

## WCA Rule Advisory Committee - 6/26/08 Meeting Draft Monitoring Section

*The general purpose of the monitoring section edits is to clarify requirements and provide more incentive for the applicant and LGU to correctly conduct, implement, and enforce monitoring of replacement wetlands. This section of the rule is arguably the most neglected, but one of the most important. All changes are modifications and/or clarifications of current rule requirements.*

### 8420.0XXX REPLACEMENT WETLAND CONSTRUCTION CERTIFICATION

Subp. 1. **Purpose.** The local government unit must certify the initial construction of replacement wetlands prior to replacement wetland monitoring. The local government unit should consider requiring a preconstruction meeting prior to initiation of replacement wetland construction, and inspect the replacement wetland during construction.

Subp. 2. **Construction as-builts.** Upon completion of initial construction or restoration activities, the landowner must provide the local government unit with as-built information that documents compliance with the approved replacement plan. As-built information includes but is not limited to:

- A. surveyed elevations of slopes, contours, outlets, and dikes;
- B. seed tags;
- C. contractor receipts or other documentation of seeding or planting;
- D. a survey map showing relevant areas of seeding and construction activities;
- E. construction photos showing relevant restoration work;
- F. description of site preparation activities such as mulching, seedbed preparation, seeding methods, or initial weed control activities; and
- G. a comparison of the as-built specifications versus the design specifications ~~(first annual plan only)~~ and a **description and** rationale for significant changes.

Subp. 3. **Construction inspection and certification.** Upon receipt of as-built information from the landowner, the local government unit ~~must inspect the replacement wetland to determine whether the as-built complies with the project when construction is complete and certify compliance with construction specifications of the approved replacement plan.~~ **must inspect the replacement wetland to determine whether the as-built complies with the project when construction is complete and certify compliance with construction specifications of the approved replacement plan.** The local government unit ~~and~~ **may** inspect the project at any time during the construction and monitoring periods, ~~and any time after that~~ to assess the long-term viability of the replaced wetland. ~~If the local government unit determines that the construction is not in compliance with the approved plan, it must promptly notify the landowner of the deficiencies and actions required to gain compliance.~~ **If the local government unit determines that the construction is not in compliance with the approved plan, it must promptly notify the landowner of the deficiencies and actions required to gain compliance.** When the local government unit certifies that the construction specifications have been met, the local government unit ~~shall so advise~~ **must notify** the applicant ~~and technical evaluation panel, and return any construction bond or other construction security that the applicant had provided;~~ **and technical evaluation panel, and return any construction bond or other construction security that the applicant had provided;** Upon construction certification, the local government unit may release a portion of any financial assurance the applicant had provided, while retaining a sufficient amount remains to ensure compliance with monitoring and replacement requirements.

*The above section was expanded from a few sentences that were moved from 0620 (yellow highlight) regarding the first year of monitoring. These edits provide a more formal review and approval of initial construction activities. The initial activities are often the most important for long-term success. Corrections are more easily made at this early stage when contractors are still mobilized on the site. This benefits the applicant and the LGU to carefully scrutinize the initial restoration activities rather than identifying problems several years after construction when contractors and sometimes landowners are long gone. A sentence was added stating that the LGU may release a portion of the financial assurance (if obtained) after initial construction approval. Question to consider: what if the LGU fails to certify construction within a reasonable timeframe?*

## **8420.0600XXX REPLACEMENT WETLAND MONITORING**

**Subpart 1. Purpose.** The purpose of replacement wetland replacement monitoring is to measure replacement wetland success relative to replacement goals and identify any needed corrective actions during the monitoring period. ~~ensure that the replacement wetland achieves the goal of replacing lost functions and values.~~

### **Subpart 2. Responsibilities.**

A. Monitoring of replacement wetlands is the responsibility of the approved replacement or banking plan applicant. Upon written mutual agreement of the applicant and local government unit, the local government unit may assume monitoring responsibilities and charge fees to the applicant. Such an agreement does not release the applicant from the responsibility to provide replacement as specified in the approved replacement plan.

B. The local government unit in which the replacement wetland is located is responsible for ensuring compliance with the approved monitoring plan. For project-specific replacement in which the wetland impact site occurs in a different local government unit from the replacement site, the local government unit for the impact site may assume the monitoring enforcement responsibility for the replacement site per written agreement between the local government units.

***This section was expanded to include clear statements regarding monitoring responsibilities for applicants and LGUs. Clarification was added in regard to monitoring responsibilities when replacement wetlands occur in a different LGU than the impact site. BWSR staff will explore the issue further to determine if in fact the applicant is the appropriate designee for monitoring responsibility as opposed to the fee title owner or bank account holder.***

## **8420.0610 DURATION OF MONITORING**

### **Subpart 3. Duration of Monitoring.**

Monitoring shall be by means of an annual report as specified in part 8420.0620 and shall continue for five years following completion of the wetland replacement project, or until the technical evaluation panel deems the replacement wetland to be fully functional. Monitoring must begin no later than the first full growing season following local government unit construction certification. Monitoring must continue for a minimum of three full growing seasons and until the technical evaluation panel determines that the replacement is successful. Through written notification to the applicant, the local government unit may extend the required monitoring period beyond three full growing seasons for not more than an additional five-year period if the goals of the replacement plan ~~has~~ have not been achieved, but, ~~in the written opinion of the technical evaluation panel,~~ may be achieved with more time. The local government unit's notification must specify the reasons for the extension and any corrective actions necessary to bring the replacement wetland into compliance with the approved plan. For project-specific replacement plans, if the local government unit determines that the goals of the replacement have not been achieved, and will not be achieved with more time, the local government unit must pursue one or more corrective actions identified in 8420.06X0 Local Government Unit Monitoring Oversight.

*This section was altered to set minimum length of monitoring requirements to better reflect the realities of replacement success and compliance, while at the same time placing more emphasis on LGU to be involved in monitoring oversight. This modification recognizes the fact that some replacement wetlands can be fully functional in a short amount of time, that the LGU is the decision maker, and that it is difficult for LGUs to track and enforce monitoring for long periods of time due to staff turnover and landowners that are no longer accessible. Some onus is put on the LGU to justify extension of monitoring beyond the maximum which, again, will require greater involvement by the LGU. Language was added such that monitoring length is referred to in terms of “full growing seasons” rather than years as growing season is the relevant factor.*

*The current language places no limit on the monitoring period, but places the onus on the LGU to specify why the monitoring period is being extended. There are a couple other options to consider:*

- 1. Retain current draft language (without a limit), but restore the “in the written opinion of the TEP” language.*
- 2. Add a maximum (i.e. 6 growing seasons) with written TEP opinion required to extend beyond the maximum.*

## **8420.0620 MONITORING ANNUAL REPORT**

### Subpart 14. **Purpose. Monitoring annual reports.**

**A. Requirement.** Following construction certification by the local government unit, the applicant must submit annual monitoring reports documenting the progress of the replacement wetlands during the monitoring period. The purpose of the annual report is to describe actual wetland restoration or creation activities completed during the past year, activities planned for the upcoming year, and the success of the replacement in achieving identified goals and performance standards information in subpart 2. The applicant shall submit the annual report to the appropriate local government unit according to subpart 2B, where the replacement wetland is located on a date determined by the local government unit but no later than December 31. until the applicant has fulfilled all of the requirements of the local government unit. The local government unit, at its discretion, may prepare the annual report for the applicant. The local government unit must distribute copies of the monitoring report to the technical evaluation panel. For wetland banking projects, the applicant must also submit the annual report to the board’s wetland banking administrator. The monitoring reports must be submitted annually until the technical evaluation panel determines the replacement has been successful.

~~Subp. 2-~~ **B. Report content.** The annual report shall, at minimum, include the following information ~~and other site-specific information identified by the local government unit:~~

- ~~A1. a description of the project location map with legal description, size, current wetland type (Cowardin classification), and desired wetland type (goal);~~
- ~~B2. a comparison of the as-built specifications versus the design specifications (first annual plan only) and a rationale for significant changes~~ description of replacement wetland goals and performance standards in terms of size, replacement credit amount, plant community types, hydrology, and wetland functions and a comparison of the current replacement wetland to these goals and standards;
3. description of restoration activities completed during the past year;
4. description of restoration activities planned for the upcoming year;
- ~~C5.~~ hydrology measurements during the growing season: seasonal water level elevations at fixed, repeatable locations representative of the replacement wetland types, or areal coverage measurements during the period April through October of inundation for replacement wetlands with deeper water hydrologic regimes (deep marsh, shallow open water, shallow marsh);
- ~~D6.~~ a map of plant communities within the boundaries of the replacement site, hydrologic indicators observed including square footage or acreage of each and identification of areas of invasive or non-native vegetation; and

- ~~E7. color photographs of all replacement areas the project area taken anytime during the growing season from fixed, repeatable reference locations that are representative of each plant community type;~~
- ~~8. delineation and survey of the replacement wetland areas, if applicable, for the final monitoring year and;~~
- ~~9. other information specified in the approved monitoring plan or subsequently requested by the local government unit;~~

*Language was added above to emphasize tying the replacement wetland progress to the goal of the replacement plan. The sentence related to the LGU potentially preparing the monitoring report was struck because it was stated at the beginning of the monitoring section under responsibilities. A sentence was added specifying that BWSR receive a copy of monitoring reports for banks. This will strengthen the banking program oversight responsibility. Monitoring report requirements were strengthened by adding more specific language and by requiring landowners to identify the previous year's activities and activities for the next year. This enforces the stated purpose of monitoring reports.*

#### **~~8420.0630895 MONITORING DETERMINATIONS BY THE LOCAL GOVERNMENT UNIT MONITORING RESPONSIBILITIES.~~**

~~The local government unit responsible for monitoring as determined under part 8420.0230:~~

~~A. must inspect the project when construction is complete and certify compliance with construction specifications, and may inspect the project at any time during the construction and monitoring period, and any time after that to assess the long-term viability of the replaced wetland. When the local government unit certifies that the construction specifications have been met, the local government unit shall so advise the applicant and return any construction bond or other construction security that the applicant had provided;~~

*The first sentence above is relocated to C below. The paragraph above was relocated to the construction certification section and edited there.*

#### **Subpart 1. Monitoring Oversight.**

~~A. The local government unit must evaluate all monitoring reports for compliance with report requirements and must determine if the replacement plan goals can still be met within the specified monitoring period based on the current condition of the replacement wetland and the applicant's proposed management activities for the following growing season.~~

~~B. may order corrective action at any time during the required monitoring period if it the local government unit determines that the goals of the approved replacement plan will not be met, it and may require the applicant to prepare an amended wetland value replacement plan for review and approval by the local government unit, which describes in detail the corrective measures to be taken to achieve the goal of replacing lost wetland functions and values;~~

~~C. shall make a finding based on a site visit at the end of the monitoring period as to whether the goal of the replacement plan has been met. If the goal of the replacement plan has not been met, the local government unit shall order corrective action and extend the monitoring period; and~~

~~D.~~ shall require one or more of the following actions ~~if during the monitoring period the local government unit finds that the goal of the replacement plan will not be met:~~

- ~~(1)~~ order specific corrective actions on the replacement wetlands;
- ~~(2)~~ order the applicant to prepare and implement a new or revised replacement plan;
- ~~(23)~~ request the enforcement authority to issue a cease and desist order on the draining and filling wetland impact activity if it has not been completed;
- ~~(34)~~ request the local soil and water conservation district to order restoration of the impacted wetland;
- ~~(45)~~ obtain forfeiture of a bond or other security and use the proceeds utilize the financial assurance to replace the lost wetland functions and values;
- ~~(56)~~ ask the pursue a district court ~~to~~ order requiring the applicant to fulfill the replacement plan; or
- ~~(67)~~ other actions that the local government unit determines necessary to achieve the goal of the replacement plan.

~~C.~~ The A local government unit responsible for monitoring as determined under part 8420.0230: oversight that does not receive required monitoring reports associated with an approved replacement plan application shall either pursue enforcement actions in Part B or utilize any financial assurance the applicant had provided, in an amount sufficient to complete monitoring requirements.

#### Subpart 2. Certification of successful replacement and completion of monitoring.

Upon completion of the minimum monitoring period, the applicant may request a field review by the local government unit and determination by the technical evaluation panel of the success of the replacement wetland. If the replacement is determined successful by the technical evaluation panel, the local government unit shall provide written notification to the applicant that the replacement is certified successful and the monitoring requirements have been fulfilled. Upon certification of successful replacement the local government unit must release any remaining financial assurance submitted by the applicant, provided all other conditions of the approval are met.

***The edits to this section primarily consolidate and clarify some repetitious language. Clarification as to the basis of the determination of monitoring compliance has been added. The above paragraph also involves the TEP in determining the success of wetland replacement. A statement was also added specifically allowing the LGU to utilize financial assurance (if obtained) to complete monitoring.***