

WCA PERMANENT RULE ADVISORY COMMITTEE

MnDOT Training and Conference Center  
Shoreview, Minnesota

June 26, 2008

**Meeting Notes**

Committee Members:

**Agriculture**

Mn Corn Growers Association-

Doug Albin.

Warren Formo.

Mn Farm Bureau-

Chris Radatz.

Staci Bohlen.

Mn Farmers Union-

Jim Tunheim.

Thom Peterson.

Mn Soybean Growers Association-

Lawrence Sukalski.

Mn Wheat Growers Association-

Bruce Kleven.

**Business**

Builders Association of Mn-

X Lisa Frenette.

Stephanie Berklund.

Builders Assoc. of the Twin Cities-

Drew Budelis.

X 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

Mike Caron.

Fred Corrigan.

**Environment/Conservation**

Audubon Mn –

Susan Solterman.

Izaak Walton League - Mn Division –

Bill Barton.

Dell Erickson.

Mn Center for Env. Advocacy-

Janette Brimmer.

Henry Van Offelen.

Mn Conservation Federation-

Gary Botzek.

Sierra Club - North Star Chapter-

Mollie Dean.

**Local Government**

Association of Mn Counties-

Duanne Bakke.

Harlan Madsen.

Metropolitan Inter-County Assoc.-

X Keith Carlson.

Mn Assoc. of SWCD –

X Sheila Vanney.

Mn Association of Townships –

Dave Fricke.

X Dan Greensweig.

Mn Assoc. of Watershed Districts-

X Roger Lake.

Mn County Engineers Association –

X Doug Fischer.

X Tom Tri.

Mn Rural Counties Caucus-

X Todd Beckel.

X Wade Pavleck.

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**Others**

Mn Viewers Association-

Jim Weideman.

Wetland Professionals Association-

Allyz Kramer.

X Andi Moffat.

Minnesotans for Wetlands-

Mary Mueller.

X 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 –

Sid Cornelius.

**State Government**

Department of Agriculture-

Joe Martin.

Department of Natural Resources-

Doug Norris.

X Julie Ekman.

Department of Transportation –

X Frank Pafko.

Sarma Straumanis.

Pollution Control Agency-

Dave Richfield.

**Note: X = in attendance**

Guests: Bill Wilde, Minnesota Pollution Control Agency; Leonard Binstock, Agricultural Drainage Management Coalition; Chuck Wingert, Land Improvement Contractors Association; Greg Russell, DNR-Forestry; Barbara Walther, Wetland Professionals Association; Jeremy Geske, Minnesota Farm Bureau; Don Parmeter, American Property Owners Coalition; and Ron Harnack.

Staff: Dan Girolamo, Dale Krystosek, Les Lemm, Jeremy Maul, and Dave Weirens.

Dave Weirens called the meeting to order at 9:10 a.m.

Review April 24, 2008 Meeting Notes.

Dave Weirens briefly reviewed the May 22, 2008 meeting notes. Barbara Walther asked about the discussion of buffer that occurred at this meeting and that her notes indicated there was a consensus on the proposal for buffer credit at 50% up to twice the wetland area. Les Lemm responded that this was supported by the Technical Committee and will be considered during development of the final draft rule.

**ACTION.** Roger Lake asked that a summary of rule changes be produced, that would identify changes as follows: (1) depart from the current rule; (2) a result of reordering; and (3) those that are different from the Corps.

Review Draft Proposed Rule Amendments – Wetland Banking.

Dan Girolamo led this discussion, and began by giving an overview of the significant changes in the draft rule.

**ACTION.** Ron Harnack said he found subp. 2 on page 2 confusing and that it should be reordered, especially regarding LGU discretion to certify wetlands for deposit. This authority should be moved up in the rule, so an applicant can know about this LGU need to certify right away.

Ron Harnack expressed concern over the language in subp. 3 that requires an access easement for “any other state, local or federal” authority that authorizes use of credits. Dave Weirens said this language provides flexibility to bankers to sell wetland credits for multiple programs. Barbara Walther clarified that this provision only applies to authorized use, not purchase of credits by a government.

**ACTION.** Strike “other state, local, or” from subp. 3 on page 3.

Ron Harnack asked about the requirement to mark bank boundaries. Dan Girolamo responded that the current requirement is for 2 markers per ¼ mile.

Ron Harnack asked if the rule allows deposit of 15% of the credits after implementation of the banking plan. Dan Girolamo responded, yes for WCA.

Barbara Walther asked about deleting the topographic setting requirement. Les Lemm responded that this is an old rule requirement. Frank Pafko followed by stating this had to do with the old wetland typing convention that included flow through wetlands that is no longer in the rule.

**ACTION.** Paragraph H on page five should include a reference to the monitoring section.

Ron Harnack asked about the requirement that the legal boundary survey in H. (2) must be completed by a registered land surveyor. Dan Girolamo said the reason is to increase the professionalism in wetland banking.

Ron Harnack suggested allowing use of aerial photographs that would provide the same level of detail. Leonard Binstock suggested that GPS could provide the same level of detail. Mike Whitt referred the discussion to A on page 3 that provides, “land survey or comparable method of field measurement” and suggested that the language under H. should be consistent with this.

**ACTION.** Language in A on page 3 and H on page 5 should be consistent in how a survey should be conducted.

Ton Tri expressed concern over the potential length of the monitoring period, especially for gravel pits. Lisa Frenette followed by expressing concern over too much LGU discretion in determining the length of the monitoring period. Dan Girolamo stated that the current maximum length is ten years. Marita Valencia said that the length is case by case for each bank, depending on what the banker is trying to do. Les Lemm suggested deferring this issue until the monitoring section is reviewed.

Mike Whitt asked if fencing should be required to address encroachment. Dan Girolamo said that the markers and inspections are the current method to address encroachment.

Todd Beckel asked if the rule should leave the information requirements up to the LGU.

Ron Harnack asked about substituting impact for "drainage or filling", as included on page 6. Les Lemm responded that impact is currently defined as drain or fill and this change is being made throughout the rule.

Doug Fischer asked about diverting water from a wetland. Les Lemm responded that this would be an impact under the current definition.

**ACTION.** Keith Carlson said the reference to subpart 8 on page 7 should be subp. 3.

**ACTION.** Subp. 4 should be changed by deleting "until at least one regulatory authority has approved the use" to "until the agency with authority over the impact to be mitigated by the purchase of bank credits has approved the use".

Ron Harnack suggested eliminating the percentages in the administrative fees, and just using the maximum amounts. Dave Weirens responded that the language matches statute

**ACTION.** Subp. 6 should be changed to correspond to 2007 statute regarding the deposit of wetland banking fees.

Leonard Binstock asked why the state is the insured party under the required title insurance. Ron Harnack responded because it is required by the Attorney General.

**ACTION.** Consult with the Attorney General regarding the requirement for the state to be named as the insured party for title insurance on wetland banking easements.

#### Review Draft Proposed Rule Amendments – Monitoring.

Les Lemm opened the discussion of this section by stating that a goal of the rulemaking is to improve the quality of wetland mitigation.

Lisa Frenette asked about the list of requirements under Subp. 2, and if all of the items are needed. Barbara Walther said the requirements help ensure quality.

**ACTION.** Eliminate, consolidate the list of items under Subp. 2, and ensure consistency with the banking section (i.e. D. a "survey map").

Andi Moffat asked about "promptly" in Subp. 3 as this word relates to the 60 day rule. Les Lemm responded by stating there is no connection as this is not a decision.

**ACTION.** Add “in the approved replacement plan” after goals in Subpart 1 on page 2.

Andi Moffat asked what liability the LGU has if they say the wetland looks good, and then fails.

Leonard Binstock asked about inspector training requirements, how ensure there is qualified staff. Les Lemm said that BWSR will do more in the future, and that replacement wetland inspection is a role of the TEP.

Doug Fischer asked if applicant under subp. 2A on page 2 should read landowner. Les Lemm said that the development of the consolidated rule will include a review of the appropriate use of these terms.

Lisa Frenette asked about financial assurance requirements. Les Lemm said that BWSR staff are still undecided; currently it is left up to the LGU. Lisa Frenette suggested that if an existing letter of credit is being used, then that should be modified to incorporate wetland mitigation, and not do another one.

Doug Fischer said that attorneys do not like the term “as-built”, instead should use something like drawing of record.

**ACTION.** BWSR Staff should consult with the Attorney General’s office regarding use of the term as-built.

Lisa Frenette asked about the fees discussed under Subpart 2A on page 2, and if this would be on top of the banking fee. Les Lemm this would be separate and essentially a fee for service. Kelly Bopray followed, that some LGU’s, such as Maple Grove currently require this. Dan Girolamo stated that there are two kinds of monitoring, initial and long term.

Tom Tri said, regarding Subpart 3, that the original monitoring period was a maximum of 5 years, not minimum, for some wetland types 3 years can be enough. Applicants are looking for flexibility, and that the monitoring period may need to extend beyond 5 years. A longer monitoring period can be Ok if there is no annual report.

Wade Pavleck stated that there should not be open ended liability.

**ACTION.** Add an end date for monitoring, which can be extended for extenuating circumstances.

**ACTION.** In Subpart 4A tie “identified goals” to the approved replacement plan.

**ACTION.** Reports should be semi-annual, or some term other than annual for long term monitoring.

**ACTION.** In Subpart 4, after successful, add according to subpart 3”.

Ron Harnack said the annual reports are a lot of work, and asked if there should be different standards for small impacts, such as not allow project specific replacement, banking only. He followed by asking who will look at the report, or care.

Keith Carlson said that after one year credits are available, if there is a problem, then no further withdrawals, the current system creates 5 years of uncertainty. What about limiting the geographic scope of replacing wetland impacts. Les Lemm responded by stating that scattered wetlands do not do a good job of replacement wetland functions and values.

Ron Harnack stated that someone has to use the information; there are cases where the wetland can be fully functional in less than 3 years. LGU's and TEP's need that flexibility.

**ACTION.** The monitoring period can be less than 3 years with concurrence of the TEP.

**ACTION.** The first year report should include documentation of the WCA deed restriction for project specific replacement.

**ACTION.** In subpart 1, on page 4 delete “still”.

**ACTION.** On page 5, amend the draft rule language to specify that the SWCD does not order restoration, but develops the restoration plan.

Ron Harnack asked about subpart 2 on page 5, and that it assumes the LGU looks at all reports. What happens if the LGU does not, is the replacement wetland certified by default. Les Lemm suggested the LGU could be required to respond no later the subsequent growing season (to the request by the landowner for certification).

**ACTION.** Also, add a response time period for the LGU to the applicant request.

Keith Carlson expressed concern over the decision making, where the rule has the LGU making the decision throughout, but then it is the TEP at the end.

**ACTION.** Specify that the certification decision is reviewed by the TEP, with the LGU making the determination.

#### Review Draft Proposed Rule Amendments – Appeals.

Lisa Frenette asked about use of the word send; does this equal mail? Les Lemm responded yes.

Wade Pavleck asked if an appeal has ever been successful. Dale Krystosek responded yes.

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Lisa Frenette followed her comment by stating that the rule will need to be checked for the term written notice.

Wade Pavleck asked if the filing fee is nonrefundable. Dave Weirens said that the purpose of the fee is to cover a portion of the costs of administering the appeals process.

Leonard Binstock asked where the fee language came from. Dave Weirens responded that this is the 2007 statutory amendments.

Julie Ekman asked if the new language in paragraph is from statute. Les Lemm responded yes.

Ron Harnack asked if an appeal is remanded, does a new 60- day period start up. Dave Weirens responded that the LGU is provided an additional 30 days to conduct the remand. Ron Harnack followed by asking if a remand would be justified by no written record. Les Lemm said yes.

Les Lemm asked the Committee if the LGU should be required to produce only one copy, which BWSR would use to generate the additional copies required for the appeal process, or if the LGU should generate all copies required for notification.

Ron Harnack said that the LGU should send one copy to BWSR, and increase the fee to cover the cost. Doug Fischer agreed that this would make the process more consistent.

Tom Tri asked who receives the copies. Dale Krystosek responded that they go the Board's Dispute Resolution Committee and other parties to the appeal.

**ACTION.** Amend the rule to have the LGU send one copy to BWSR, which will make the copies required for the appeals process, and increase the fee to cover the added cost.

Review Draft Proposed Rule Amendments – Enforcement.

**ACTION.** Leave technical matters in the hands of the TEP, delete concurrence of the enforcement authority where it appears in this section.

Ron Harnack said that BWSR needs to work out the enforcement process with PCA, as WCA and stormwater violations are similar.

**ACTION.** Add a timeline to subpart 3a as it relates to the issuance of a certificate of satisfactory restoration or replacement.

Review Draft Proposed Rule Amendments – Penalty for LGU Failure to Apply Law.

**ACTION.** Julie Ekman provided proposed language drafted by Doug Norris to replace a portion of A, which is as follows: If a local government unit fails to acknowledge in writing its responsibilities under this chapter and the act, as required in local government unit duties, part XX, the board will impose a 60-day moratorium in the local government unit's jurisdiction in implementing this chapter and the act, including decisions on exemption, wetland boundary, wetland type, no-loss, replacement plan, and banking applications. The board will notify the local government unit of the start and end dates of the moratorium.

**ACTION.** The Attorney General should review D and its conformance to Mn. Stat. 15.99 regarding if there should be a timeframe that allows action on pending/already submitted applications when a moratorium is declared

Review Draft Proposed Rule Amendments – Wetland Planning.

Ron Harnack asked why we are reviewing this language when there is no agreement with the Corps. Les Lemm stated that there are opportunities to improve the rule that should be pursued in either case. We also looked at the National mitigation rule in making these improvements in order to create consistency and create the opportunity for the Corps to accept these plans, and we do intend to discuss the issue with the Corps in further detail.

Sheila Vanney asked why watershed districts are being added to subpart A. Ron Harnack said the watershed districts are authorized to develop wetland plans and make cities implement WCA consistent with these plans.

**ACTION.** Add rule after ordinance where it appears in this section.

**ACTION.** Amend B to delete “meet locally identified”.

Keith Carlson asked if should is a discretionary word, as used in subpart 3. Les Lemm responded yes.

Les Lemm stated that items B and E in subpart 4 are very similar and may be combined.

Ron Harnack asked about deleting ten years. Les Lemm stated that the term of wetland plans is provided in subpart 9.

Keith Carlson asked if E on page 3 allows departing from 1:1 so long as the overall replacement is at least 1:1. Les Lemm responded yes.

**ACTION.** Delete “over the life of the plan” from E. on page 3.

Keith Carlson asked about using watershed or plan area, and that one term should be used.

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**ACTION.** Ron Harnack suggested deleting “restores naturally occurring wetlands and” from C. on page 4.

**ACTION.** The state review agencies should be listed in subpart 6.

Keith Carlson asked if a TMDL would meet the requirements for a wetland plan.

**ACTION.** Specify that the LGU may request an extension.

Dave Weirens stated that the remaining items: High Priority Regions and Areas; Wetland Preservation Areas, and Mining and Calcareous Fens will not be reviewed today due to a lack of time, But that Committee members should submit comments or questions to me or Les Lemm.

The meeting adjourned at 3:10 p.m.