

**Wetland Conservation Act  
Permanent Rulemaking**

**September 21, 2007**

**Official Comments**

Comments were submitted by the following:

1. Barrett, Melissa, Kjolhaug Environmental Services Company
2. Beckel, Todd, Commissioner, Lake of the Woods County
3. Brough, Tony, Hennepin County
4. Dean, Mollie, Sierra Club
5. DeRuyter, Mike, Kjolhaug Environmental Services Company
6. Duehr, Jeremy, Westwood Professional Services
7. Belz, Pamela, Builders Association of the Twin Cities
8. Feliz, Annie, Benton Soil and Water Conservation District
9. Frenette, Lisa, Builders Association of Minnesota
10. Gracyzk, Greg, Carver Soil and Water Conservation District
11. Gustafson, Jim, Itasca Soil and Water Conservation District
12. Haertel, Jim, BWSR
13. Kaster, Tony, URS Corp.
14. Keizer, Robb; Meyer, Ben; Smyth, John; Bonestroo
15. Kelly, Tim, Coon Creek Watershed District
16. Kjolhaug, Mark, Kjolhaug Environmental Services Company
17. Kunkel, Beth, Kimley-Horn and Associates
18. Kunst, Kelly, Kjolhaug Environmental Services Company
19. Lemm, Les, BWSR
20. Mann, Lee, City of Farmington
21. Naber, Jason, Emmons & Olivier Resources
22. Norris, Doug, DNR-Ecological Resources
23. Peterson, Lynda, BWSR
24. Powell, Ken, Rice Creek Watershed District
25. Rodacker, Dennis, Anoka Conservation District
26. Steffenson, Cade, Mille Lacs County
27. Thatcher, Jyneen, Washington Conservation District
28. Weetman, David, Westwood Professional Services
29. Wozney, Brad, BWSR

Comments organized by rule section.

**8420.0105 Scope**

- Amend 8420.0105, the second sentence: “This chapter regulates excavation in the permanently and semipermanently flooded areas of type 3, 4, or 5 wetlands, and in all wetland types if excavation ~~includes filling or draining or results in conversion to nonwetland.~~” Strikethrough text should be changed to: “results in partial drainage, a lower wetland elevation, or conversion to non-wetland.” (Wozney)(Lemm)
- Specify that excavation in wetlands and filling in wetlands are impacts. (Haertel)
- Regulate excavation in wetlands when it reduces wetland quantity or quality. (Norris)

**8420.0115 Scope of exemption standards.**

- 4<sup>th</sup> paragraph. To “approved replacement” add “or wetland banking”. (Haertel)
- Increased administration burdens associated with restricting exemption options. (Kjolhaug)
- All exemptions should be reported. (Keizer et al)(Mann)

**8420.0115, Subp. 1 Agricultural activities**

- Distinguish between producers who are in the program vs. those who are not. (Beckel)
- “Normal farming practices” definition does not specifically exclude fill or excavation activities. (Keizer et al)(Mann)
- There needs to be language for a 10-year deed restriction. (Graczyk)
- Restore the 10-year deed recording requirement (certainly Subp A). I am already seeing applicants taking advantage of the lack of this provision. (Wozney)
- 8420.0122 Subp1 C. This is wide open! There is no limit to the amount of fill/excavation impact or type of wetlands involved. If left as is this could spread like wildfire and impact lots of previously protected sites and get producers in hot water with FSA. I have already had one project come through that was turned down twice in the last two years. Now it went through without a hitch (i.e restrictive recording requirements). (Steffenson)

**8420.0115, Subp. 2 Drainage**

- Delete D (exempts impacts to wetlands that been in existence less than 25 years): Private landowners should have the right to maintain their private ditches, unless the ditch has been abandoned for agriculture and the entire ditch is located in a watershed where the agricultural land use has been abandoned. In many instances, the ditch has not required maintenance within 25 years because of slow sedimentation and veg. growth rates. (Felix)

#### **8420.0122, Subp. 4 Wetland restoration**

- This is counter productive to restoring wetland functions and values. The initial project was to restore the wetland by landowner A. New landowner B wants to develop. He somehow finds that it was a restoration without funding and wants to proceed down this exemption. Bare in mind this is not a created wetland, but a restored wetland. This means that it was originally here and should not have been removed to begin with. WCA is relatively new and wetland impacts were not considered during the drainage years. (Steffenson)

#### **8420.0115, Subp. 5 Incidental Wetlands**

- “Incidental wetlands” should not be classified as an exemption. It should be a no-loss or determination of non-jurisdiction. This can be an issue because “Exemptions may not be combined on a wetland that is impacted by a project.” It also results in areas that are not meant to be regulated wetlands being reported as acres lost to exemptions, which is misleading at the least. (Wozney)(Lemm)
- Allow combining this exemption with other exemptions. (Haertel)

#### **8420.0115, subp. 6 Utilities; public works**

- “Significantly modifies or alters” is still too vague, most underground utility projects have the potential to modify much more than 0.5 acres, but these impacts are usually temporary. Suggest eliminating this provision and that allowing temporary impacts with an approved restoration plan. (Keizer et al)(Mann)

#### **8420.0115, Subp. 8 De minimis Exemption**

- Change to a sequencing de minimis exemption, sequencing is not required, fill is allowed, with 1:1 replacement. Easily done via the wetland bank, statewide. BWSR can manage this service, add a transaction fee, and allow any wetland bank to decide if they want to be included in this de minimis banking. (Brough)
- Small amounts will be frustrating, provide guidance on when to allow purchase of bank credits instead of replacement plan for small amounts (50 square feet). (Thatcher)
- 400 or 1000 square feet for >80%+, allow LGU’s to reduce via wetland plan, amend shoreland ordinance, etc. (Beckel)
- Making the changes passed by the legislature part of the permanent rule is a bad idea. The recent legislative changes do not account for the discussions that took place in 1996 which increased the de minimis to a level that accommodated small routine projects and still required that the fill be minimized. (Kelly)
- A 20 sq.ft. de minimis is a slap in the face to folks that are trying to do the right thing by contacting us. I fear as word of this change spreads we will lose the cooperation we have worked long and hard to obtain and people will just do their project in hope of not getting caught rather than ask how to do it the right way. This will add to an already over stretched enforcement work load. It is the feeling of the Itasca SWCD that the option of a 400 sq.ft. de minimis exemption be reinstated for the greater than 80% counties. (Gustafson)

- De minimis rule has not been simplified: a.) more complicated by adding shoreland zone and setback category; b.) 20 s.f. should be zero, leads to confusion; c.) require sequencing analysis for all de minimis determinations, allow LGU/TEP to deny if the impact does not meet sequencing; d.) all wetland types should be treated equal and/or eliminate use of circular 39 in this section, if not entire rule. (Keizer et al)(Mann)
- The exemption in its current form is confusing, cumbersome, not scientifically based, and counterproductive to the WCA program. Varying the amount by type is “old world” thinking and not consistent with ecological thinking. It is a good public relations tool in showing the law is not “heavy handed”, however the number needs to be enough to do something like a driveway, 20 sf is not the right number might as well be 0. (Powell)
- This will better protect the critical wetland areas, but the wording is not as easy as it could be. My opinion is that it needs to be reworded. I would also note that this will increase workload in developing areas. I would anticipate almost double the applications in Mille Lacs County for minor projects. While this does not mean impact, it does reflect considerable workload increase which most LGU's can ill afford. (Steffenson)
- Have you considered reduction to zero, but allowing automatic replacement plan approval up to the previous 400 sq ft? Basically this could give them what they had without meeting avoidance and minimization up to the 400. The impact would still be replaced and still must meet the replacement of functions and values via banking. This option would still generate work, but it will be less than the typical replacement plan. (Steffenson)
- De minimis should be simplified and based on sound science. (Lemm)

**8420.0115, Subp. 9 Wildlife habitat**

- There needs to be a 10-year deed restriction and a loosening of restrictions on excavation in monotypic, choked out cattail areas. Maybe a flat 50% is a little much as large areas could essentially be excavated out, possibly allow in the 2-4 acre range. Finally, there should be an “and” at the end so you need to meet 1 and 2 and 3. (Graczyk)

**8420.0200 Determining Local Government Unit; Duties**

- Reduce the number of LGUs by limiting the entities that can be an LGU to Counties, WD/WMOs, SWCDs, and large cities. No townships or small cities. This will improve administrative efficiency and effectiveness. (Wozney)(Lemm)
- Define “knowledgeable and trained staff” or set specific standards and criteria that LGU staff must meet to implement WCA. Local governments can simply fill out a form and suddenly become the administrator of the WCA. They do not need to show any competence in identifying wetlands or understanding the rules. (Wozney)
- Require all LGUs to submit an annual report. (Wozney)
- Clearly define who is (or who isn't) LGU on transportation projects. (Wozney)

- Require LGU's to issue a bright colored permit for applicants to post on site. (Wozney)
- Attorney General staff recommend Mn. Stat. 15.99 be revised so default approval does not occur during the 30-day local appeal process. Item C, clarify that fees may be charged by LGU's for local appeals. Add records retention requirement for LGU's. (Haertel)
- Because of the current state of wetland mitigation and monitoring, the effect that the rule changes have on this area could be great, or unnoticeable. There is great inconsistency from LGU to LGU in administering WCA as it pertains to mitigation. By changing the rules to increase the amounts of replacement or eventually revise the program to come more in line with the ACOE will simply result in requiring more mitigation that may or may not get built, a result that won't be known because there isn't sufficient LGU staff to find out. Mitigation has just fallen to the side in the course of things. I think we should make sure we do better with what we have than assume the "more is better" approach is an improvement. (Kunst)

#### **8420.0220 No-loss determination**

- Change "request" to "receive", delete "a" and add before "determination" "an approved". Merely requesting an exemption does not preclude a landowner from being subject to enforcement actions, they must receive an approved determination for no-loss of wetlands. Also, second paragraph, last sentence, delete entire sentence. It makes no sense for an LGU to evaluate evidence and not make a determination. (Haertel)

#### **8420.0240 Technical evaluation panel procedures**

- Delete "at least" and for each of the three members listed, change "a" to "one" to clarify that the TEP is three people unless public waters affected. At the end of the first sentence, replace the period with "and," (coma after "and"), and before "technical professional employee" change "a" to "one". (Haertel)
- Some of the exempt Rules attempt to add more specificity and make the Rule more encompassing, but the unintended effect is to take more discretion away from the LGU and the TEP. The TEP process has proven to be the most effective part of WCA and should be strengthened, not weakened. (Lemm)

#### **8420.0250 Appeals**

- Third paragraph, first sentence. Change "mailing" to "forwarding". Last sentence, change "part" to "parts" and to "8420.0230" add "8420.0210, 0220, 0225". Subp. 3, end of third paragraph, add "The local government unit public hearing must be an evidentiary hearing before a panel consisting of three or more appointed or elected officials. If an appeal is remanded, a new application is not required that would need to be noticed and additional information may be submitted." Sixth paragraph, first sentence. Change to "Upon appeal, the local government unit shall, upon request, promptly forward to the board the requisite number of copies of the record on which it based its decision." (Haertel)

#### **8420.0290 Enforcement Procedures**

- Enforcement of locally adopted wetland plans – who should do it – city, SWCD, conservation officer? (Thatcher)
- The rule should clearly define what constitutes a violation of a replacement plan and what may be an administrative issue. (Wozney)
- Transfer the role of SWCD’s in enforcement procedures to the LGU. (Felix)
- Certain enforcement provisions. (Norris)
- Contractor Liability. There should be a penalty to the contractor for not obtaining the signed statement from the property owner and mailing it to the LGU. This will prevent many violations, associated workload, and wetland losses. Perhaps through APO? (Lemm)

#### **8420.0510 Replacement plan procedures**

- Provide more specific methodology for determining wetland impacts. This is especially important for projects that may result in less obvious wetland impacts such as partial drainage of wetlands or indirect (secondary) impacts. Specifying exact assessment methodology to be use for determining wetland impacts for particular activities (such as drainage repairs) would eliminate some of the subjectivity and standardize assessment protocol used by regulatory agencies. (Wozney)
- Provide clear guidance on wetland typing, and wetland typing of wetland impacts (if an applicant fills in a type 2 fringe of a type 3 wetland, which type do you claim as impact and what type meets in-kind definition?) (Wozney)
- Excess credits created by projects should be tracked so they can be applied to future phases of the same project. Under the new rules do credits created in advance have to be placed in the wetland bank first? Is it possible to create credits too far in advance? (Weetman)
- Mitigation is provided for wetlands that are impacted via the standard permit process, but the wetland would be degraded if it was preserved and surrounded by development. It is important to make sure that what we try to regulate will actually make a difference, not just an exercise in futility. (Kunkel)

#### **8420.0520 Sequencing**

- Change the concept of wetland avoidance to include upland buffers adjacent to high quality and sensitive wetlands. The current regulatory framework only protects the wetlands themselves from direct physical impacts while ignoring potentially significant secondary impacts of altering critical surrounding uplands. This could be changed to include specific buffer requirements around preserved wetlands meeting a certain criteria based on quality and sensitivity. (Wozney)
- Provide better guidance to justify when sequencing flexibility can be used. In particular, this should involve a clearer definition of “degraded wetland”. (Wozney)

#### **8420.0541 Actions eligible for credit**

- Sliding scale credit for water quality treatment areas is a return to a looser process, it is workable, but guidance will be needed. (Thatcher)
- Allow crediting from a broad natural resource perspective, i.e. vegetative restoration for water quality, wildlife habitat, shoreline erosion control measures, conservation easements. (Beckel)
- Increase credit for restoring wetland vegetation. (Beckel)
- Eliminate vegetative restoration option for mitigation or at least clarify it has to be permanently maintained. (Wozney)
- The replacement ratio should not increase under the in-kind definition when impacts to partially drained basins are to be replaced with the pre-drainage (pre-settlement) wetland community type as approved by the TEP. (Wozney)
- Give equal or more replacement credit for wetland restoration as compared to wetland creation. From an ecological perspective, it would be more beneficial to have existing degraded wetlands restored rather than just avoided and have their adjacent upland converted to manmade wetlands. The concept of no net loss should be reassessed in this regard and allow for the maximum credit possible. (Wozney)
- The rules need to clearly define “pretreatment of runoff” and better define “separated”(e.g. reinstate the language from the former rule that read “the two cells are completely separated by a barrier for up to the ten-year critical event...”, but revise it slightly to provide more flexibility for innovative stormwater treatment practices). (Wozney)
- One item that has never made sense is the preference for restoration of wetlands to rectify impacts while little replacement value is given for restoring areas. When presented with a wetland suitable for restoration most times it will be an area dominated by invasives such as reed canary grass. The cost associated with adequately eliminating reed canary grass from an existing wetland and establishing a native plant community is usually much higher than the cost of creating a new wetland and seeding and managing for natives. The former efforts only gets an applicant 25% PVC, while the latter provides 100% NWC. One gets 100% NWC from restoring “natural hydrology and vegetation” on a completely drained wetland. It seems to me that a completely drained wetland has usually been ditched and that the restoration of hydrology would be a rather simple matter in the context of constructing a development. Also, what constitutes “natural vegetation”? The rule should specify native vegetation for a given wetland Type as is done in other portions of the rule.

In summary, I feel that more credit should be given for wetland restoration if it is a preferred form of replacement. I don't necessarily advocate 100% NWC for all restoration but I feel upping the amount of credit for restoration would encourage more replacement in a manner that is consistent with the priorities expressed in WCA. (Kunst)

- Actions eligible for replacement and elimination of PVC. (Kjolhaug)
- In some cases PVC should be allowed for first cell of a two cell system, where the second cell is a wetland or if the water quality pond provides pretreatment before entering an existing wetland. Guidance is needed on pretreatment. (Keizer et al)(Mann)
- The rules are not clear on what is meant by pretreatment. (Weetman)
- Certain provisions of the “Actions Eligible for Credit” need attention to promote compatibility with the Clean Water Act Section 404 program while meeting the state’s no-net-loss goals. (Norris)
- The water quality treatment area option should be eliminated entirely, with the possible exception of infiltration/biofiltration practices for water quality/quantity when it is more than is required by federal, state, or local water quality requirements. (Lemm)
- Eliminate PVC/NWC and just give different ratios of credit for different mitigation activities. The emphasis should be more on functions and values and less on acres. (Lemm)
- Eliminate vegetative restoration option for mitigation or at least clarify it has to be permanently maintained. (Lemm)

#### **8420.0542 Timing of replacement**

- The term concurrent is still listed in statute, after the revised term in advance, this is confusing. Municipal projects will be subject to increased replacement because they will not be able to meet the “in advance” rule. The in advance requirement is impractical when it comes to the bidding process and construction scheduling of publicly funded projects. (Keizer et al)(Mann)
- This section requires replacement before or concurrent with impacts, “unless an irrevocable bank letter of credit or other security acceptable to the local government unit is submitted to the local government unit to guarantee successful completion of the replacement.” As an alternative to the “in-time” replacement requirements of the exempt Rule, obtaining financial security should be mandatory for all project-specific replacement unless the replacement is completed and functional prior to the impacts. This will meet the intent of the “in-time” provision of the exempt Rule. Mandatory security will also help improve the quality of wetland mitigation sites and better ensure public value is not lost. If and when the replacement wetland becomes fully functioning, consideration could be given to returning the surety with interest. This would create more of an incentive to do a good job fulfilling mitigation responsibilities. (Lemm)

#### **8420.0543 Wetland replacement siting**

- Prohibition against impacts in 50% counties being replaced in 50-80% counties defies efforts made by watershed districts to direct mitigation into ecologically significant areas, perhaps accept mitigation within the same sub-watershed. (Thatcher)

- I do not support the new strategy for replacement siting. The approach is biased and potentially harmful to Anoka County and other 50-80% metro/near metro counties that are within the upper Mississippi River watershed. (Kelly)
- Inconsistencies/incompatibilities and confusion associated with the different regions of the state (11-county, 7-county, bank service areas, >80%, <80%, <50%, 50 - 80%). (Kjolhaug)
- Replacement is required in the 7 county metro area, however there are minor watersheds that overlap this boundary. By using the term "notwithstanding", this section excludes the use of minor watersheds in priority siting regardless of county boundaries. (Keizer et al)(Mann)
- The new system now allows you to go to metro counties first before looking at the major or minor watershed. How is that a watershed approach? If there is a concern about going to portions of watersheds outside of the metro, maybe limit it to the portion of the watershed within the county that you are filling within. The new system is too complicated and creates too many problems for administration. (Weetman)
- This section is one of the most troubling of the new rules. Essentially we now have 3 different geographic considerations for replacement siting including major watersheds, banking service areas, and counties (along with their presettlement wetland designations). Add to this the 7-county metro and we have a 4<sup>th</sup> consideration. This whole topic needs to be reconsidered, simplified and related back to WCA goals. (Powell)
- The biggest concern I have with the new process in within the replacement siting area for the 7 county metro. There are 6 counties that are less than 50% counties and one that is a 50 – 80% county. Replacement now must occur within the 7 county metro and less than 50% counties cannot replace in a 50- 80% county. This restricts remaining counties from purchasing credits in Anoka County and impacts in Anoka County cannot replace within their own watershed in Washington County (less than 50%) or Chisago County (50 – 80%). This makes the wetland banks within Chisago and Anoka County to be less marketable when replacement within the major watershed is priority within WCA.

It is difficult to promote wetland banking in these two counties, when the success of wetland restoration is extremely high and the landscape is conducive to high quality wetlands. And it drops the value of the existing wetland banks. (Peterson)

- Replacement siting requirements should be simplified and based on sound science. The current requirements are unnecessarily complex. (Lemm)

#### **8420.0544 Public Transportation**

- Replacement should be 1:1 and not at the same ratio as for any other applicant. (Beckel)

## 8420.0549 Evaluation of wetland functions and value

### In-Kind/Out-of-Kind

- While the Eggers and Reeds plant community classification system is excellent, like all classification systems it cannot adequately or accurately capture the infinite variety and complexity that actually occurs in the field. You end up with two classification systems which in essence do the same thing; generally describe habitat.

In addition, the proposed amendment adds a tool which sets the stage for on-going conflict and confusion that exists between both classification systems. To legislate the use, and to use the system for evaluating or categorizing the success or failure of management whether mitigation, restoration, creation, etc. is to not only needlessly complicate an already complicated system, but to set-up and potentially punish both the applicant and the LGU for failure. (Kelly)

- Repeal circular 39, add the hydrogeomorphic classification system, and do not adopt Eggers and Reed at this time. (Kelly)
- In Kind Replacement: In-kind has always been a laudable goal. However, within disturbance driven ecosystems such as the Anoka Sand Plain such a hard and fast goal is unrealistic, counter productive, and punitive. (Kelly)
- The Eggers and Reed wetland typing system: It is not practical for replacement ratios to increase for replacing impacts to a fresh wet meadow (type 2) with a sedge meadow (type 2). I foresee problems with using this system in the metro and agricultural areas where a high percentage of the wetlands have been degraded hydrologically and/or vegetatively. (Wozney)
- Confusion associated with wetland typing changes. (Why did we add Eggers and Reed but not get rid of Circ 39?). Confusion associated with replacement wetland siting preferences and replacement ratios. 0.25 penalties for not in advance is not fair or justified. (Kjolhaug)
- The replacement siting and “in-kind” requirements, including the increased ratios for out-of-kind replacement, are not just confusing, but unreasonable. The rules have always required 2:1 replacement to compensate for exemptions, shortcomings of mitigation, temporal losses, etc. The exempt rules require higher ratios unless the applicant provides mitigation 1 year in advance (an unrealistic expectation), creates a wetland of the same type as impacted, and provides the replacement “in-place”. These requirements all but assure a higher than 2:1 ratio for most wetland impacts because for a replacement to be “in-kind”, it basically has to be a bank in the same bank service area (and meet the siting requirements) **and** have the same wetland type as the impacted wetland. Because of the limited number of banks that meet all these criteria for any specific project site, the higher ratios are virtually assured. Given that no consideration is granted to a different wetland type replacement of higher quality, it seems like we are unfairly piling on more punishment than necessary. More replacement acreage should not be required when a degraded wetland is replaced with a better functioning wetland of a different type. (DeRuyter)

- My comments are centered on the question of "in-kind" wetland replacement in areas that have experienced substantial alteration of historic wetland condition. Specifically, what benefit occurs when degraded wetlands are replaced by wetlands of the type impacted when other wetland types may have had greater function and value than the impacted wetland?

Please look to 8420.0549 subparts 1,2 and 3. Subpart 1 suggests in-kind replacement when it is "environmentally preferable." However, the language in subparts 3 and 4 and the replacement requirements in subpart 7 force applicants to replace a wetland in-kind, or risk providing greater replacement, even when in-kind replacement is not an environmentally preferable option. For example, under the exempt rule a degraded reed canary grass infested fresh (wet) meadow would be replaced with a fresh (wet) meadow even if the historic character of the wetland may have been deep marsh. Consequently, applicants that choose to provide an "out-of-kind" wetland that may restore the historic hydrologic character of an area; or provide a wetland that is more viable in the long-term; or provide compatibility with adjacent wetland and land uses; or satisfies aquatic resource needs of the region, will be penalized and forced to create additional wetland under subpart 7. The reviewing committee should consider modifying this language to allow Local Government Units more flexibility in determining the replacement wetland required in disturbed sites. (Duehr)

- We agree that changing to the Egger and Reed 12-type classification system makes more sense, this should be used throughout the rule. (Keizer et al)(Mann)
- What was wrong with the existing system using Cowardin and Circular 39. Will switching really improve the system, or just cause more confusion? (Weetman)
- I support using Eggers and Reed, however it is confusing and cumbersome to continue to use circular 39 also. It should be all or nothing for wetland typing. (Powell)
- The in-kind section of the rules needs to be refined. In a permitting situation the question arises as to whether or not we want the same altered plant community for replacement or a more historic natural community. (Powell)
- I think the changes to the plant community types is a smart decision. However I think it should be taken one step further and used for throughout the rule. It would be more consistent statewide which is very lacking today. (Steffenson)
- The requirement to use "Wetland Plants and Plant Communities of Minnesota and Wisconsin" (Eggers and Reed, 1997) for wetland typing should not be adopted in the permanent rule for the following reasons:
  1. The publication describes "plant communities," not necessarily wetland types. Plants are only one component of a wetland, and the most subject to alteration. This change would make wetland typing more dependent on vegetation and less on hydrology.
  2. It adds complexity and difficulty but won't result in improved mitigation and doesn't help to better accomplish the goals of WCA.

3. It is not consistent with Statute. 103G.2242 Subd. 2, requires the use of “Wetlands of the United States” (USFWS Circular 39) and “Classification of Wetlands and Deepwater Habitats of the United States.” (Lemm)
- The changes under the exempt rule should not be adopted in the permanent rule because:
    1. It is not consistent with (and potentially contradictory to) statute. 103G requires replacement by “restoring or creating wetland areas of at least equal public value” under a “Wetland Value Replacement Plan.” Wetlands of different types can often meet or exceed the local value of another type. The exempt rule makes the false assumption that the type of wetland being impacted is of greater public value than any other wetland type.
    2. Most wetlands that are impacted in Minnesota have experienced some form of alteration in the past, often resulting in a change in type. For example, thousands of acres of Type 2 wetlands that currently exist were historically type 3 or 4 wetlands that were partially impacted by agricultural drainage. The exempt rule artificially places greater value on the impacted type than the original pre-settlement type.
    3. “Value” is an estimate of worth, merit, quality, or importance. In the case of wetlands, value should be determined by the local or regional importance of the functions wetlands provide (which can and does differ between wetlands and locations), not necessarily by wetland type. This is consistent with Statute, which says that “the public values of wetlands must be determined based upon the functions of wetlands...”
    4. Requiring replacement of the same type does not ensure better mitigation or better accomplish the goals of WCA. Furthermore, .0547 Subp. 2 requires replacement that would result in wetlands or wetland characteristics that naturally occur in the landscape area in which the replacement will occur. Ecology and public value should be the focus, not necessarily wetland type.
    5. This requirement creates an incentive for wetland creations over restorations, as applicants would need specific type(s) of wetland that may be different than what is available for restoration. For example, the impact could be type 2, but fully restoring a nearby drained prairie pothole would create a type 4. This could actually result in more low quality mitigation.
    6. The requirement is, in effect, not implementable. For example, lets say a wetland impact is 60% type 7 and 40% type 2. What if the actual replacement ends up being in a different ratio (which would almost always be the case)? At what point should this determination be made? Does the LGU now go back and require an additional .25:1 replacement? (Lemm)

#### In-Advance

- Eliminate the in-time component of the Exempt Rule. The argument of “temporal loss” of wetlands is not substantiated, nor is it an adequate argument to require higher replacement ratio. (Wozney)
- In advance makes it more advantageous to go offsite for credits that are already constructed in order to get a lesser replacement ratio. Rewards purchasing from wetland bank vs. trying to create credits on-site as specified in the rules. (Weetman)

- When the Rice Creek Watershed District adopts an RMP, they go through the standard 45-day Rule review and adoption process. Included in the Watershed Rule that implements the RMP and governs development within the RMP, are the varied wetland mitigation standards. It should be clear in the new language proposed for 8420.0549 Subp. 6 (iii) how the 45-day Rule adoption process fits with the proposed 30-day replacement ratio review. (Naber)
- The changes under the exempt rule should not be adopted in the permanent rule because:
  1. The corresponding increases in ratio for mitigation that is not “in time” is based on the concept of “temporal loss.” This requirement attempts to convert a temporary period of time to fixed number of acres, which is like converting linear miles to gallons of milk. It is not based on sound science or public policy.
  2. To be considered “in time,” mitigation “must have wetland hydrology and hydrophytic vegetation established one full growing season prior to the impact.” Effectively, to fulfill this requirement, construction would need to take place at least a year in advance of any impacts. This adds cost to projects and it is sometimes not even allowed by LGU’s.
  3. This is also inconsistent with wetland science. For example, a type 2 wetland may not have wetland hydrology for several years, depending on climatic conditions. Yet this rule requires hydrology to be present without regard to natural variability. It does not replace the need for trained staff and professional judgment. It also makes it difficult to comply with the “in-kind” replacement requirements when creating a type 1 or 2 wetland.
  4. It may be somewhat inconsistent with other parts of the Rule and Statute. 8420.0542 states that replacement must be completed “in advance of or concurrent with” the wetland impacts. 103G.2242 Subd. 3 states that replacement “must be completed prior to or concurrent with” the impacts. Under the current Rule, replacement that is concurrent with the wetland impacts meets the statutory requirements and the “Timing of Replacement” requirements of .0542, but is penalized an additional .25:1 under .0549.
  5. This requirement also raises several questions regarding its implementation. For example, who will monitor and track it when the existing monitoring requirements are often not being met? What does an LGU do if the mitigation isn’t fully meeting the requirements for the first year? Do they make the project wait another year (or more), require additional work, require another .25 to 1 mitigation, or call the mitigation a failure? What is the process for approval as “established?” Is it a formal decision or a staff opinion? Is there any TEP review? How does an approval affect the 5-year monitoring requirement or the ability to require fixes later in the monitoring period?
  6. It is desirable for mitigation to be completed prior to impacts, a higher replacement ratio should not be applied if it is not. The requirement will not improve mitigation quality, may result in more bad mitigation, and will be difficult to implement. (Lemm)

#### Replacement Siting

- Allow flexibility to replace wetlands of equal value based upon their ecological importance for their specific region of the state, this flexibility is warranted in the forested region due to amount of public land and forested wetland. (Beckel)
- A county in the greater than 80% area can allow replacement to occur in an adjacent bank service area without an increase in the replacement ratio. (Beckel)

- In the replacement siting, we are attempting to combine the concept of replacing in: Watersheds, Counties, Pre-settlement wetland criteria, Banking service areas. This concept is ambiguous and makes it difficult for LGU's and TEP members to guide applicants.

Therefore, it is possible that an impact that in Watershed District A could be mitigated in Watershed District B, which is in another metro county. Since Anoka is the only 50-80% county in the metro, you are contradicting the basic concept of keeping mitigation sites in the same pre-settlement area, watershed, and bank service area.

It would be much clearer if the language in item 8 had a meaning of "not disregarding items 1-5". Better yet, repeal item 8. If the idea was to keep mitigation for metro impacts in the metro area that is already stated in Item 3.

This will further put a strain on mitigation site management. Keeping track of mitigation sites is difficult enough, without having to coordinate with other LGU's on mitigation sites in other parts of the state. This will only confuse and deter the proper amount of attention mitigation sites require to be successful.

In regards to the in-place, aspect there is a further contradiction. In-place is defined as in the same watershed; however, our metro watersheds are within multiple counties, of which some are non-metro. So, is it, in-kind if the mitigation is in the same watershed, but a non-metro county? These are the types of real scenarios that we will have to provide guidance to applicants. (Rodacker)

#### Replacement Ratios

- Criteria should be established to allow the TEP to reduce the replacement ratio below 1:1, when the impact wetland is of a lower quality than the replacement wetland. (Beckel)
- The new language proposed for 8420.0549 Subp. 6 (iii) that addresses varying mitigation ratios should be clear about how the new Rule affects mitigation variation in wetland plans already reviewed and approved as a CWPMP. (Naber)
- The replacement ratio should be 50% NWC and 50% PVC and not the 1:1 NWC and the remainder PVC as it currently is. (Keizer et al)

#### **8420.0550 Wetland replacement standards**

- Increase and establish wetland mitigation/replacement standards. This could significantly curtail current losses of wetland functions. Potential modifications include requiring buffers for replacement wetlands, requiring the use of licensed native seed contractors for replacement wetlands, and establishing specific bounce and depth requirements based on wetland plant community goals. Incorporate "performance standards" (beyond MNRAM) within "Wetland Replacement Standards" section 8420.0550 so that TEPs and applicants are on the same page regarding wetland quality (invasives) at the end of the monitoring period. Shouldn't there be a certain percentage of submergent vegetation covering the deep portions of types 3,4, and 5 before monitoring ceases? BWSR or DNR should earmark funding for researching and experimenting invasive species control techniques. (Wozney)

- Replacement evaluation criteria related to maintaining/improving wetland condition. (Norris)

#### **8420.0600 Monitoring**

- We understand that BWSR intends to establish maintenance requirements for replacement wetlands through these rule amendments. BWSR should consider the practical application when developing maintenance requirements. This issue is important to BATC members, and we look forward to further discussions throughout the rulemaking process. (Belz)
- Provide an effective mechanism for wetland monitoring. The current system allows applicants to do their own monitoring. This results in biased assessments and the monitoring often goes undone and is forgotten by LGUs. Although sureties/bonds are now required by LGUs when created replacement wetlands are proposed, there is no standard, and bond amounts are often inadequate to ensure compliance. Possible solutions include developing a system of independent monitoring of wetland replacement sites funded by applicants, consider giving an oversight agency the mandate and funding to independently monitor replacement wetlands, and require the option for all local governments to hold a specified cash bond amount only to be released once TEP certifies wetland mitigation as complete or require a 5-year contract with an appropriate party be submitted with the wetland permit application to complete the annual monitoring requirements. (Wozney)
- Require surety for all wetland replacement areas for 5 years or until TEP approval. (Wozney)
- Improved monitoring and performance standards for replacement wetlands. (Norris)
- The intricate regulations would be rendered mute if the WCA did a better job of encouraging and requiring successful mitigation. Few actually do the monitoring and few LGU's enforce the requirement. The whole wetland permitting process is heavily focused on the application, little attention is devoted to the follow-through and monitoring. Serious consideration needs to be given to making wetland mitigation sites viable, possible solutions include: Increased sureties mandated by law; rules that specify that project construction cannot proceed until the mitigation is constructed first; only licensed restoration contractors are allowed to construct the mitigation; shorter monitoring period that can be realistically enforced; rules that prohibit the selling or transferring of land utilized for mitigation until the mitigation is certified; establishment of a statewide tracking system for wetland mitigation that specifies proposed, constructed, and certified mitigation areas; and/or mandated regular mitigation monitoring audits of LGU's by BWSR and SWCD's. The most promising of these is to require mitigation sites be constructed first. We need real, practical solutions that can be reasonable followed by the applicant and reasonably implemented by LGU's. (Powell)
- Clearly one of the biggest problems with the current wetland regulatory program is a general lack of successful, quality mitigation. The current monitoring and replacement follow-up system is broken. Rule requirements for "front-end" scrutiny, staffing and funding limitations, poor construction, and lack of authority after-the-fact lead to a lesser emphasis on monitoring and assuring success on the "back-end. To minimize the loss of public value from wetland impacts, we need better, not necessarily more, mitigation. The following could help:

1. Require an effective surety for all project specific replacement that is not fully functional prior to impact.
2. Under the current system, LGUs should be required to track and provide information on mitigation sites and monitoring, which should be reviewed during BWSR audits. Audits should be more frequent and have a greater focus on results (specifically mitigation construction, success, and functionality).
3. Keep the rule as simple and efficient as possible. The more time that has to be spent on other requirements, the less time available for construction monitoring and follow-up. The Rule should also be more results oriented.
4. BWSR should explore developing a system where monitoring oversight is performed on a state-wide basis by BWSR or some third-party entity. A similar model has worked well for monitoring and assessing bank sites, and could be done on a trial basis in several LGU's in the Metro area. Most LGU land-use programs are set up for more of a front-end review and approval. Monitoring follow up often doesn't fit well with the other things LGU's do. Under this system, the LGU would be responsible for project review, approval, and permitting, while the monitoring and follow-up is performed by a separate entity. (Lemm)

#### **8420.0650 Local comprehensive wetland protection and management plans**

- Locally generated wetland plans need to be accepted under both WCA and Section 404 of the Clean Water Act. (Beckel)
- Eliminate the option for 50-80% areas to reduce the overall mitigation ratio to 1:1 as part of a CWMP or limit CWMPs to >80% areas. Other areas can still do their own plan/ordinance /policy and approve it locally (since there's very little flexibility allowed for <80% CWMPs, it ends up costing staff and board time on something with very little benefit that doesn't need BWSR approval). (Wozney)
- Change the CWMP review and approval process to follow the water planning process (number and length of review periods, board approval, etc.). (Wozney)
- Eliminate the option for 50-80% areas to reduce the overall mitigation ratio to 1:1 as part of a CWMP. Change the CPWMP review and approval process to follow the water planning process (number and length of review periods, board approval, etc.). (Lemm)

#### **8420.0700 Wetland banking**

- Eliminate the option of separate banking systems established by LGUs. (Wozney)
- There appears to be an increased trend to avoid private banking – I'm fielding numerous complaints about the program. BWSR should assess the (perceived?) problems and simplify the process where possible, reconsider the fee structure, and regain the respect banking deserves. (Wozney)

- The banking siting places Anoka in an unfortunate situation. In Anoka, we have the potential to create high quality Type 1 and 2 wetlands by blocking ditches, shallow scraping and re-seeding. However, since the new rules prohibit Anoka banks from selling to anybody outside the 50-80 zone i.e. the rest of the metro, you have stripped potential bankers from prospective clients. Sure, we can make a supply, but there is no demand. (Rodacker)
- Lack of clear direction on the banking program. Are we encouraging banking or not? (Kjolhaug)
- Banking: Eliminate the annual fee and make it a flat rate based on each transaction. Also eliminate the option of separate banking systems established by LGUs. (Lemm)

### **Exemption Reporting/Data**

- The following data should be collected from landowners claiming an exemption to the Wetlands Conservation Act: (1) name of person; (2) location of wetland being impacted; (3) exemption being claimed; (4) size of wetland being impacted; (5) size of impact; (6) wetland type being impacted, if known, or a written description of wetland characteristics; (7) dates work on wetland will be done; and (8) date LGU receives form.

A form should be created listing the categories above. These forms should be retained using the same schedule as other WCA forms. We have a strong preference that the Board should quickly generate a web-based reporting system for this and other requirements, as this will reduce the burden on BWSR, local government units, landowners, and other affected entities.

The form should be completed by anyone who will impact a wetland but will not create a replacement plan due to an exemption. LGUs should collect these forms. However, LGU's acceptance of the form does not imply that they are certifying the exemption is being used correctly or that the LGU or the State is giving consent to the project. Processes to challenge the use of an exemption still apply. This form should be completed for all exemptions.

If forestry or utilities are able to provide the information listed above through data that is currently being gathered, they may submit the information to BWSR on an annual basis. (Dean)

- Providing mechanisms for obtaining better information on the loss of wetlands due to application of the WCA exemptions. (Norris)

### **WCA/Section 404 Consistency**

- The incorporation of many of the 404 policies into WCA is not practical, quite unpopular, and is not creating administrative efficiencies or regulatory simplification. (Wozney)
- The decision to align WCA with 404 has added layers of confusion. It is difficult to align programs that do not regulate the same wetlands and have different goals. If we are trying to make WCA more effective than we need to start with questions like "What is our mission" I think we have lost our vision in an effort to be more like the Corp. (Rodacker)

- WCA and 404 compatibility issues. (Can we revisit the idea of having WCA cover some of the 404 program?) (Kjolhaug)
- I do not see the value in changing WCA to become more like the 404 program. Despite its imperfections, WCA has worked pretty well in stopping the vast majority of wetland impacts while allowing reasonable land use and (fairly) clearly defining its rules. The 404 program, on the other hand, is a mess. Its requirements have always been a moving target, with no clearly defined rules, constantly changing guidelines that are administered differently by each of their project managers which are then subject to being overruled by unseen and unknown supervisors. Changing WCA to match the 404 program is like chasing the wind, because the COE's policies have never been stable.

I would rather have knowledgeable, experienced people work to revise WCA's rules to improve its shortcomings than to radically change WCA just for the sake of aligning with 404. Before settling on permanent rules, I urge you to consider having extensive public input on proposed rule changes (including the exempt rules), and to especially consider the input of the people who have the most experience and are most familiar with WCA. (DeRuyter)

- WCA and Section 404 of the Clean Water Act regulate different things, so why continue trying to adapt WCA regulations to St. Paul Corps District policies? The WCA needs to come up with the very best regulations it can to meet its goals and requirements and make the program work. If after it is drafted, there are ways to mesh some requirements with the Corps and still meet the goals, then it should be modified accordingly. (Powell)
- I understand the need to combine the COE 404 process and the WCA, however, it is difficult in Minnesota when the COE process is dictated in Washington DC and tries to make that process the same for all 50 states. We have a state law that is customized for the State and has similar sequencing and avoidance requirements as the COE and a more restrictive replacement process. (Peterson)
- The programs, their implementation process, their purpose, and their enabling legislation are different and always will be. Natural resource management is not a one-size-fits-all endeavor, and federal agency priorities and policies may not always match the State's. WCA Rules should first focus on the best ways to accomplish the State's goals and legislative intent efficiently and effectively, then similarities can be explored for potential administrative consistencies. (Lemm)

## **Miscellaneous**

### Rulemaking Process

- As BWSR moves forward with the WCA rulemaking, we strongly encourage the state to consider all proposed rule amendments as they relate to the scope and purpose of WCA. BATC looks forward to working with BWSR in developing practical and reasonable standards and regulations that achieve no net loss in the quantity, quality, and biological diversity of Minnesota's wetlands. (Belz)

- In an effort to make the WCA as effective as possible, I think it would be good idea is to keep allowing people to comment as we implement the new rules. That way we can see what works and what does not. (Rodacker)
- I am requesting that the exempt and proposed rule changes be submitted to a qualified technical review panel for feasibility assessment. This technical panel should be comprised of BWSR staff, LGU representatives, and consultants. (Barrett)
- My over-arching concerns are about the program becoming confusing and difficult to work with, and as a result less effective. This is also seriously reducing support for the program. It has always been a strength of WCA that we could look at the rules and figure out what the law required, yet there was flexibility to be used when appropriate. We seem to be moving in the opposite direction, with no obvious benefit to the resource.

I recommend that an advisory group of wetland professionals have a major role during the rulemaking process. This group should include BWSR field staff, LGU's, and consultants. These people should work with WCA on a regular basis and it should be the majority of the work they do. These are the people who best understand problems that currently exist and would understand how changes would affect the program - both good and bad.

We have only been using the emergency rules for a short time, but it is apparent to most that they are flawed. The final rulemaking process should be used to correct these problems and consider improvements. All WCA rules should be on the open for change, consistent with current statutes. Possible future statutory changes should also be addressed. (Kjolhaug)

- My concerns center on the trend toward greater complexity, which will seriously jeopardize the program's workability and erode public support for wetland conservation. I am also very concerned that the process for making these changes has not adequately involved enough input from the public, and specifically those who are most familiar with the WCA.

I encourage you to consider the input of those who work with the rules on a daily basis, such as current BWSR staff, consultants, and LGU's. While invited stakeholders appropriately had an opportunity to participate in the WCA Assessment process, most of them do not have an understanding of how the rules work in practice. The exempt rules are reflective of that lack of understanding. People who work with the rules every day will best understand how changes will work in real life, not just theory. (DeRuyter)

- Extend the comment period. There has not been enough time to understand the temporary rules and the comment period is already over. (Powell)
- All of the WCA rules should be "on the table" for review and consideration. (Powell)
- BWSR should consider forming a technical committee to thoroughly review existing and proposed WCA changes. The committee should consist of consultants and LGU's (along with BWSR staff) that have 10+ years of experience. (Powell)

- First step in the rule revision process should be to set specific goals for WCA. 8420.0100 lays out some broad goals, but I think we need more specific sub-goals related to what we (the State) want to see in specific projects affecting wetlands. A sub-goal might encourage restoration of degraded wetlands. Once the sub-goals are met, all of WCA should be reviewed to determine if it contributes to the goals. The 2nd question should be, “can this WCA be reasonably implemented by LGU’s? Proposed changes should be evaluated in light of particular goals and be accompanied by an explanation of why it was made and how it contributes to WCA goals. A final litmus test is to actually apply it to real regulatory/permit situations and see if and how it works. (Powell)
- Stakeholder Input - Input on the Rule should be divided into two categories:
  1. Input on goals and values; what’s important to them.
  2. Input on how best to accomplish those goals (if possible and appropriate), and how to structure the program and its requirements.

Input from citizens, interest groups, agencies, and other stakeholders should be relied on heavily for the first, while LGUs, SWCDs, BWSR staff, and wetland consultants should be relied on for the second. It is extremely important for BWSR to directly involve those identified in number two above in policy development. This process should include review and evaluation of all current WCA regulations, identifying strengths and weaknesses, and brainstorming on how to address them. (Lemm)

### Regulatory Simplification

- Contrary to the stated intent of regulatory simplification, the exempt rules bring the complexity to a whole new level. We now have 3 wetland classification systems instead of 2. The De Minimis exemption now requires a flowchart to determine which of the 8 (formerly 4) amounts apply to proposed impacts. Storm water ponds qualify for replacement credit, but only if they meet all of the design criteria of a created wetland (including pre-treated water!). In other words, we can still get credit for storm water ponds, but only if they in no way resemble a storm water pond. Wouldn’t it be simpler to just eliminate the storm water pond-for-credit option? (DeRuyter)
- The regulatory simplification aspect of the rules change process has not been met. The MOU with the Corps has not been followed and we still have to deal with PVC and NWC in the WCA and a separate process and ratios with the Corps. (Keizer et al)(Mann)
- We feel that many of the changes have not been directed towards regulatory simplification or further protection of the resources, but were driven by political decisions that did not necessarily follow a scientific knowledge base. (Keizer et al)
- A general reorganization of the rules is needed to simplify and enhance their usability. (Norris)

- The new/revised rules will not make the process more efficient and will likely not improve the resource. The rules have become increasingly more confusing and difficult to interpret and apply, and this is not only from a consultant perspective, but from the LGU side as well. The rules need to be practical and easy for the average resident and LGU to understand, and to make the banking process more attractive. Changes to the banking process of a few years ago have acted as a deterrent to the creation of private banks. Additionally, with the tighter restrictions on where the mitigation credits can be used, developers will have a difficult time creating wetlands ahead of time that they can use on their projects. Inconsistencies in the rule that compound the confusion, like use of Circular 39 in some sections, Cowardin in others, and Eggers and Reed in still others, adding the 11-county metro area for some sections, wetland bank service areas for others, major watersheds and counties, and then there are shoreland areas. (Kunkel)
- Administrative Impacts and Efficiency - SIMPLER IS BETTER. (Lemm)

#### Other

- Under “Replacement Plan Determinations”, “Exemptions”, etc, eliminate wording such as “within ten days of receipt...” and replace with a single statement that applications, decisions, etc. must follow the requirements of Minn. Stat 15.99. (Wozney)
- Clarify that delineations received outside the growing season, or with insufficient time or ability to review within the growing season, may be considered incomplete until conditions are appropriate for review (Wozney)(Lemm)
- While achieving “no net loss” is in the State’s public interest, it is not required to be achieved solely within the confines of the WCA regulatory program. The WCA regulatory program is one of several State policies and programs that work together to achieve the public interest. Applying the goal of “no net loss” to the WCA regulatory program alone creates unrealistic and unattainable expectations for WCA Rules. (Lemm)
- The Rule should do a better job of encouraging more of a landscape resource management framework. Wetlands are one component of an interconnected ecosystem. A focus solely on wetland protection (in terms of acres) can, and often does, result in a loss of function and public value due to the indirect effects of other actions and/or loss of other resources. There are several ways the Rule can potentially address this, including:
  1. Allow more options for mitigation.
  2. Increase the protection requirements for mitigation wetlands.
  3. Allow flexibility for wetland requirements in order to balance the protection of other valuable resources (i.e. an oak savanna) and provide for natural resource management on a landscape setting.
  4. Create a more direct link between wetland regulations and local land-use planning through CWPMPs and local land-use plans.
  5. Develop more effective assessment tools to aid (not replace) in staff/TEP evaluations of wetland and landscape function. (Lemm)

- The ultimate goal of the Wetland Conservation is to minimize the loss of public value from the unintended effects of individual actions. The current rule focuses too much on acres and not enough on functions and values as State Statute intends. We are replacing acres but losing public value due to poor mitigation, indirect impacts, and impacts on other resources (especially if those impacts are due to avoiding a wetland). (Lemm)
- Geographical Variation of Standards - While administrative requirements should be consistent statewide, when it comes to exemptions, replacement requirements, etc. the rule should continue to recognize the State's significant regional differences. (Lemm)
- Work with legislators to accomplish legislative changes where necessary. (Lemm)