

WCA PERMANENT RULE ADVISORY COMMITTEE

MnDOT Training and Conference Center  
Shoreview, Minnesota

February 28, 2008

**Meeting Notes**

Committee Members:

**Agriculture**

Mn Corn Growers Association-

Doug Albin

X Warren Formo.

Mn Farm Bureau-

Chris Radatz

X Staci Bohlen.

Mn Farmers Union-

Jim Tunheim

Thom Peterson.

Mn Soybean Growers Association-

Lawrence Sukalski.

Mn Wheat Growers Association-

X Bruce Kleven.

**Business**

Builders Association of Mn-

Lisa Frenette

Stephanie Berklund.

Builders Assoc. of the Twin Cities-

X Rick Packer

James Vagle.

Mn Association of Realtors-

Susan Dioury.

Mn Chamber of Commerce-

Keith Hanson

Tony Kwilas.

Mn Forest Industries-

Wayne Brandt.

Utilities –

X Blake Francis.

Aggregate Ready-Mix Assoc. of Mn

X Mike Caron

Fred Corrigan.

**Environment/Conservation**

Audubon Mn –

Susan Solterman.

Izaak Walton League - Mn Division –

X Bill Barton

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-

X Duanne Bakke

Harlan Madsen.

Metropolitan Inter-County Assoc.-

X Keith Carlson.

Mn Assoc. of SWCD –

X Sheila Vanney.

Mn Association of Townships –

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-

X Allyz Kramer

Andi Moffat.

Minnesotans for Wetlands-

Mary Mueller.

Mn Assoc of Professional Soil Scientists

X Peter Miller

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-

X Doug Norris

X Julie Ekman.

Department of Transportation –

Frank Pafko

X Sarma Straumanis

Pollution Control Agency-

X Dave Richfield.

**Note: X = in attendance**

Guests: Chuck Lenthe, Anderson Passe; Leonard Binstock Agricultural Drainage Management Committee; Chuck Wingert, Land Improvement Contractor's Association; Rick Dahlman, DNR-Forestry; Bob Patton, Mn Department of Agriculture; Eric Hedtke, Minnesota Association of Townships; Linda Runbeck, American Property Coalition and Don Parmeter, American Property Coalition.

Staff: John Overland, Dale Krystosek, Les Lemm, Jeremy Maul, Ken Powell, and Dave Weirens.

Dave Weirens called the meeting to order at 9:05 a.m.

All in attendance introduced themselves.

Review January 31, 2008 Meeting Notes.

Dave Weirens reviewed the January 31, 2008 meeting notes. His review focused on the action items. Tom Tri asked for a revision on page 4 that his point on excavation was regarding road construction activity and not wildlife habitat.

Draft Rule Review – Application Requirements.

Ken Powell led the review of the application requirements section of the draft rule.

On page 1, under subpart 1. E. Bill Barton asked what is meant by “if applicable”? Ken Powell responded that this is meant to be tied to the decision type requested.

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Peter Miller commented that standardizing the approval process for boundary and type applications is a good thing because it is currently done differently in different LGUs.

Peter Miller asked about seasonal constraints. Ken Powell responded that the application forms need to be revisited, in part, to address this issue.

Linda Runbeck asked what is meant by an “accurate map” and if it could be just a drawing. Ken Powell responded that this is up to the local government, and depends on the project.

Bill Barton asked if it would be more appropriate to define when a written description of the project isn’t applicable (Subpart 1, item E) rather than saying “if applicable.” Ken Powell responded that it is referring to the type of decision requested.

Leonard Binstock asked about allowing the local government to decide, what if there is more than one local government? Allyz Kramer responded that the local governments would decide that one is in the lead for the project.

**ACTION.** Doug Norris stated that references to project in Subp. 2 special considerations, needs to be modified to refer to applications, as applications are approved or denied, not projects.

Sarma Straumanis asked about H and J, that denial is not a requirement of these. Doug Norris stated that the purpose of H is that if wetlands used for education are proposed to be impacted, that educational function must be replaced or the application denied.

**ACTION.** Subp. 2, paragraphs H and J need to have their intent clarified.

Allyz Kramer asked how a county would know if a threatened and endangered species exists on a project site and how do applicants know if they should contact the DNR or not? It is not clear what an applicant should do. Doug Norris responded that this can be difficult and not everyone comes to DNR for information, but we should just to give them a heads up to be aware of threatened and endangered species. The DNR reviews the applications and in the future the DNR will be placing this info on their website as well.

Todd Beckel stated that there needs to be a happy medium between southern and northern Minnesota, and that the threatened and endangered species issue is just part of a checklist. He went on to state that there are a lot of impacts in the north, but asked what is the value of the wetland.

**ACTION.** Doug Norris suggested defining wetland type in the definition section (which would include “and subsequent modifications by the board” of the MOU) and referring to types rather than the memorandum of understanding in the first paragraph of wetland boundary and type applications and any other places in the rule it is referred to. The reference to the U.S. Army Corps Manual should include “and supplements.”

Peter Miller asked how wetland bank credits will be transitioned with the new wetland typing system. Dave Weirens responded that a transition system will be established as part of the actions eligible for credit section.

Todd Beckel commented that fewer wetland types are better and we should not increase the number of types.

Peter Miller commented that a number could be added to each plant community type so people know what Circular 39 type they correspond to.

Allyz Kramer stated that delineation reports need to describe the vegetation, not just identify the plant community type, and the 87 manual is not always clear as to what's required in a report. Linda Runbeck followed that a huge educational effort is needed. Marita Valencia said that the Corps has been using this typing system for several years.

Lynda Runbeck expressed concern over retroactive rule changes. Someone could have started a project a few years ago and be in compliance with the rules but now the rules could be changing on them.

**ACTION.** Doug Norris stated that several changes should be made to the No Loss Applications section. (1) change "the" to "any" after whether in the middle of the first paragraph; (2) add "under their own authority" after require on the same line as (1). "Under its own authority" should also replace "through local controls" in the Exemption Applications paragraph.

**ACTION.** Peter Miller asked what is meant by on-site? Preliminary sequencing application language should be changed to specify that the local government staff must be physically on site. Allyz Kramer suggested the following language: ...the local government unit, "having been on site," may provide a sequencing determination...

**ACTION.** Doug Norris and Peter Miller asked when does the 60-day requirement begin? Ken Powell responded that the list of requirements should be revisited and separate them into what is required for completeness, and an "other" requirements list.

**ACTION.** Sarma Straumanis suggested combining D and H, or at least placing them next to each other, under Replacement Plan Applications as they both address soils requirements. In addition, in D, the soils map should be required only where available.

**ACTION.** Peter Miller suggested clarifying in J who will do the monitoring.

**ACTION.** Doug Norris suggested that use of the word “affidavit” in M implies a notarized document and, for purposes of this section, should be changed to “statement.”

**ACTION.** Mollie Dean suggested adding a new item regarding compliance with the replacement siting standards, which would include the location of the impact and replacement sites.

**ACTION.** Rick Packer asked what is the purpose of O and P, and if O would prevent getting credit for otherwise eligible stormwater facilities? Les Lemm responded that these are in statute except for “was not restored or created for other unrelated regulatory purposes.” BWSR will look at this language to make sure it doesn’t prevent credit for otherwise eligible stormwater treatment facilities.

Dave Richfield indicated that the language in O and P could be looked at to help align state water policy.

**ACTION.** X should be clarified and restated with clear reference to conservation easements for replacement wetlands, possibly listing what the evidence of recording must include. In addition, throughout the rule, the use of the terms “replacement wetland, replacement wetland areas,” and “replacement areas” should be consistently used.

The length of time that maintenance and management must be done on a replacement wetland was discussed. Rick Packer was concerned about a requirement to maintain replacement sites “forever,” and stated that there should be some reasonableness in the rule for maintenance requirements (i.e. if a few cattails end up in a type 2 replacement wetland 10 years down the road, there shouldn’t be a requirement to remove them). Doug Norris stated that there is a difference between ongoing management and, for example, a dike blowing out and draining the wetland. The exception would be if credit was given for vegetative restoration, it would need to be maintained forever. Sarma Straumanis added that there is a difference between maintaining a jurisdictional wetland and accomplishing the vegetative establishment performance standards. Bill Barton commented that permanent maintenance requirements for replacement wetlands could place a higher priority on avoidance. Dave Weirens added that this issue will be addressed more directly under replacement requirements.

Draft Framework - Scope, No-Loss, and Exemptions.

Les Lemm reviewed the draft framework for identifying how the proposed rule will distinguish between activities that are not regulated under WCA (scope), and those that are considered a no loss or are exempt.

Peter Miller commented that these issues are interrelated, and that we want to be sure that we are not causing a process problem, following the no loss procedure when exempt is the way to go.

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Other comments on the Framework language included: DNR waters are not within the scope of WCA, “within the scope of” should be changed to “subject to regulation by,” and the terms impact and activity should be defined in the rule and used consistently and appropriately.

Dave Richfield, said that the state water policy should be considered in this discussion. It is important to protect the wetland, but to avoid unintended consequences.

Draft Rule - No Loss Determinations.

John Overland reviewed the draft no loss determinations rule section.

**ACTION.** Doug Norris suggested changing “completing” to “conducting” in the first paragraph, and “exotic” to “non-native” under B(1) on page 1.

**ACTION.** John Overland offered that the clauses in B(2) should be flip-flopped.

Peter Miller asked how will predominately 4-foot deep and canary grass wetlands be regulated. Allyz Kramer asked how will the rule deal with a wetland converted to stormwater use over time? Peter Miller followed by saying the B(1) will be used to create open water.

It was suggested that a two-meter maximum depth for excavation be specifically listed under item B.

A general comment was made that the proposed approach to excavation was a good thing.

Peter Miller suggested that BWSR look at providing consistency with the Corps in regards to excavation. Marita Valencia said she would send information on current Corps policy.

**ACTION.** Bill Barton suggested deleting “solely” in B(2). It was then suggested to replace “solely” with “primarily” and add “or to receive additional untreated stormwater or agricultural drainage” to the end of the sentence.

**ACTION.** Dave Richfield said that increasing water may change the wetland type, stress the plant community, affect nutrient movement, some limit may be appropriate. Doug Norris suggested an alternative to limit negative consequences, by using language such as: “The excavation is conducted solely to improve the ecological condition of a degraded wetland.” The words “maintain or enhance” could be substituted for “improve.”

Bill Barton commented that, if landowners are allowed to excavate in a wetland, they should be required to improve it. Marita Valencia commented that it is impossible to make a narrow swath through a reed-canary grass wetland anything different.

**ACTION.** Leonard Binstock suggested adding ditch banks into C. Another change suggested in C is to add “existing” before culverts and delete “through roadways”.

**ACTION.** Allyz Kramer suggested adding “or another type” to D.

Sarma Straumanis suggested moving items E and G to scope.

**ACTION.** The following part of G is redundant with E: “the excavation activity is limited to excavation and removal of deposited sediment in constructed stormwater management basins”.

Leonard Binstock asked when the financial assurance is returned under H(3) and who determines that. He also commented that holding up large financial assurances can cause major cash flow issues to developers. John Overland responded that this generally occurs within 6 months and that we have tried to clarify throughout the rule that the LGU makes the decision.

**ACTION.** H(3) should be clarified regarding who and when determines the financial assurance is returned.

Allyz Kramer asked what the performance standards are under H? John Overland responded they are the same as the replacement standards.

Draft Rule – Scope of Exemption Standards.

John Overland reviewed the draft rule – scope of exemption standards.

Bill Barton said that the exemptions do not apply to public waters wetlands.

**ACTION.** Doug Norris suggested that replacement for impacts to calcareous fens is handled under a different procedure than under replacement plans. This should be clarified in the Scope of Exemption Standards.

**ACTION.** Dale Krystosek commented on the hanging language on page 5 that ends with acknowledgment. This corresponds to current rule language and could be “county recorder speak,” but does not seem to end right.

Bill Barton asked if we need to allow an affidavit as evidence for an exemption. John Overland responded that there could be cases where USDA air photos are no longer available. Dave Weirens added that we are already proposing to “raise the bar” by requiring other information to be considered first.

**ACTION.** In reference to Exemption Standards, Subpart 1 C, Sheila Vanney requested guidance as to what “certified” by the SWCD meant, including clarification that the certification could be done by SWCD staff without formal board action.

**ACTION.** Fill for wheeled irrigation booms language needs to be moved from scope to the ag exemption for consistency with the framework discussed earlier.

**ACTION.** Doug Norris suggested using language previously considered by the BWSR Rule Team regarding spoil placement that includes specific reference to the right-of-way. Les Lemm responded that this issue would be discussed with Chief BWSR Engineer Al Kean.

**ACTION.** Allyz Kramer suggested adding “years” after 25 under private drainage system maintenance on page 9.

Les Lemm commented that the term enhancement is used on page 9 to avoid confusion with 103E terms. Chuck Wingert said he thought that would work well.

Todd Beckel asked about Drainage Enhancement (1)(a) and what about a couple of years when a crop does not get planted? Dave Weirens responded that this is statutory language.

**ACTION.** Allyz Kramer requested being consistent with how the wetland types are referenced throughout the rule (i.e. fresh wet meadow vs. fresh-wet meadow).

**ACTION.** Sarma Straumanis suggested changing “wetlands impacted” to “proposed wetland impacts” in the last sentence of Subpart 4, Restored Wetlands, item A.

**ACTION.** Allyz Kramer said that use of “pre-project” in this exemption is confusing. In the first sentence of Subpart 4, Restored Wetlands, item A, it was suggested to clarify that “pre-project conditions” means the hydrologic conditions that existed prior to the restoration activities conducted per the contract or easement. Perhaps use “contract” instead of “project.” It was also suggested to use consistent language in this part regarding use of an affidavit.

**ACTION.** In regards to the proposal for the restored wetlands exemption to not apply after 25 years, it was asked if this applied now (retroactively) or at some point in the future. The comment was made that, if the 25 year limitation isn’t in statute, it shouldn’t be added in rule. It was recommended that BWSR ask the Attorney General if it is allowable to eliminate the incidental exemption after 25 years.

Leonard Binstock suggested that if the wetland is manmade and wasn’t a wetland before, there should be no restrictions on future impacts and there should not be a 25-year time limitation. A 25-year time limitation should not apply to incidental wetlands or wetlands created under Subpart 4, Restored Wetlands, items A and B. Bill Barton followed by asking if these wetlands are counted towards no net loss.

**ACTION.** The Restored Wetland exemption should separate created into one category, and enhancement into another for establishing exemption conditions.

**ACTION.** Doug Norris suggested adding floodplain forest to the De minimis Exemption to ensure it is unchanged from current rule and law.

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**ACTION.** Doug Norris said the Wildlife Habitat Exemption needs to continue to specify that there cannot be an adverse impact to a federally listed endangered or threatened species.

John Overland said the Exemption Determination section should be deleted here as these provisions are addressed elsewhere in the rule.

The Committee selected April 24 as the fourth meeting, and maintained March 27 as the third meeting.

The meeting adjourned at 3:15 p.m.