

Exemptions: Application, Implementation, Estimates, and Reporting

WCA Rule Advisory Committee – 4/24/08 Meeting Materials

Introduction

The 2007 Minnesota Legislature directed BWSR to develop rules that (1) address the application and implementation of Wetland Conservation Act exemptions, and that (2) provide for estimates and reporting of exempt wetland impacts, specifically including the drainage, utilities/public works, and de minimis exemptions. The statutory requirement and strategies for addressing it are below.

Requirement

Sec. 127. Minnesota Statutes 2006, section 103G.2241, subdivision 11, is amended to read:

Subd. 11. **Exemption conditions.** (a) A person conducting an activity in a wetland under an exemption in subdivisions 1 to 10 shall ensure that:

(1) appropriate erosion control measures are taken to prevent sedimentation of the water;
(2) the activity does not block fish passage in a watercourse; and
(3) the activity is conducted in compliance with all other applicable federal, state, and local requirements, including best management practices and water resource protection requirements established under chapter 103H.

(b) An activity is exempt if it qualifies for any one of the exemptions, even though it may be indicated as not exempt under another exemption.

(c) Persons proposing to conduct an exempt activity are encouraged to contact the local government unit or the local government unit's designee for advice on minimizing wetland impacts.

(d) The board shall develop rules that address the application and implementation of exemptions and that provide for estimates and reporting of exempt wetland impacts, including those in section 103G.2241, subdivisions 2, 6, and 9.

1.) Application and Implementation

Current WCA Rules address the application and implementation of exemptions, however, through the Permanent Rule revision process the applicable sections of rule will be reviewed for clarity, specificity, and consistency. In addition, the following two actions are recommended:

- A) Amend the Rule to clearly differentiate between “exempt” activities and “unregulated” activities. The current rule (and in some cases statute) identifies some activities that do not impact wetlands as “exempt.” Yet activities that do not impact wetlands are not regulated under WCA, and therefore do not require an exemption. This is somewhat contradictory, causes confusion as to what LGUs should report regarding exempt impacts, and contributes to inaccuracies in the data. BWSR staff propose to reorganize the rule to clarify that exemptions are activities that impact a jurisdictional wetland but are exempt from replacement plan requirements. Activities that do not impact a wetland and qualifying temporary impacts should be included in the Scope or No-Loss sections whenever possible. The clarified rule will have the same effect as statute, but will be easier for LGUs and landowners to understand and will improve the accuracy of the data reported regarding acres of wetland lost.
- B) Provide detailed guidance. Upon adoption of the permanent rule, BWSR will update, clarify, and refine official guidance where needed to provide additional detail on the interpretation, application, and implementation of exemptions as they relate to specific activities.

2) Estimates and Reporting

A number of measures will be employed to improve our ability to provide estimates and reporting of exempt impacts. The particular measure used will vary for the different exemptions. All options would include an educational component. Six options are outlined below for consideration:

- A) Require noticing of exemption applications. Under current rule, LGU decisions on exemptions can be made without noticing the application or providing anyone an opportunity for comment. BWSR staff propose to amend the rule to provide a single standard for noticing of all applications, including exemptions. Under the staff proposal, those required to receive notice under current rule section 8420.0230 for replacement plans would also receive notice, a copy of the application, and an opportunity for comment on exemption applications when they are applied for.
- B) Require all LGUs to report WCA activities to BWSR. Currently, only those LGUs who receive funding for WCA administration through the Natural Resources Block Grant are required to report annual WCA activities to BWSR. BWSR staff propose to amend the rule to require all WCA LGUs to annually report their activities to BWSR. This will provide a more comprehensive picture of statewide activity.
- C) Develop an improved reporting form with more detail regarding exemptions. The previous form only asks for the number of exemption determinations made by the LGU and the acres of impact. A new reporting form for activities occurring in 2008 requests the number of exemption determinations and acres of impact specific to each individual exemption category. This will dramatically improve the precision of the data, allowing for a comparison of approved impacts under each individual exemption.
- D) Clarify in Rule that LGUs can require approval of exemptions. BWSR staff propose to amend the rule to clarify that local governments have the option to require approval of exemptions under their own authority. Local governments can make this decision based on local capacity, the type of exemption, and the applicability to the geographic area. In areas where local governments choose to require approvals, it could result in improved reporting data. This data could also be used to provide statistical estimates of non-reported exemptions in other areas.
- E) Collect and utilize data from DNR Enforcement and LGU investigations. The DNR conducts annual flights in a limited number of counties to identify wetland impacts (potential violations). These flights do identify impacts that are exempt. The information obtained from these investigations can provide data on unreported exempt impacts. The DNR is willing to collect the necessary data. If collected, there is also the potential to utilize the data to provide for statistical estimates of non-reported exempt impacts in other areas.
- F) Consistent use of the “Contractor Responsibility and Landowner Statement Form.” WCA currently requires contractors to submit a form to notify the LGU when they will be conducting work in wetlands. DNR Waters requires a similar “Contractor’s Permit Verification” form (based on an almost identical statute) for work in public waters. Both DNR and BWSR have identified a need for improved consistency in the promotion, use, applicability, and enforcement of this requirement. Due to the similarities in both the statutory requirements and the forms themselves, agency staff have identified changes necessary to consolidate the forms and will be developing clear guidance for its use. This will provide LGUs with data on otherwise unreported exempt activities.

Below are some additional options. Options A and B would likely face significant opposition and have issues or drawbacks that should be fully weighed if they are considered. Option C would require additional funding to complete a comprehensive study. However, they remain under consideration and are presented here for comment and discussion.

- A) Require LGU approval of all exemptions. Under this option, landowners would be required statewide to apply to the LGU and receive approval for any exemption before conducting the exempt activity. Proponents believe it would provide more accurate data on exempt wetland impacts and provide additional protection for the resource. Opponents claim the requirement would increase LGU workload; the requirement would be difficult to enforce; the requirement may be less effective in rural or agricultural areas; the cost of implementation would outweigh the benefits obtained; it is contrary to the original intent of WCA; and it would require a statute change to implement since currently exempt impacts would then require a permit.
- B) Require landowner notification of exempt activity. Under this option, the landowner would be required to provide a written notice to the LGU prior to conducting an exempt activity. Similar to the above option, supporters claim it could improve the data collected. Opponents claim an increased LGU workload; the requirement would carry no penalty for non-compliance and thus be unenforceable; landowners would not be aware of the requirement or aware that they are even in a wetland; the costs of implementation would not justify the benefits obtained; and the data collected will not be consistent.
- C) Statistical analysis by sampling area. Under this option, funding would be sought to perform a comprehensive study of various locations statewide, including an inventory of exempt wetland impacts over a given period of time. The information collected would be analyzed in correlation with other data to develop statistical estimates of unreported exempt activity across the state. A less comprehensive statistical analysis could be accomplished under options 4 and 5 above.