

WCA PERMANENT RULE ADVISORY COMMITTEE

MnDOT Training and Conference Center
Shoreview, Minnesota

August 29, 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-

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 –

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-

X Mollie Dean

Local Government

Association of Mn Counties-

Duanne Bakke

X Harlan Madsen.

Metropolitan Inter-County Assoc.-

Keith Carlson.

Mn Assoc. of SWCD –

Sheila Vanney.

Mn Association of Townships –

Dave Fricke

X Dan Greensweig.

Mn Assoc. of Watershed Districts-

X Roger Lake.

Mn County Engineers Association –

Doug Fischer

X Tom Tri.

Mn Rural Counties Caucus-

Todd Beckel

X Wade Pavleck.

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Others

Mn Viewers Association-

Jim Weideman.

Wetland Professionals Association-

Allyz Kramer

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-

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

Julie Ekman.

Department of Transportation –

Frank Pafko

X Sarma Straumanis

Pollution Control Agency-

X Dave Richfield.

Note: X = in attendance

Guests: Barbara Walther, Wetlands Professional Association; and Kent Rodelius, Prinsco/Minnesota Land Improvement Contractors Association.

Staff: Les Lemm and Dave Weirens.

Dave Weirens called the meeting to order at 9:12 a.m.

Review June 26, 2008 Meeting Notes.

Dave Weirens reviewed the June 29, 2008 meeting notes. Tom Tri asked about a statement attributed to him on page 5. Dave Weirens said he would review his notes and get back to him.

Introduction.

Dave Weirens reviewed the meeting schedule from July until the BWSR Board meeting in December and the proposed rule reorganization. He also discussed the rule sections that were posted on the BWSR website, and that the wetland replacement section has not been posted, but should be by the end of September. BWSR and the Corps of Engineers have been meeting to discuss rule issues and the Wetland Mitigation Rule.

Consolidated Draft Rule Review.

Les Lemm led the review of the consolidated draft rule. He stated that the definitions and references are being moved to the end of the rule.

Purpose (page 1).

Mike Whitt asked about capitalization in the rule. Les Lemm answered that capitalization is unchanged from the current rule.

Dave Weirens stated that a reference to statute changes made in 2008 should be included under Purpose and Scope.

Scope (page 2)

Doug Norris expressed concern over the proposal to move the incidental wetlands exemption to Scope. The issue is that exemptions are regulated, but replacement is not required, however, moving it to Scope eliminates regulation. Sarma Straumanis said that many areas that fall under the incidental exemption do not look like wetlands and there are workload issues to prove if the area is or is not a “jurisdictional” wetland.

Barbara Walther suggested that this language should include “does not regulate areas that have taken on wetland characteristics”.

ACTION. Do not include “incidental” in Scope, but state that stormwater and drainage are not jurisdictional, that the prohibition on using more than one exemption does not apply to the incidental wetlands exemption, and put something back in the Incidental Wetlands Exemption.

Discussion continued on this issue. Wade Pavleck disagreed with Doug Norris. Sarma Straumanis stated that the language refers to areas specifically designed or altered by the hand of man. Doug Norris stated that man-made, incidental wetlands should be non-jurisdictional. Kelly Bopray asked about excess water being added, would that be incidental?

ACTION. Doug Norris suggested modifying the last sentence on page 2 to read, “This chapter does apply to state agencies, but does not require state agencies to obtain local government unit approvals.”

Presettlement Wetland Acres and Areas (page 3)

ACTION. Tom Tri suggested switching B and C under Presettlement Wetland Acres and Areas.

ACTION. Sarma Straumanis suggested deleting “Acres and” from the title of this section.

Determining Local Government Unit; Duties (page 4)

Doug Norris suggested adding “under this chapter” after decisions on the third line of this section on page 4. Les Lemm responded that the definition of decision will specify under this chapter.

ACTION. Wade Pavleck suggested adding “governmental” before entity in C on page 4.

Dan Greensweig asked who WCA authority can be delegated to. Les Lemm said there are a number of options; counties, cities, townships, watershed organizations, and soil and water conservation districts. He added that guidance can be used to identify who WCA authority can be delegated to.

ACTION. Add “project specific” before replacement in the first line of E on page 5.

ACTION. Doug Norris suggested separating the new sentence from the first paragraph in E on page 5.

ACTION. Add “establishment” before banking in F on page 5.

ACTION. Doug Norris suggested it may be appropriate to combine F with E on page 5.

Doug Norris asked about H, and how this language matches up with the language on state agency authority under Scope on page 2, and that it may make sense to move this language to that part of the rule. The discussion also included that this language speaks to who the LGU is on state land.

ACTION. Move the first two sentences of H to a new C, and the third sentence to Scope. The fourth sentence will remain in H on page 5.

Local Government Unit Duties (page 5)

Dan Greensweig asked if it is necessary to require a separate acknowledgement under Subp. 2, especially if there is annual reporting. Les Lemm said, yes, to ensure that BWSR knows who has assumed responsibility.

Doug Norris asked if the acknowledgment requirement applies to state agencies. Les Lemm responded that it applies to all WCA LGU’s, including state agencies.

Mike Whitt asked how the wetland delineator certification program fits into B. Les Lemm responded that the Committee discussed LGU requirements and decided that this would be deferred to Board policy after the rulemaking is complete.

Dan Greensweig stated that the word “evidentiary” in C on page 6 does not add much, and if it is used should be more explicit on what evidence can be presented.

Wade Pavleck asked who makes the final decision under C. Les Lemm responded that the staff makes the final decision when delegated that authority by the governing body.

Dan Greensweig asked about the language in D. Les Lemm said that the Attorney General’s Office wants this language. Tom Tri asked what it means. Les Lemm responded that it means the evidence must support the decision. Dan Greensweig said he would like to see the same language as used in variance law, “arbitrary and capricious”. Using different language will get expensive to litigate.

Sarma Straumanis asked about F and who decides that all requirements are fulfilled. Les Lemm responded that this is currently part of the process.

Dan Greensweig said that under H, it will cost LGU's money to report on technical issues. Wade Pavleck followed by stating this is an unfunded mandate. Les Lemm responded that BWSR currently provides funds to counties and soil and water conservation districts for WCA administration, which includes this reporting function.

Mollie Dean asked about the new exemption reporting requirement. Dave Weirens responded by reviewing the series of proposals that are being included in the rule and other non-rule items that will improve data. However, no new exemption tasks are proposed for this rulemaking due to legal authority, concerns over data quality, and LGU workload issues.

Procedures and Penalty for Local Government Unit Failure to Apply Law (page 6)

Wade Pavleck asked about the affect of a moratorium for failure of an LGU to implement WCA. Les Lemm said the options are to adopt or delegate to another LGU.

Dan Greensweig asked if a moratorium existed without a notice? Les Lemm responded that the rule requires a BWSR notice. Dan Greensweig asked if there are any court cases about what happens with Minn. Stat. 15.99 under a WCA moratorium? Les Lemm said we will get to that issue soon.

ACTION. C on page 7 should be moved into B, or modify the reference to "part" on the first line to read "subpart".

Wade Pavleck asked what the penalty is for noncompliance. Dave Weirens said there can be no approved wetland impacts. Tom Tri asked if there is any help BWSR can provide to an applicant. Dave Weirens responded that BWSR is not authorized to make wetland impact decisions under WCA.

Dan Greensweig said he is concerned over how a court would review D, the language should refer directly to Minn. Stat. 15.99, paragraph 3.

Technical Evaluation Procedures (page 7)

ACTION. Doug Norris asked if "provided" in B should be "approved".

Barbara Walther suggested using TEP instead of panel, as this is the common term used.

Dan Greensweig expressed concern that deleting "wetland" in front of ordinances in C may allow the TEP to interpret any ordinance.

ACTION. Add "implementing these plans" after ordinances in C on page 8.

ACTION. Mike Whitt suggested moving the sentence, “The panel also must review applications for replacement of public road projects as provided in 8420.XXXX, banking projects as provided in 8420.XXXX, and monitoring of replacement wetlands as provided in 8420.XXXX to its own paragraph.

ACTION. It was suggested moving the last sentence of C to D, both on page 8.

Local Government Unit Application and Decision Procedures (page 9)

Mollie Dean said, in reference to the “seasonal constraints” language in Sub p. 2, that there is a distinction between incomplete application rejection and denial. Mike Whitt suggested identifying specific factors that limit the ability to verify data, such as snow cover.

Tom Tri added that the Corps and some counties allow provisional permits. Les Lemm suggested providing more direction on this issue in guidance. Harlan Madsen said that the word “prevent” is subject to interpretation.

Dan Greensweig suggested adding a specific reference to Minn. Stat. 15.99, subd 3. 3.

ACTION. Doug Norris expressed concern over the language in 3A on page 10, and that adding the following after plan would clarify this: “when compared to the previously approved replacement plan.

ACTION. Sarma Straumanis suggested modifying 3A1) on page 10, as follows: when the area to be impacted under the revised plan is more than ten percent larger than the previously approved impact area.

ACTION. The second sentence in Subp. 4 on page 10 should be moved to immediately prior to the yellow language in this subp.

ACTION. In Subp. 4, delete “reject” and replace it with “deny” on line 8; add “in their finding” after “include” and before “the” on line 7; and delete “concur with an extension” and replace this with “recommends an extension to the local government unit” on line 11.

ACTION. Mike Whitt suggested making the valid term of the LGU decision to be the same here (3 years) and in the banking section (2 years).

ACTION. Tom Tri asked how long a delineation is good for under WCA, and suggested matching the time period with that of the Corps.

Harlan Madsen asked if the TEP has oversight on the LGU time period, and if it has decision making authority. Les Lemm responded that the TEP responsibilities are within the time periods of 15.99 and that the TEP does not have decision making authority

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Dan Greensweig observed that the rule uses landowner and applicant interchangeably, and that the rule should use applicant, otherwise all noticing will require a title search.

ACTION. The Attorney General should be asked to provide advice when to use landowner and when to use applicant.

Mike Whitt stated that subp. 6 conflicts with the banking section and who should report the banking transaction. Doug Norris stated that he is concerned over selling a credit more than once, which can be prevented if both the banker and LGU send in the notice.

ACTION. The rule should require the wetland banker and LGU to notify BWSR of banking transactions.

Previously Approved Applications (page 11)

ACTION. Doug Norris suggested deleting “Approved applications” and replacing it with “Activities for which an application has been approved” in the first line of this part.

General Application Requirements (page 12)

ACTION. Delete “project” and replace this with “activity” in B3 on page 12.

ACTION. Delete “determine” and replace this with “evaluate” or “show” or “verify” in B7 on page 12.

ACTION. Add proof of property rights to B on page 12, and delete it from Exemption Applications on page 13 and A5 on Replacement Plan Applications on page 15.

Tom Tri asked why someone would ask for a preliminary sequencing decision. Les Lemm said it can be used by a landowner to decide whether or not to proceed with a project and that it should be documented. Doug Norris said it is his understanding that determination means a paper record.

Doug Norris suggested using the statutory language and clarify what determination means.

Dave Weirens said that the next meeting on September 11 will continue on page 15 where this meeting left off.

The meeting adjourned at 3: 10 p.m.