responded that statute drives the rule.

ACTION. Dave Richfield suggested including the same reference to pre-treatment here as in Subp. 1.

Subp. 9 Water quality and wildlife habitat.

Barbara Walther asked what 12.5% is based on? Dale Krystosek said it is consistent with the MOU. Barbara Walther followed by asking at what point are functions measured, the comparison of current vs. proposed condition? Tom Tri said the MOU allows up to 33% for enhancement projects.

ACTION. Dale Krystosek suggested discussing vegetative restoration in this Subp.

Bill Barton asked about allowing restoration of buffers on existing wetland to receive credit.

Drew Budelis asked why the metro area is not eligible for this provision. Ken Powell offered that there are more mitigation opportunities in the metro area. Drew Budelis said that this provision would benefit trout in the metro areas as much as anywhere. Ken Powell said that exceptional natural resource value is the route for those activities in the metro area. Dave Richfield suggested that BWSR is putting this in as a way to generate credits in a part of the state where options are limited.

Les Lemm said this is also consistent with the new federal mitigation rule. Mollie Dean asked what a high value wetland is. Dale Krystosek said this needs to be defined.

ACTION. Define high value wetland.

Chuck Lenthe asked what would happen if the landowner does the work, then sells the land; would BWSR or the LGU go after the new landowner if there was a problem? Dale Krystosek said yes, through the easement.

ACTION. Specify that areas outside of the greater than 80% area can the use the exceptional natural resource value provision.

Linda Runbeck asked what about a discharge into a trout stream? Dave Richfield referred to Miller Creek in Duluth that does not support trout due to development impacts to water temperature. Linda Runbeck suggested that the PCA is not looking at municipalities, but instead going after landowners.

Subd. 10 – Wetland preservation.

Dave Weirens referred the Committee to the legislation that was passed by the Legislature last week. BWSR staff have not had time to amend the draft rule to incorporate this language, but will do so in the next version of the draft.

Subp. 11 – Wetland credit conversion.

Ron Harnack asked if buffer is included. Les Lemm said yes, does the draft rule need to clarify this? Tom Tri asked about preservation site and buffer? Les Lemm said that the credit amount is 12.5% for the wetland area and buffer.

Steve Commerford asked if buffer could be added to an existing wetland replacement, how would this be handled. Ken Powell said that you would have to go back to how credits could be generated under the current rule.

Draft Standards and Criteria for State Wetland Banking

Les Lemm provided an overview of the three major changes included in this draft rule: (1) the organization of the rule; (2) eliminates the provision for a banking system separate from the state system; and (3) paragraph E on page 4.

ACTION. Ron Harnack expressed concern over the role of the LGU, and their ability to restrict the use of banking, this should be stated up front in Subp. 2 on page 2.

ACTION. The banking rule should have a scope Subp.

Chuck Lenthe discussed his concerns over enforcement and corrective actions, and if the original fee owner or a subsequent landowner should be responsible. It is not an appropriate burden for a subsequent fee owner, who may have paid more for the land, especially when the creation of the credits has taken value. He suggested the following options: increase the monitoring period, possible from 5 to 10 years; create a fee that BWSR would collect to fund future corrective actions.

Dave Weirens stated that landowners need to go through due diligence prior to purchasing property, and that the easement provides landowner responsibilities and BWSR authorities regarding the future of that mitigation area.

Drew Budelis said that when it comes to purchasing property it is buyer beware, one option would be for BWSR to sign off before a land sale that involved a wetland mitigation site.

ACTION. The rule should be examined for how it addresses transfer of ownership.

Ron Harnack said that there are two different situations that affect how these move forward: (1) sites with credits; and (2) sites without credits.

ACTION. (1) Establish a fee for ongoing maintenance of existing wetland mitigation sites, possibly built into homeowner association fees; or (2) increase the existing banking fee to cover maintenance costs.

Drew Budelis said that he is against paying more for an uninformed landowner, buyer beware.

Les Lemm asked what does maintain mean? When is or should a wetland be considered natural.

Dave Weirens said the next meeting will be Thursday, June 26, when the Committee will have to get through banking, monitoring, enforcement, appeals, and wetland planning.

The meeting adjourned at 3:10 p.m.