

2011 WCA STATUTE CHANGES

Summary of Key Changes with Explanations - Effective August 1, 2011

WETLAND BANKING

103G.005, Subd. 10e. Local government unit. "Local government unit" means:

- (1) outside of the seven-county metropolitan area, a city council, county board of commissioners, or a soil and water conservation district or their delegate;
- (2) in the seven-county metropolitan area, a city council, a town board under section [368.01](#), a watershed management organization under section [103B.211](#), or a soil and water conservation district or their delegate; ~~and~~
- (3) on state land, the agency with administrative responsibility for the land; and
- (4) for wetland banking projects established solely for replacing wetland impacts under a permit to mine under section 93.481, the commissioner of natural resources.

Effect of Change: This change establishes the DNR as an LGU responsible for implementing the WCA wetland banking provisions only for projects that will be used exclusively to replace wetland impacts occurring under a permit to mine. This will increase flexibility for the DNR and mining companies in complying with WCA replacement requirements, while increasing transparency for local governments and other interested parties when banking is proposed to mitigate mine related wetland impacts.

103G.2242, Subd. 14. Fees established. (a) Fees must be assessed for managing wetland bank accounts and transactions as follows:

- (1) account maintenance annual fee: one percent of the value of credits not to exceed \$500;
- (2) account establishment, deposit, or transfer: 6.5 percent of the value of credits not to exceed \$1,000 per establishment, deposit, or transfer; and
- (3) withdrawal fee: 6.5 percent of the value of credits withdrawn.

(b) The board may establish fees at or below the amounts in paragraph (a) for single-user or other dedicated wetland banking accounts.

(c) Fees for single-user or other dedicated wetland banking accounts established pursuant to section 103G.005, subd. 10, paragraph (e), clause (4) are limited to establishment of a wetland banking account and are assessed at the rate of 6.5 percent of the value of the credits not to exceed \$1,000.

Effect of Change: Allowing BWSR to establish fees less than those otherwise required recognizes that certain special account types, specifically including those established per 103G.005, Subd. 10(e) above, may have reduced administrative costs associated with them due to their nature and operation, and thus a reduced fee can be appropriate. BWSR's fee structure will be adjusted accordingly for banking projects approved for mining. Any other reduced fees would be established via board policy.

ELECTRONIC COMMUNICATIONS AND NOTICING

103G.005, Subd. 10f. Electronic transmission. "Electronic transmission" means the transfer of data or information through an electronic data interchange system consisting of, but not limited to, computer modems and computer networks. Electronic transmission specifically means electronic mail, unless other means of electronic transmission are mutually agreed to by the sender and recipient.

103G.2373 ELECTRONIC TRANSMISSION.

For purposes of sections 103G.221 to 103G.2372, notices and other documents may be sent by electronic transmission unless the recipient has provided a mailing address and specified that mailing is preferred.

Effect of Change: The above paragraphs provide a definition for "electronic transmission," which was previously undefined. WCA was enacted in 1991 and, although amended numerous times, the statute had not kept pace with current technologies. Specifically, statute required LGU notices regarding applications, decisions, etc. to be sent via U.S. mail. This requirement was counter to how many people prefer to communicate, resulting in delays and increased workload, and increased printing expenses. Allowing communication by electronic transmission will simplify noticing procedures, reduce costs, and increase efficiency. This definition and other amendments to various other parts of WCA statute relating to electronic transmission will allow for such communication. However, the definition will also allow landowners to continue to receive notices via U.S. mail if preferred.

103G.2242, Subd. 6. Notice of application. ~~(a) Except as provided in paragraph (b), within ten days of receiving an~~ Application for approval of a replacement plan under this section must be reviewed by the local government according to Minnesota Statutes 15.99, subdivision , paragraph (a). Copies of the complete application must be mailed or sent by electronic transmission to the members of the Technical Evaluation Panel, the managers of the watershed district if one exists, and the commissioner of natural resources. Individual members of the public who request a copy shall be provided information to identify the applicant and the location and scope of the project.

~~(b) Within ten days of receiving an application for approval of a replacement plan under this section for an activity affecting less than 10,000 square feet of wetland, a summary of the application must be mailed to the members of the Technical Evaluation Panel, individual members of the public who request a copy, and the commissioner of natural resources.~~

Effect of Change: The change in paragraph (a) and the deletion of paragraph (b) establishes a single requirement for providing application notices. This change simplifies program administration, reduces local government costs, and provides consistent project information to interested parties. The change also references MN Stat. 15.99 rather than providing a specific timeframe to provide notice (the previous "10 days" was less than, and somewhat inconsistent with, 15.99).

REPLACEMENT WETLAND SITING

103G.222, Subd. 3. Wetland replacement siting. ~~(a) Siting wetland replacement~~ Impacted wetlands in a 50 to 80 percent area must be replaced in a 50 to 80 percent area or in a less than 50 percent area. Impacted wetlands in a less than 50 percent area must be replaced in a less than 50 percent area. All wetland replacement must follow this priority order:

- ~~(1) on site or in the same minor watershed as the affected~~ impacted wetland;
 - ~~(2) in the same watershed as the affected~~ impacted wetland;
 - ~~(3) in the same county or wetland bank service area as the affected~~ impacted wetland;
 - ~~(4) for replacement by wetland banking, in the same wetland bank service area as the impacted wetland, except that impacts in a 50 to 80 percent area must be replaced in a 50 to 80 percent area and impacts in a less than 50 percent area must be replaced in a less than 50 percent area;~~
 - ~~(5) for project specific replacement, in an adjacent watershed to the affected wetland, or for replacement by wetland banking, in an adjacent another wetland bank service area, except that impacts in a 50 to 80 percent area must be replaced in a 50 to 80 percent area and impacts in a less than 50 percent area must be replaced in a less than 50 percent area; and~~
 - ~~(6)~~ (5) statewide for public transportation projects, except that wetlands ~~affected~~ impacted in less than 50 percent areas must be replaced in less than 50 percent areas, and wetlands ~~affected~~ impacted in the seven-county metropolitan area must be replaced at a ratio of two to one in: (i) the affected county or, (ii) in another of the seven metropolitan counties, or (iii) in one of the major watersheds that are wholly or partially within the seven-county metropolitan area, but at least one to one must be replaced within the seven-county metropolitan area.
- ~~(b) Notwithstanding paragraph (a), siting wetland replacement in greater than 80 percent areas may follow the priority order under this paragraph: (1) by wetland banking after evaluating on-site replacement and replacement within the watershed; (2) replaced in an adjacent wetland bank service area if wetland bank credits are not reasonably available in the same wetland bank service area as the affected wetland, as determined by a comprehensive inventory approved by the board; and (3) statewide.~~
- ~~(c) Notwithstanding paragraph (a), siting wetland replacement in the seven-county metropolitan area must follow the priority order under this paragraph: (1) in the affected county; (2) in another of the seven metropolitan counties; or (3) in one of the major watersheds that are wholly or partially within the seven-county metropolitan area, but at least one to one must be replaced within the seven-county metropolitan area.~~
- ~~(d)~~ The exception in paragraph (a), clause ~~(6)~~ (5), does not apply to replacement completed using wetland banking credits established by a person who submitted a complete wetland banking application to a local government unit by April 1, 1996.
- ~~(e)~~ (c) When reasonable, practicable, and environmentally beneficial replacement opportunities are not available in siting priorities listed in paragraph (a), the applicant may seek opportunities at the next level.
- ~~(f)~~ (d) For the purposes of this section, "reasonable, practicable, and environmentally beneficial replacement opportunities" are defined as opportunities that:
- (1) take advantage of naturally occurring hydrogeomorphological conditions and require minimal landscape alteration;
 - (2) have a high likelihood of becoming a functional wetland that will continue in perpetuity;
 - (3) do not adversely affect other habitat types or ecological communities that are important in maintaining the overall biological diversity of the area; and

(4) are available and capable of being done after taking into consideration cost, existing technology, and logistics consistent with overall project purposes.

(e) Applicants and local government units shall rely on board approved comprehensive inventories of replacement opportunities and watershed conditions, including the Northeast Minnesota Wetland Mitigation Inventory and Assessment (January 2010), in determining whether reasonable, practicable, and environmentally beneficial replacement opportunities are available.

~~(g)~~ (f) Regulatory agencies, local government units, and other entities involved in wetland restoration shall collaborate to identify potential replacement opportunities within their jurisdictional areas.

Effect of Change: Language in the first two sentences of the subdivision was relocated from clauses 4 and 5 and modified to provide a single standard for all wetland replacement (both project-specific and banking), allowing impacts in wetland rich areas of the state to be replaced in areas with fewer wetlands, but not the opposite. The priority order must still be followed, however. This change makes the replacement wetland siting criteria simpler and more effective.

Changing “affected” to “impacted” clarifies the language consistent with MN Rule 8420 and other parts of statute. The addition of “wetland bank service area” in paragraph (a), clause 3 simplifies the siting criteria by treating project-specific wetland replacement the same as replacement through wetland banking, which was previously located in clause 4.

The deleted paragraphs (b) and (c) are no longer necessary because of the changes in paragraph (a), clauses 1-5 above, and the new language in paragraph (e) which provides a technical basis for identifying appropriate siting opportunities. This is consistent with the “Northeast MN Wetland Mitigation Inventory and Assessment” funded by the legislature in 2007 and completed by BWSR in 2010. Allowing replacement wetland siting based on actual data and watershed conditions will increase opportunities available to landowners and improve the resource benefits provided by replacement wetlands. Paragraph (e) also allows for board approval of future inventories, which then can be used for making decisions on siting and the availability of wetland replacement.

The deletions also remove somewhat obsolete language. For example, much of the intent behind paragraph (c) is now accomplished by the implementation of stormwater treatment requirements and metropolitan watershed management plans prepared under MN Stat. 103B. Replacing this language with a single watershed-based standard will still require applicants to investigate opportunities for replacement close to the impact site, when beneficial opportunities are not available, will allow flexibility to move farther out in the watershed to find sites regardless of political boundaries.

DECISIONS AND APPEALS

103G.2242, Subd. 2a. Wetland boundary or type determination.

(d) ~~Appeals of decisions made by designated local government staff must be made to the local government unit. Notwithstanding any law to the contrary, a ruling on an appeal must be made by the local government unit within 30 days from the date of the filing of the appeal.~~

Effect of Change: This deletion removes the mandate for a local appeals process for decisions made by designated local government staff. Now all designated staff decisions are final unless the local government chooses to establish a local appeals process under their own authority. Appeals go to BWSR when no local appeals process is established. Guidance on local appeals will be developed and provided to LGUs.

(e) The local government unit decision is valid for ~~three~~ five years unless the Technical Evaluation Panel determines that natural or artificial changes to the hydrology, vegetation, or soils of the area have been sufficient to alter the wetland boundary or type.

Effect of Change: Increasing the timeframe that decisions are valid provides consistency with federal wetland regulations, increased flexibility and simplification for landowners, and slight workload reductions for local governments.

103G.2242, Subd. 9. ~~Appeal~~ Appeals to the board. (a) Appeal of a replacement plan, sequencing, exemption, wetland banking, wetland boundary or type determination, or no-loss decision, ~~or restoration order~~ may be obtained by mailing a petition and payment of a filing fee, which shall be retained by the board to defray administrative costs, to the board within 30 days after the postmarked date of the mailing or date of sending by electronic transmission specified in subdivision 7. If appeal is not sought within 30 days, the decision becomes final. If the petition for hearing is accepted, the amount posted must be returned to the petitioner. Appeal may be made by:

- (1) the wetland owner;
 - (2) any of those to whom notice is required to be mailed or sent by electronic transmission under subdivision 7;
- or
- (3) 100 residents of the county in which a majority of the wetland is located.

(b) Within 30 days after receiving a petition, the board shall decide whether to grant the petition and hear the appeal. The board shall grant the petition unless the board finds that:

- (1) the appeal is ~~meritless~~ without sufficient merit, trivial, or brought solely for the purposes of delay;
- (2) the petitioner has not exhausted all local administrative remedies;
- (3) expanded technical review is needed;
- (4) the local government unit's record is not adequate; or
- (5) the petitioner has not posted a letter of credit, cashier's check, or cash if required by the local government

unit.

(c) In determining whether to grant the appeal, the board, executive director, or dispute resolution committee shall also consider the size of the wetland, other factors in controversy, any patterns of similar acts by the local government unit or petitioner, and the consequences of the delay resulting from the appeal.

(d) ~~All appeals~~ If an appeal is granted, the appeal must be heard by the committee for dispute resolution of the board, and a decision must be made by the board within 60 days of filing the local government unit's record and the written briefs submitted for the appeal and the hearing. The decision must be served by mail ~~on~~ or by electronic transmission to the parties to the appeal, and is not subject to the provisions of chapter 14. A decision whether to grant a petition for appeal and a decision on the merits of an appeal must be considered the decision of an agency in a contested case for purposes of judicial review under sections 14.63 to 14.69.

Effect of Change: The changes to Subd. 9 specifically allow the appeal of LGU decisions regarding sequencing, deletes "restoration order" which is covered separately (below), and allows appeals to be made and noticed via electronic transmission consistent with other changes. Statute previously did not specifically allow appeal of sequencing decisions, while MN Rule did. Other changes clarify the processing of appeals and modifies Board authority to make decisions on appeals when they are without sufficient merit as determined by a review of the appeal petition and the LGU record. These statute changes improve consistency with current rule.

103G.2242, Subd. 9a. Appeals of Restoration or Replacement Orders. A landowner or other responsible party may appeal the terms and conditions of a restoration or replacement order within 30 days of receipt of written notice of the order. The time frame for the appeal may be extended beyond 30 days by mutual agreement, in writing, between the landowner or responsible party, the local government unit, and the enforcement authority. If the written request is not submitted within 30 days, the order is final. The board's executive director must review the request and supporting evidence and render a decision within 60 days of receipt of a petition. A decision on an appeal must be considered the decision of an agency in a contested case for purposes of judicial review under sections 14.63 to 14.69.

Effect of Change: This new subdivision establishes a process for the appeal of restoration orders that is different than for local government decisions. Restoration orders are enforcement orders that are not made by local governments and therefore warrant a different appeal process. This issue was identified during the WCA rulemaking that concluded in August 2009 and is the result of an inadvertent statutory change made in 2007. The intent is to have primarily the same process and timeframes as was provided in the 2002 and 2007 Wetland Conservation Act rules. The new language is consistent with the 2009 rule and does not affect the current appeal process.

WETLAND PRESERVATION FOR REPLACEMENT CREDIT

103G.2251 STATE CONSERVATION EASEMENTS; WETLAND BANK CREDIT.

In greater than 80 percent areas, preservation of wetlands ~~owned by the state or a local unit of government,~~ protected by a permanent conservation easement as defined under section 84C.01 and held by the board, may be eligible for wetland replacement or mitigation credits, according to rules adopted by the board. To be eligible for credit under this section, a conservation easement must be established after May 24, 2008, and approved by the board. Wetland areas preserved under this section are not eligible for replacement or mitigation credit if the area has received financial assistance from public conservation programs.

Effect of Change: This allows the preservation of important high quality wetlands for replacement credit, regardless of property ownership (statute previously limited preservation to public lands). This provides more options in >80% areas where traditional replacement opportunities are limited and improves consistency with federal wetland regulations. It will also improve the targeting of preservation to wetlands truly at risk, help protect valuable wetland functions critical to watershed health, and improve consistency with federal rules. The last sentence provides further assurance that wetlands protected by other conservation easements are not eligible.