

## Wetland Conservation Act (WCA) Topic of the Week

### Utility Line Projects

July 22, 2020

*WCA topics of the week are a series of informal fact sheets that provide practical information on WCA program implementation in a question and answer format. They are intended to better clarify and summarize certain aspects of WCA implementation and should be considered as supplemental to WCA statutes, rules and any associated BWSR guidance and policy. Information in these fact sheets are subject to change over time.*

**Question:** Does WCA have special rules for projects involving utility lines?

**Answer:** Yes. There are two exemptions that apply specifically to utility projects, the *Utility Exemption* and the *Federal Approvals Utility Exemption*. The Utility Exemption allows projects that involve the installation, maintenance, repair, or replacement of utility lines to impact wetlands without replacement if total wetland impacts are less than one-half acre and overall wetland impacts are minimized. The exemption also applies to the repair or updating of existing subsurface sewage treatment systems necessary to comply with local, state, and federal regulations.

The Federal Approvals Utility Exemption allows projects that involve the installation, maintenance, repair, or replacement of utility lines to impact wetlands without replacement if all wetland and other aquatic resource impacts require a permit from the U.S. Army Corps of Engineers. The exemption has several conditions including a noticing requirement (see appendix).

**Question:** Does the WCA Utility Exemption apply to all aspects of utility projects such as access roads, buildings and other structures?

**Answer:** No. The exemption only applies to the utility line itself (pipeline, fiber optic cable, electric line, storm or sanitary sewer line, etc.). Ancillary components of the utility line like lift stations, signage, lighting, line support structures, clean-outs, manholes, transformers, and the like are generally considered to be part of the line. Wetland impacts resulting from utility-related structures not directly associated with the utility line like sewage treatment plants, stormwater ponds, culverts, electric substations, access roads, utility plants, etc. are not eligible for the exemption.

**Question:** Do most utility line projects qualify for one of the WCA exemptions?

**Answer:** Actually, most utility line projects involve temporary impacts such as excavating to repair/replace lines/pipes. These temporary impacts are often considered as a “no-loss” of wetlands. Specifically, WCA considers temporary impacts to wetlands to be a no-loss if they restore impacts to pre-project conditions within 6 months (or longer if agreed to by the WCA Local Government Unit) and an appropriate financial assurance is posted.

**Question:** How are utility projects processed for WCA compliance when they cross more than one WCA Local Government Unit (LGU) jurisdiction?

**Answer:** If a utility line project results in wetland impacts in two LGUs, then the LGU with zoning authority makes the decision on the project. If both LGUs have zoning authority, then the LGU where the most wetland impact occurs makes the decision. If there are more than two LGUs, BWSR coordinates the review such that there is a unified decision on WCA compliance.

**Question:** What type of delineation is needed for utility projects?

**Answer:** Utility projects that involve only temporary wetland impacts can often be processed with a wetland delineation/determination derived from offsite resources (aerial imagery, soils mapping, etc.) and minimal field reconnaissance. This is referred to as a Level 1 delineation. Some utility projects occur in the interior of large wetland complexes. Use of a Level 1 delineation is appropriate in instances where the entire project footprint is within wetland. Otherwise, standard wetland delineation methods (Level 2) are required.

**Question:** What if a utility line project impacts wetlands and does not meet the requirements for the Utility Exemption or the Federal Approvals Utility Exemption?

**Answer:** Then the project would require a wetland replacement plan.

**Question:** What is the best way to evaluate a utility line project?

**Answer:** Generally, the following questions should be addressed:

1. Are all proposed wetland impacts temporary? If yes, then the project could qualify for the WCA no-loss provision associated with temporary impacts.
2. Will permanent wetland impacts be less than one-half acre? If yes, the utility exemption may apply. If the impacts extend across the jurisdiction of several LGUs, then applicants should contact the BWSR regional wetland specialist for assistance in coordinating the project review for multiple LGUs.
3. Will the project require a permit from the U.S. Army Corps of Engineers? If yes, then the applicant could try to qualify for the Federal Approvals Utility Exemption. All requirements of the exemption must be met including providing the appropriate notice to all LGUs with jurisdiction over project wetland impacts.

## Appendix – Minnesota Wetland Conservation Act Federal Approvals Exemption for Utilities

A replacement plan is not required for wetland impacts resulting from the construction, maintenance, or repair of utility lines, including pipelines, and associated facilities when:

1. The applicant has provided notice to all Wetland Conservation Act local government units with jurisdiction over the proposed project, including a description of the project, the proposed alignment, the intent to utilize this exemption, and notification that comments may be provided to the U.S. Army Corps of Engineers, St. Paul District (Corps). The notice must be provided prior to or concurrent with application for a permit from the Corps. In the event the proposed work is eligible for a Corps non-reporting general permit, the applicant must submit an application and request verification from the Corps that the proposed work complies with the terms and conditions of the non-reporting general permit;
2. All affected wetlands are either jurisdictional under the federal Clean Water Act or the applicant agrees to proceed with the federal review using a preliminary jurisdictional determination which assumes that all aquatic resources in the project area, including any wetlands, are jurisdictional under the Clean Water Act;
3. The applicant receives a general permit verification letter or a signed individual permit (letter of permission or standard individual permit) from the Corps authorizing the work under Section 404 of the Clean Water Act and provides a copy to each local government unit; and
4. Once authorized by the Corps, all work must be conducted and completed in accordance with the terms and conditions of the Corps' permit (33 U.S.C. §1344), including any conditions provided by Wetland Conservation Act local government units that the Corps determines are necessary to protect the public interest for a particular project, and the exemption conditions of MN Rule Chapter 8420.0410.

Failure to comply with conditions 1 through 4 will void eligibility for this exemption. Applicants are encouraged to coordinate with local government units early and throughout the project planning process.

For the purposes of this exemption, “utility line” means *any pipe or pipeline for the transportation of any gaseous, liquid, liquefiable, or slurry substance, for any purpose, and any cable, line, or wire for the transmission of electrical energy, telephone, electronic data, and radio or television communication.*

This exemption applies only to the Minnesota Wetland Conservation Act. This exemption does not apply to public waters, to calcareous fens as identified by the commissioner, to activities that affect any of the special considerations identified in MN Rule Chapter 8420.0515, or to other circumstances identified in MN Rule Chapter 8420.0420, subpart 1, item B. Qualification for this exemption does not release the project sponsor from any rules, regulations, requirements, or standards of any applicable federal, state, or local agency.