

MN Wetland Professional Certification Program Regulatory Training

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2023 MWPCP Schedule

- WCA Regulatory Training- St Cloud MNDOT Training Facility- April 20
- Regional Training: Rochester - May 16-17
- Wetland Delineation and Regulation Basic Class: Arden Hills- June 12-16
- Floristic Quality Assessment (FQA) - MNDOT Shoreview Training Center – June 20
- Basic Wetland Plant ID- Farmington (July 18) or Brainerd (July 20)
- Wetland Delineation Refresher- Prairie Woods ELC- Spicer- August 8
- Regional Training: Fergus Falls – August 15-16
- Wetland Delineation and Regulation Basic Class: Brainerd - September 11-15



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End of the current renewal period

- Current certification renewal period ends on December 31, 2023 for all who transferred to the MWPCP from the U of MN Wetland Delineation Certification Program.
- Credit reporting deadline for this renewal period is January 1, 2024.
- Submit the [Credit Hour Reporting Form](#) with proof of attendance no later than January 1, 2024.
- Not required to submit a credit hour reporting form for MWPCP courses.
- COVID-related [temporary continuing education policies](#) will lapse at the end of 2023.

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Next renewal period

- The next credit renewal period begins January 1, 2024 and ends on December 31, 2026.
- [MWPCP Continuing Education policy](#) requires 18 credit hours of MWPCP-approved training.
- Six of those may be online training.

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MWPCP Regulatory Training- St Cloud

<https://bwsr.state.mn.us/node/4681>



- Agenda:
- De minimis
- Sequencing
- Special Considerations
- Lunch
- Restoration Orders
- Appeals
- Incidental Wetlands



<https://bwsr.state.mn.us/minnesota-wetland-professional-certification-program>

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De Minimis

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De Minimis

Table 1: Base de minimis exemption amounts for all of Minnesota

Area	Wetland Type	Exemption Amount	Notes
Non-Shoreland Areas	Types 1, 2, 6, 7 (excluding white cedar and tamarack wetland and any Type 7 wetland in a 50% metro county)	10,000 ft ²	In all > 80% counties
		5,000 ft ²	In non-metro 50-80% counties
		2,500 ft ²	In metro 50-80% counties
Within Shoreland, but beyond structure setback	Types 3, 4, 5, 8, and white cedar and tamarack wetland (excluding any Type 7 wetland in a < 80% metro county)	300 ft ²	In metro < 50% counties
	Types 1, 2, 6, 7	400 ft ² *(1,000 ft ²)	
Within Shoreland and structure setback	Types 3, 4, 5, 8, and white cedar and tamarack wetland	300 ft ²	
Within Shoreland and structure setback	All wetland types	20 ft ² *(100 ft ²)	

*Increased amounts shown in parenthesis may be allowed if wetland is isolated from the public water, or if permanent water runoff retention or infiltration measures are established in proximity to the impact and approved by the shoreland management authority.

- De minimis 8420.0420 Subp 8
- The de minimis exemption covers small impacts to wetlands typically used for driveways, roads, small projects by landowners, etc.
- Very specific requirements depending on location in state, local area, shoreland, etc.
- Review all nuances of each part for every project

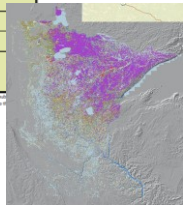
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De Minimis

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- Always site specific
- Where you are matters
- Wetland type dependent
- Shoreland proximity
- Defining the project
- Requiring applications?
- How to track? Do you track?

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Exemptions 8420.0420

Impacts to wetlands that DO NOT require replacement

- The activity is still regulated.
- WCA does not REQUIRE an application; some LGU's may.
- Follow standard conditions: stormwater, fisheries, comply with other laws



Exemptions do not apply to: calcareous fens, wetland bank sites, project-specific replacement sites (8420.0420 Subp 1B)

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General Exemption Requirements

- Only has to fit one; not disqualified if not exempt by another
- If impacts exceed max allowed = nothing is exempt
- Max may not apply to all situations or wetlands-very specific
- May not be combined on a project
- Must stabilized to prevent sedimentation/erosion.
- May not divide property simply to get more

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Noticing Requirements

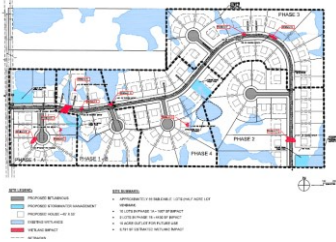
Summary of LGU Application Types		
Decision Type	NOA Required	NOD Required
Boundary or Ty	Yes	Yes
No-Loss	No	Yes
Exemption	No	Yes
Sequencing	Yes	Yes
Replacement PI	Yes	Yes
Bank Plan	Yes	Yes

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Defining the project

"Project" means a specific plan, contiguous activity, proposal, or des necessary to accomplish a goal as defined by a local government unit.

- Properties cannot be divided to increase the de minimis
- Think about wetlands during planning and zoning decisions.



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Defining a project for de minimis

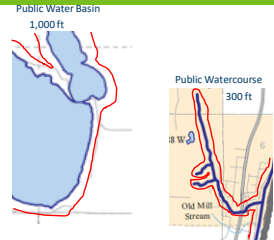
- Considerations:
 - Related activity
 - Timing
 - Ownership
 - After-the-fact?



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Shoreland definition

- DNR definition:
 - 1,000 ft from the OHWL of a public water basin or the shoreland area defined in local ordinance, which can be more restrictive
 - 300 ft from the OHWL of a public watercourse or the shoreland area defined in local ordinance, which can be more restrictive



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Wetland Type for de minimis

Circular 39 Classification system
- Based on hydrology and vegetation

Two groups of wetland types for de minimis:

- Types 1,2,6&7
- Types 3,4,5&8

Wetland Type	Hydrology	Vegetation
Type 1	Seasonally flooded	Grasses, sedges, cattails
Type 2	Inland fresh meadow	Grasses, sedges, cattails
Type 3	Inland shallow marshes	Grasses, bulrushes, cattails, arrowhead
Type 4	Deep marsh	Cattails, reeds, spike rush, bulrushes, pondweeds, duckweeds, water lilies, wild rice
Type 5	Inland open water	Pondweeds, water milfoils, fringed by emergent vegetation
Type 6	Shrub swamps	Shrubs, sedges, cattails
Type 7	Wooded swamps	Deciduous trees, sedges, cattails
Type 8	Emergent wetlands	Emergent vegetation



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Types 1 & 2

Type 1- Seasonally flooded basins

Landscape position: depressional basins, floodplains

Hydrology: Seasonally Flooded, dry for much of growing season



Type 2- Inland fresh meadow

Landscape position: depressions, lake fringes

Hydrology: saturated, without standing water for most of the growing season



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Types 6 & 7

Type 6- Shrub swamps

Landscape position: sloped, along river and lake fringes

Hydrology: Saturation with seasonal shallow inundation



Type 7- Wooded swamps

Landscape position: mineral flats, sloped

Hydrology: saturated with seasonal inundation for short periods

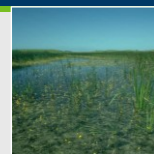


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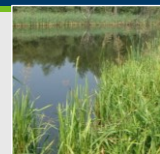
Types 3,4,5



Type 3- Inland shallow marshes
flooded up to 6" in depth
Grasses, bulrushes, cattails, arrowhead



Type 4- Deep marsh
6" to 3' of near permanent surface water with open water components
Cattails, reeds, spike rush, bulrushes, pondweeds, duckweeds, water lilies, wild rice



Type 5- Inland open water
<8.2' (2.5m) deep
Pondweeds, water milfoils, fringed by emergent vegetation

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Type 8

Bogs

Landscape Position: organic flats, lake fringe

Hydrology: permanently saturated

Vegetation: Herbaceous strata dominated by sphagnum moss, leatherleaf, Labrador tea, sedges, black spruce and tamarack trees

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What is a tamarack or white cedar wetland?

- Either of species is a dominant species using the dominance test (50/20 Rule)
- If no delineation has been conducted, TEP should make findings demonstrating dominance using the 50/20 rule prior to making a de minimis determination

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- For wetlands larger than 40 acres, wetland type may be defined as the deepest water regime within the wetland and within 300 feet of impact

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Where you are in the State

Table 1: Base de minimis exemption amounts for all of Minnesota

Wetland Type	Non-Shoreland Areas	Within Shoreland, but beyond structure setback	Within Shoreland and structure setback
Types 1, 2, 3, 7 (excluding white cedar and tamarack wetland and any Type 7 wetland in a 30% wetland county)	10,000 SF in all 85% counties 5,000 SF in counties 50-85% wetland 2,500 SF in counties 30-45% wetland 1,000 SF in counties 10-25% wetland	500 SF	500 SF
Types 4, 5, 6, and white cedar and tamarack wetland	10,000 SF in all 85% counties 5,000 SF in counties 50-85% wetland 2,500 SF in counties 30-45% wetland 1,000 SF in counties 10-25% wetland	400 SF (1,000 SF)	400 SF (1,000 SF)
Types 1, 2, 3, 7	10,000 SF in all 85% counties 5,000 SF in counties 50-85% wetland 2,500 SF in counties 30-45% wetland 1,000 SF in counties 10-25% wetland	500 SF	500 SF
Types 4, 5, 6, and white cedar and tamarack wetland	10,000 SF in all 85% counties 5,000 SF in counties 50-85% wetland 2,500 SF in counties 30-45% wetland 1,000 SF in counties 10-25% wetland	400 SF	400 SF
All wetland types	20 SF (100 SF)	20 SF (100 SF)	20 SF (100 SF)

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>80% areas

(1) in a greater than 80 percent area:

- 10,000 square feet, except for type 3, 4, 5, or 8 wetland or white cedar and tamarack wetland, outside of the shoreland wetland protection zone;
- 400 square feet, except for type 3, 4, 5, or 8 wetland or white cedar and tamarack wetland, outside of the building setback zone, as defined in the local shoreland management ordinance, but within the shoreland wetland protection zone. This amount may be increased to 1,000 square feet by the local government unit if the wetland is isolated and determined to have no direct surficial connection to the public water;
- 100 square feet of type 3, 4, 5, or 8 wetland or white cedar and tamarack wetland, outside of the building setback zone, as defined in the local shoreland management ordinance; or
- 20 square feet of any wetland inside the building setback zone, as defined in the local shoreland management ordinance;

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Shoreland but isolated from public waters in >80%

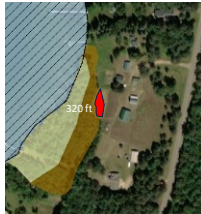
- "This amount may be increased to 1,000 square feet by the local government unit if the wetland is isolated and determined to have no direct surficial connection to the public water"
- Walk reach between wetland and public water
- Document surficial connection if present
- Produce TEP findings
- Consult shoreland management authority (often City, County, Township zoning)

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Scenario

A project is located within the building setback zone in a >80% area of the State and proposes to fill and impact 320 ft² of a type 2 wetland.

Does not Qualify



25

50-80% areas

- (2) in a 50 to 80 percent area:
 - (a) 5,000 square feet, except for type 3, 4, 5, or 8 wetland or white cedar and tamarack wetland, outside of the shoreland wetland protection zone and outside of the 11-county metropolitan area;
 - (b) 2,500 square feet, except for type 3, 4, 5, or 8 wetland or white cedar and tamarack wetland, outside of the shoreland wetland protection zone and inside the 11-county metropolitan area;
 - (c) 400 square feet, except for type 3, 4, 5, or 8 wetland or white cedar and tamarack wetland, outside of the building setback zone, as defined in the local shoreland management ordinance, but within the shoreland wetland protection zone;
 - (d) 100 square feet of type 3, 4, 5, or 8 wetland or white cedar and tamarack wetland outside of the building setback zone, as defined in the local shoreland management ordinance; or
 - (e) 20 square feet of any wetland inside the building setback zone, as defined in the local shoreland management ordinance; or

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Types 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100	5,000 SF	In metro 50-80% counties
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Scenario

A project is located outside of metro and outside of shoreland in a 50-80% area of the State and proposes to fill and impact 4,975 ft² of a type 2 wetland. The applicant owns the entire wetland basin.

Qualifies



27

>50% areas

- (3) in a less than 50 percent area:
 - (a) 2,000 square feet of type 1, 2, or 6 wetland outside of the shoreland wetland protection zone and outside of the 11-county metropolitan area;
 - (b) 1,000 square feet of type 1, 2, or 6 wetland outside of the shoreland wetland protection zone and inside the 11-county metropolitan area;
 - (c) 400 square feet of type 1, 2, or 6 wetland outside of the building setback zone, as defined in the local shoreland management ordinance, but within the shoreland wetland protection zone;
 - (d) 100 square feet of type 3, 4, 5, or 8 wetland outside of the building setback zone, as defined in the local shoreland management ordinance; or
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Types 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100	5,000 SF	In metro 50-80% counties
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Scenario

A project is located outside of shoreland in the less than 50% area of the State and proposes to fill and impact 175 ft² of a type 5 wetland. The applicant owns the entire wetland basin.

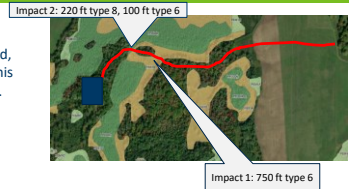
Does not Qualify



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Impacts to multiple wetlands

• If multiple wetlands are impacted, the smallest applicable de minimis amount is applied to the project.



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When wetland extends off property

- When a landowner does not own the entire wetland, the de minimis is the lesser of:
 - The base amount of de minimis
 - 5% of landowner's portion, down to a minimum of 400 square feet



31

Scenario

A project is located outside of shoreland in a greater 80% area of the State and proposes to fill and impact 5,800 ft² of a type 2 wetland. The applicant owns 120,000 ft² of the wetland basin.



Qualifies

5% of 120,000 equals 6000

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"Informal" de minimis "determinations"

On Wetland Determination Templates

- Applicant "may apply"
- LGU would like to document impact(s)
- Likely would be considered formal decision if challenged
 - Retain record as a decision
 - Include map showing impact location(s)
- NOD has same effect

Dear XX XXXX,
 Thank you for the opportunity to review your XXXXX Permit. The project proposes to build a XXXXX year primary XXX County Pond (X) PFD XXXXXXXXX.
 On June XX, 2017, I conducted a site visit to your property at/along XXXXXX. The purpose of the visit was to determine the overall extent of the impacts to wetland resources located by the proposed project.
 During this visit, I observed soils, hydrology and vegetation indicators that characterized type '1' wetlands along the small, undesignated stream. The wetland characteristics of your property, the information of the XXXXX will assist the drainage in the north of the existing driveway. The point shown for crossing will be made will impact a 100' wide strip of the described wetland. Crossing an 'X' with total base of the turn around loop which you proposed, the project as proposed will result in XXXX P² of wetland impacts.
 The Minnesota Wetland Conservation Act (MN Rule 8420.0200 Subg. 8) provides an exemption for certain amounts of impacts to certain types of wetlands. I have determined that your lot area provides a total of 10,000 P² of allowable wetland impacts, called the de minimis.
 MN Rule 8420.0210 states that the landowner "has rights" for an exemption determination. The benefit of applying for such a decision is that you will have an official finding of compliance regarding the de minimis determination. There is a formal decision to apply to a formal decision. If you file later, you will have an informal determination that your project qualifies for a wetland exemption determination.
 This determination is made on the following conditions:
 1) Wetland will not be disturbed from what has been proposed and located on the ground.
 2) All necessary County, State and Federal permits (i.e. XXXXX) are received prior to the work commencing.
 3) All conditions described on the XXXXX Permit will be followed.
 I will file this in the property folder located in the XXXXXXXXX Office and deduct XXXX P² from the property's 10,000 P² of available de minimis. The remaining de minimis for the property XXXXXXXXX is XXXX P². Please save this letter for your records. This decision is valid for 5 years from today's date.

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Tracking de minimis

Wetland	Location	PFD	Permissible	Designation	Subtotal	Complete	INCA	ETWetland	Decision	NOD	WetlandType	Area(Permitted)	SubTotals	Permitted/Minis	Min	Comments	
Wetland	North St	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100
Wetland	High Way	250	250	250	250	250	250	250	250	250	250	250	250	250	250	250	250
Wetland	Water Area	250	250	250	250	250	250	250	250	250	250	250	250	250	250	250	250
Wetland	Trailing Drive	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100
Wetland	North St	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100	100

Use data for WCA reporting

34



Questions?

35

Sequencing

OUR GOALS: LGU: Prepare you to confidently and effectively review and assess Sequencing

Applicant: Prepare you to confidently and effectively prepare a sequencing analysis to ensure project approval

Overview

- What is sequencing
- Sequencing in MN Rule 8420.0520
- Project examples/Discussion
- Questions

36

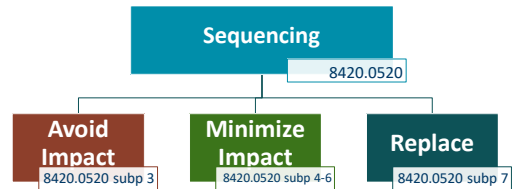
What is sequencing?

$$SeQ = A + M + r + \left(\frac{r}{t}\right) + R$$

Sequencing = Avoid + Minimize + rectify + reduce over time + replace

37

Sequencing



38

Why is Sequencing important?

- Because Statute says so....103G.222
- Ensures projects are compliant with regulations
- Ensures “avoidable” impacts are truly avoided
- Results in Least Environmentally Damaging Preferred Alternative (Federal)

39

When is Sequencing Required?

When a project proposes to impact a wetland and:

- No exemptions or no-loss provisions apply;
- The impact is regulated by WCA;
- A wetland replacement plan is required.

40

Some sequencing tidbits before we dive in:

- Arguably the most subjective part of WCA.
- Requires LGU, TEP, and applicant to *interpret* and *consider* a wide range of issues *beyond* their expertise (economics, safety, public need, cost/benefit, building design standards, parking requirements, road design standards, aesthetics, marketability, etc.).

41

Some sequencing tidbits before we dive in (continued):

- Is not entirely science-based.
- Involves assessing concepts such as “reasonable,” “feasible,” and “prudent.”
- Because the concepts behind avoidance and minimization are overlapping, the assessment of **avoidance should be clearly separated from minimization**.

42

Who is responsible for sequencing?

- *Applicant* must **demonstrate** that an activity impacting a wetland complies with sequencing requirements.
- *LGU* (with assistance from the TEP) **determines** whether or not sequencing has been demonstrated in compliance with Rule.

43

How does applicant *demonstrate* sequencing?

- Clearly define the **purpose and need** of the project.
- Identify the physical, economic, and/or demographic **requirements** of the project.
- **Justify** why this project should or must go on this site.
- Show (concept plans, discarded grading plans, etc.) and describe other *reasonable alternatives* that were considered or could be considered.

44

How does applicant *demonstrate* sequencing?

- Follow **8420.0520 Subp 3C** and include each section in application.
- This provides the vital information for assessing sequencing and ensures the applicant has considered each of the sequencing requirements.

TELL YOUR STORY

45

Preapplication meetings

- Encourage meetings with applicants BEFORE the first WCA submittal
- Remind applicants of Sequencing Requirement
- Suggest starting project with **avoidance**
- Discuss local zoning, PUD, platting, etc. These are not, independently, justification for wetland impacts.

46

Sequencing - Key Concepts

- LGU **MUST NOT** approve a wetland replacement plan unless the LGU finds the project complies with Sequencing.
- Sequencing is a **MUST** for all replacement plans
- **TWO** avoidance alternatives – only one can be “no build”
- Evaluate projects...can wetlands be avoided?
- Are impacts minimized?
- Long term effects considered?

47

Sequencing

In **descending order**, applicants must:

- A. Avoid** direct or indirect impacts (8420.0520 Subp 3);
- B. Minimize** impacts (8420.0520 Subp 4);
- C. Rectify** impacts (8420.0520 Subp 5);
- D. Reduce or eliminate** impacts that can occur over time (consider drainage area, erosion, etc.) (8420.0520 Subp 6);
- E. Replace** unavoidable impacts (i.e. replacement or mitigation) (8420.0520 Subp 7).

48

Avoidance

- Avoidance is **REQUIRED** under *Special Considerations* (8420.0515)
 - T&E Species
 - Rare natural communities
 - Special fish and wildlife resources
 - Cultural Resources
 - Groundwater sensitivity
- Coordinate with DNR

When triggered, a replacement plan “MUST be denied by LGU”

49

Avoidance

- **Wetland dependence determination** (8420.0520 subp. 3B)
 - If yes, then exempt from alternative analysis
 - Example – cranberry bog
 - Not common

50

Alternatives Analysis

- The most important and critical part of a Replacement Plan Application
- Reference **8420.0520, Subp C**
- **Every** replacement plan application.
- **Two** avoidance alternatives are required (unless infrastructure that repairs/rehabilitates).

51

Alternatives Analysis

- LGU must determine if feasible and prudent alternatives are available that avoid wetland impact

52

Alternatives Analysis

What is *feasible and prudent*?

WCA rule tells us (8420.0520 subp 3C(2)):

- Can be done from an engineering perspective
- Is in accordance with accepted engineering standards and practices
- Is consistent with public health, safety, and welfare requirements
- Is environmentally preferable based on social, economic, and environmental impacts
- Would not create any truly unusual problems

53

Evaluating Alternatives

- **LGU must consider** (8420.0520 subp 3C(3)):
- Are there other sites in the area that could accomplish the same project purpose (even if not owned by the applicant)?
- If alternate sites were considered by the applicant, were they at least “generally suitable” for the project?
- Is the preferred project site suitable for the purpose of the project?

54

Evaluating Alternatives (continued)

- LGU **must** consider (8420.0520 subp 3C(3)):
 - Could the size, configuration, or density of the project be modified to avoid wetlands?
 - Has the applicant made efforts to remove constraints (zoning restrictions, ordinance requirements, etc.) that are causing wetland impacts (i.e. request for variances, PUD, conditional use permit, etc.)?

55

What if an avoidance alternative DOES exist?

- If the **LGU determines** that a feasible and prudent alternative exist that avoids wetland impacts, it **MUST DENY** the replacement plan.

56

What if an avoidance alternative DOES NOT exist?

- If no feasible and prudent alternative is available that avoids wetland, then:
 - Avoid direct or indirect impacts (8420.0520 Subp 3);
 - Minimize** impacts (8420.0520 Subp 4);
 - Rectify impacts (8420.0520 Subp 5);
 - Reduce or eliminate** impacts that can occur over time (consider drainage area, erosion, etc.) (8420.0520 Subp 6);
 - Replace unavoidable impacts (i.e. replacement or mitigation) (8420.0520 Subp 7).

57

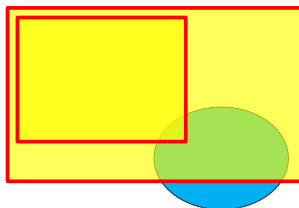
Impact Minimization (8420.0520 subp 4)

- The **applicant shall** demonstrate minimization of impacts.
- The **LGU** determines if minimization is sufficient.
- The LGU **must** consider minimization efforts including.....

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Impact Minimization (8420.0520 subp 4)

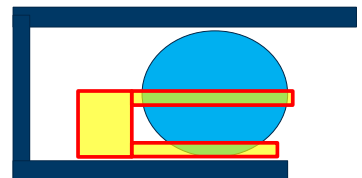
- A. Spatial Requirements of the project



59

Impact Minimization (8420.0520 subp 4)

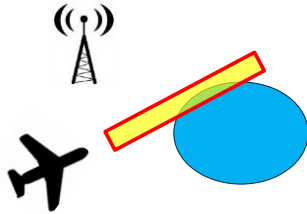
- B. Location of existing features that dictate placement of project



60

Impact Minimization (8420.0520 subp 4)

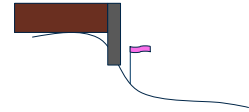
C. Purpose of the project and how that relates to placement, configuration, density



61

Impact Minimization (8420.0520 subp 4)

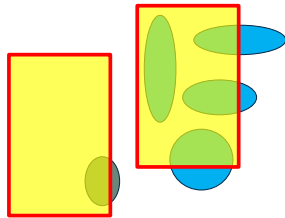
D. Sensitivity of the site design to natural features including topography, hydrology and existing vegetation



62

Impact Minimization (8420.0520 subp 4)

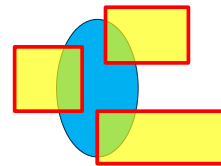
E. The value, function and spatial distribution of the wetlands on the site



63

Impact Minimization (8420.0520 subp 4)

F. Individual and cumulative impacts



64

Impact Minimization (8420.0520 subp 4)

- G. LGU must evaluate **applicant's effort** to:
- Modify the size, scope, configuration or density
 - Remove or accommodate site constraints including **zoning**, infrastructure, access or natural features
 - Confine impacts to the fringe or periphery of the wetland
 - Otherwise minimize impacts

65

Impact Rectification (8420.0520 subp 5)

- **Temporary impacts** must be rectified by repairing, rehabilitating, or restoring the affected wetland according to the no-loss provisions of 8420.0415, subp H.
- Best management practices that protect wetland function



66

Reduction/Elimination of Impacts Over Time (8420.0520 subp 6)

- After completion, further impacts must be reduced or eliminated
- LGU *must* require applicants to implement long term best management practices that protect wetland function
- Consider:
 - Erosion and sediment control practices
 - Pre/Post project wetland hydrologic watershed
 - Post project stormwater inputs and possible sedimentation
 - Adjoining property land use (e.g. backyard encroachment)



67

Replacement

- If no feasible and prudent alternative is available that avoids wetlands, AND;
- Efforts to minimize, rectify, and reduce have been demonstrated, THEN;
 - A. Avoid direct or indirect impacts (8420.0520 Subp 3);
 - B. Minimize impacts (8420.0520 Subp 4);
 - C. Rectify impacts (8420.0520 Subp 5);
 - D. Reduce or eliminate impacts that can occur over time (consider drainage area, erosion, etc.) (8420.0520 Subp 6);
 - E. Replace unavoidable impacts (i.e. replacement or mitigation) (8420.0520 Subp 7).

68

Sequencing Flexibility (8420.0520 subp 7a)

- Allowed at the *discretion of the LGU*.
- Must be requested by applicant
- Subject to conditions of **8420.0520 Subp 7a(B)**
 - Alternatives *must* still be considered by the applicant and evaluated by the LGU
 - Functional assessment provided by applicant
- LGU must document application of sequencing flexibility in the replacement plan approval

69

Wetlands on Cultivated Fields** (8420.0520 subp 8)

- For wetlands in cultivated fields, sequencing is not required.
- Conditions:
 - Replacement must be through restoration
 - Impacted wetland **must not** be converted to nonagricultural use for 10 years.
 - LGU may require a deed restriction prohibiting nonagricultural use.

**see Rule 8420.0111 subp 73. Definition of "wetlands in a cultivated field"

70

Project Examples

Please ask questions

Please provide input and comments

.....as time allows.

71

The other "no build" alternative

Remember...

- **TWO** avoidance alternatives – only one can be "no build"

No build alternative

The no build alternative is not considered to be a viable option because benefits such as increased livestock grazing area and agricultural equipment transportation convenience would go unrealized if the project were not to proceed. The location of the project connecting primary livestock grazing areas makes this an ideal location for the roadway.

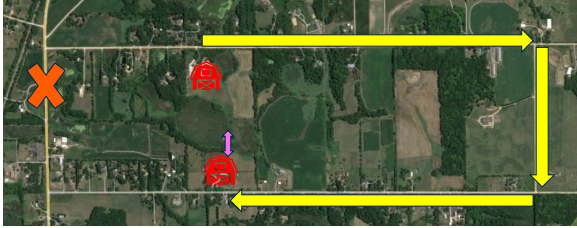
No impact alternative

The no impact alternative with no road connection is not considered to be a viable option because the project needs a roadway connection between the large upland areas for efficient farm use.

72

The other "no build" alternative

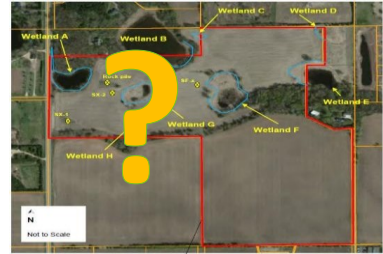
- 2nd avoidance alternatives – go around...



73

Avoidance

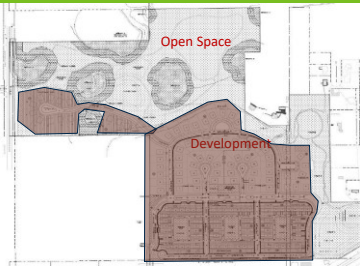
- 101 acres
- 140+ lots



74

Avoidance

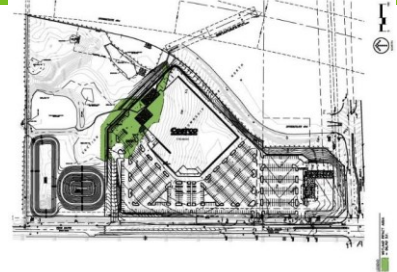
- 101 acres
- 140+ lots
- 60 acres of open space



75

Costco

- Proposed plan
- Impact Area = 86,190 sq ft
- Narrative states "avoidance is not possible"
- Avoidance alternative was NOT provided



76

Costco

Applicant is reminded that 2 avoidance alternatives are required

Alternative plan shows avoidance, however not feasible



77

Costco

- Avoidance was not feasible
 - Wetlands will be impacted
- Next Step – evaluate minimization

78

Costco

Revised application

PERMANENT WETLAND IMPACT AREA = 70,882 S.F.

TEMPORARY WETLAND IMPACT AREA = 15,976 S.F.

Total impacts = 86,858

668 sq ft more than before!

Does not meet sequencing!

79

Costco

Submittal #3

Changed the configuration of the Project (8420.0520 Subp 48)

80

Costco

Submittal #3

PERMANENT WETLAND IMPACT AREA = 49,002 S.F.

TEMPORARY WETLAND IMPACT AREA = 22,743 S.F.

81

Costco

Submittal #3

Retaining walls for additional minimization

PERMANENT WETLAND IMPACT AREA = 49,002 S.F.

TEMPORARY WETLAND IMPACT AREA = 22,743 S.F.

82

Reduction/Elimination of Impacts Over Time (8420.0520 subp 6)

Wetland Drainage Areas		
Wetland	Ex. Area (ac)	Prop. Area (ac)
1W	15,801	2,948
2W	45,193	28,064
3W	60,509	48,283
4W	18,608	17,366
5W	11,022	15,192
6W	6,263	9,599
7W	3,248	1,627
8W	4,265	3,448
9Wa	18,988	37,955
9Wb	31,592	47,916

83

Wetland Property

- Property is all wetland, therefore avoidance is not feasible for the new lake house.
- Avoidance alternative is to purchase another lot that has upland available to build on, but too expensive.
- Therefore, no other feasible and prudent alternatives exist

Is Sequencing met?
...NO

84

Questions?

85



Special Considerations



mn BOARD OF WATER AND SOIL RESOURCES

86

What are WCA Special Considerations?

Scope: Factors that must be considered when preparing/reviewing a replacement plan.

- WCA 8420.0515 (Subp. 2-10)
- Applies to impact/replacement
- Does not apply to exemptions/no loss
- Responsibility lies with Applicant and LGU

"must be considered" & "in the review of"



87

Special Considerations (8420.0515)

- Subp. 2 Endangered and threatened species
- Subp. 3 Rare natural communities
- Subp. 4 Special fish and wildlife resources
- Subp.5 Archaeological, historic, or cultural
- Subp. 6 Groundwater sensitivity
- Subp. 7 Sensitive surface waters
- Subp. 8 Education or research use
- Subp. 9 Waste disposal site
- Subp. 10 Consistency with other plans



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Special Considerations (8420.0515)-Basics

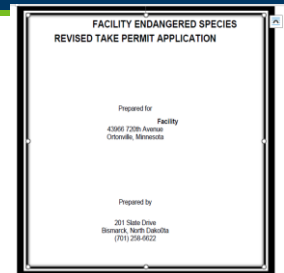
- Can result in denial
- Each Subp. has unique requirements
 - 'Permanent or significant adverse effects'
 - 'Taking of ETS'
 - 'Not maintained or adequately replaced'



89

Subp. 2 - Endangered/Threatened Species (ETS)

- Takings = No WCA approval
- DNR determines if takings has/will occur
- Can allow with DNR takings permit
 - Discretionary
 - Must be unavoidable
 - Compensatory mitigation often required



90

Subp. 2 - Endangered/Threatened Species (ETS)

STEP 1 – Evaluate Existence

- DNR natural heritage review
 - NHIS or Explore Report
 - License agreement
- Listed species under MR 6134.0200-.0400 or website
- Prior EAW?
- DNR staff (Hydro, Eco Services, TEP member)

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Subp. 2 - Endangered/Threatened Species (ETS)

STEP 1 – Evaluate Existence

- DNR NHR - Conservation Planning Report
- <https://mce.dnr.state.mn.us/>
- User defined area
- Free review and report
 - "Flags" items for more review
 - Fast
 - More maybe needed

92

ETS – Conservation Planning Report

Generate Report



93

ETS – Natural Heritage Report

- Set up account and Submits for full review
- Include non-public data
- Fee and full report
 - Flags ETS 1 mile
 - "Hit" moves to DNR Staff Review
 - No comment OR "Needs Further Review"
 - Botanical/species survey?

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ETS – Natural Heritage Report

CAUTION



BLANDING'S TURTLES MAY BE ENCOUNTERED IN THE AREA

Subp. 2 - Endangered/Threatened Species (ETS)

LGU Administration

- Request Additional information
 - Incomplete?
- Review & approve
- Wait for additional information
 - 15.99?
- ** Conditional Approval after ID



95

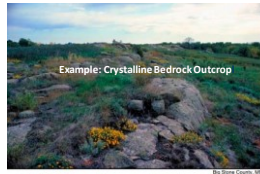
96

Subp. 3 - Rare Natural Communities (RNC)

Modification resulting in Permanent Adverse affects = No WCA approval

DNR Determines if RNC exists

LGU determines adverse affects



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Subp. 3 - Rare Natural Communities (RNC)

STEP 1: Evaluate Existence

- Assisted by applicant/consultant/LGU
- Requires discussion with DNR staff
- May require site visit, additional data, project information.

*Guidance found here
https://bwsr.state.mn.us/sites/default/files/2019-01/Wetland_WCA_Rare_Nat_Comm_Tech_Guidance.pdf



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Subp. 3 - Rare Natural Communities (RNC)

DNR Considerations

- Native Plant Communities/Natural Heritage Database
- Conservation Status
 - Greater Consideration for Vulnerable, Imperiled, Critically Imperiled

The following DNR Native Plant Communities are within the search area:

RNC Site Name	NPC Code	Native Plant Community Classification	Conservation Status Rank	Number of Communities
DNR Wetland	WET_C1	Wetland (Forest/Forest/Conifer)	S1, S4, S5	1
DNR Wetland	WET_C2	Wetland (Forest/Forest/Conifer)	S1, S4, S5	1
DNR Wetland	WET_C3	Wetland (Forest/Forest/Conifer)	S1, S4, S5	1
DNR Wetland	WET_C4	Wetland (Forest/Forest/Conifer)	S1, S4, S5	1
DNR Wetland	WET_C5	Wetland (Forest/Forest/Conifer)	S1, S4, S5	1
DNR Wetland	WET_C6	Wetland (Forest/Forest/Conifer)	S1, S4, S5	1
DNR Wetland	WET_C7	Wetland (Forest/Forest/Conifer)	S1, S4, S5	1
DNR Wetland	WET_C8	Wetland (Forest/Forest/Conifer)	S1, S4, S5	1
DNR Wetland	WET_C9	Wetland (Forest/Forest/Conifer)	S1, S4, S5	1
DNR Wetland	WET_C10	Wetland (Forest/Forest/Conifer)	S1, S4, S5	1

Conservation Status Ranks for Native Plant Community Types and Subtypes
 The native plant community (NPC) types and subtypes recognized in Minnesota have been assigned conservation status ranks (S-Ranks) that reflect the risk of elimination of the community from Minnesota. There are five ranks:

- S1 = critically imperiled
- S2 = imperiled
- S3 = vulnerable to extirpation
- S4 = apparently secure, uncommon but not rare
- S5 = secure, common, widespread, and abundant

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Subp. 3 - Rare Natural Communities (RNC)

DNR Considerations

- Condition Rank of Native Plant Communities
 - presence or abundance locally, regionally, statewide?
- Landscape Context
 - Outstanding, High, Moderate, Below
- Biodiversity Significance rank
 - Outstanding, High, Moderate, Below

EWB DIVISION DIRECTOR ROUTING SLIP - DECISION REQUEST

Subject: Rare Natural Community (RNC) Designation Decision

Region: Region 1 - NW Region 2 - NE Region 3 - Central Region 4 - South

Project/Title Name: Rock Outcrops (Mine Site)

Regional Staff Recommendation:

Name: [Redacted] Position: Regional Ecologist

Date: 2/26/2020 Phone #: 507-255-1256 Email: [Redacted]

Summary of Findings and Recommendations:

The rock outcrops within the rock outcrop communities on the site qualify as a rare natural community (RNC) under Minnesota Wetland Conservation Act (WCA) rules, Chapter 60A.01, Subp. 3 based on the site meeting the 5 criteria:

- News status of plant community- they have previously been determined by the DNR to be intact, viable, and of relatively high quality. It is one of the few remaining places that the state endorses. Biodiversity remains.
- Conservation Status Rank: Imperiled (S2)
- Condition of the site: ranges from fair to excellent and good (AG) to good (B)
- Landscape context: site contains some of the largest bedrock outcrops in the Ottertail area and these outcrops support the state of typical outcrop plant species
- Site of Biodiversity Significance: High to Moderate

Recommendation: Designate the equivalent of post-wetland as "rare natural community" for the purposes of the wetland conservation act.

100

Subp. 3 - Rare Natural Community (RNC)

STEP 2: Will it be permanently adversely impacted?

LGU determination

- Consider indirect/direct impacts
- Permanence (on-going? Future?)
- Scope of impact
- Options for project modification
- Mitigation measures (setbacks/buffers) & Sufficient Replacment
- DNR input/options



101

Subp. 4 Special fish and wildlife resources

- Significant adverse effect on special/locally significant F & W
- Potential Resources
 - fish passage/spawning areas,
 - water birds,
 - waterfowl,
 - deer wintering/wildlife corridor
- Could include others



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Subp. 4 Special fish and wildlife resources

- Must determine if a resources exists nearby/within impact site
 - Local resource managers
 - Public data sets
 - May not meet Criteria as RNC but could be noted & locally significant?
- Must determine resource affects
- Consider F(x) replacement options



103

Subp 5 - Archaeological, historic, or cultural resources

- Modification of known AHC
 - Includes sites on or eligible for National Registration
 - LGU must determine if significant adverse effect on the AHC value
 - "in consultation with State Historical Preservation Office" (SHPO)



104

Subp. 5 - Archaeological, historic, or cultural resources

- Submit to SHPO
 - <https://mn.gov/admin/shpo/environmental-review/review/>
 - Applicant or LGU
 - 30 days?
- 106 review with Corps, or
- Online Portal (arch/cultural)
 - [Home Page - OSAsites \(mn.gov\)](#)
- Qualified individual=full access

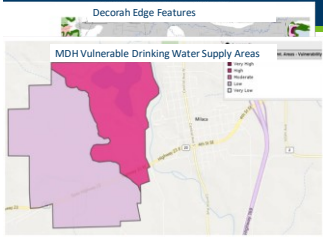
105

Subp. 5 - Archaeological, historic, or cultural resources

- Results**
- No property or suspected resource letter
 - Request more information/site survey
 - Phase I/Other data submittal
- LGU**
- Review & move to NOD
 - Wait for additional information
 - 15.99?
 - Conditional Approval NOT a good option

106

Subp. 6 - Groundwater sensitivity



- Examples may include Decorah edge or Vulnerable well areas
- [Source Well Protection Mapping](#)
 - Groundwater layers
- <https://mnatlas.org/gis-tool/Where-to-find-information>
 - Numerous layers.....

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Subp. 6 - Groundwater sensitivity



- Significant adverse effects on groundwater quality = no WCA approval
- LGU determination
 - Expand TEP to include others staff resources
 - [Groundwater Resources, data and studies \(DNR\)](#)
 - [Criteria and Guidelines for Assessing Geo Sensitivity...](#)

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Subp. 7 - Sensitive surface waters

Resources Include

- Designated Trout streams
- Outstanding Resource Value Waters
 - Lakes, Rivers and Fens
 - MN Rule 7050.0180 .0335



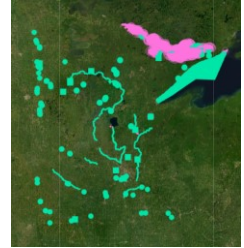
109

Subp. 7 - Sensitive surface waters

Resource Location

- List at Revisor website – [here](#)
- Mapping at <https://mpca.maps.arcgis.com/apps/webappviewer/index.html?id=8358fe79d8e14403a28fe3451aa7f48b>

OR [MnGeo Search](#)



110

Subp. 7 - Sensitive surface waters

- Activity cannot have a significant adverse effect on the water quality

- Coordination with PCA
- Coordination with DNR



111

Subp. 8. - Education or research use

- Are the wetlands impacted known for educational or research purpose?

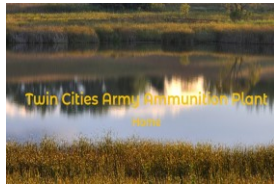
- If so, will these uses be maintained?
- Can the uses be adequately replaced?
- If not, must be denied



112

Subp. 9 Waste disposal site

- LGU must evaluate type/amount of waste material at site.
 - (former dump, superfund site, TCAAP/AHATS)
- If the activity involves hazardous waste or contaminants, must comply with federal/state standards
 - Does activity include excavation/grading in areas?
- Work must be conducted according to State and Federal standards
 - Seek assistance with Solid waste authority and/or MPCA



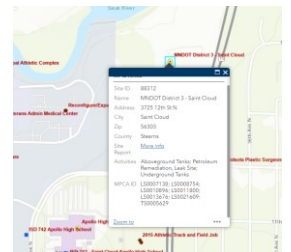
113

Subp. 9 Waste disposal site

MPCA Resources

<https://www.pca.state.mn.us/air-water-land-climate/cleanup-and-redevelopment>

- Previously contaminated and those being investigated for contamination
 - Contaminated/Hazardous waste sites
 - Groundwater contamination sites
 - Petroleum leak sites



114

Minnesota Wetland Conservation Act Restoration Order

Pursuant to Minn. Stat. § 103G.2372 and MN Rule part 8420.0900, this order is being issued by the Minnesota Department of Natural Resources to restore wetland that was impacted in violation of the Minnesota Wetland Conservation Act. **Violation of this order is a misdemeanor.**

Reference Number: _____

This order is issued to:

Name: _____

Address: _____

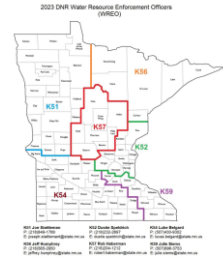
WCA Restoration Orders



121

Enforcement Guidance & Contacts

- [Violations and Restoration/Replacement Orders Topic of the Week](#)
- [Enforcement Procedures online module](#)
- Water Resource Enforcement Officers contact found on [BWSR WCA Contacts page](#)



122

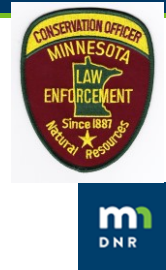
Enforcement Procedure Overview



123

DNR Enforcement Role

- Landowner contact if Cease and Desist Orders issued
- Write Summary of information on violation
- Gather Evidence of the violation including contractor's info
- Issue Restoration and Replacement Order
- Grant Extensions
- Initiate enforcement action
- Follow and track all violation cases
- Issue RPN for after the fact cases. (not in progress)



124

Enforcement Procedures (8420.0900)

Subpart 1. **Enforcement authorities.** The commissioner, conservation officers, and other peace officers may issue cease and desist orders and restoration and replacement orders.

Subp. 2. **Cease and desist orders.**

A. Cease and desist orders may be issued when the enforcement authority *has probable cause that an activity is being or will again be conducted that impacts a wetland, does not qualify for no-loss or an exemption, and is being or will again be conducted without prior approval of a replacement plan by a local government unit*



125

Enforcement Documents

Resource Protection Notice

Cease & Desist Order

ANY VIOLATION OF THIS ORDER IS A MISDEMEANOR

126

Cease & Desist Orders (8420.0900 Subp. 2.)

- B. A cease and desist order must not be issued if the landowner:
- (1) has, and is complying with, a valid approval from the local government unit or
 - (2) has sufficient evidence to support qualification for an exemption or no-loss.

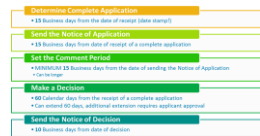
C. The enforcement authority must advise the landowner that the landowner's written application should be made immediately to the local government unit

The enforcement authority issuing a cease and desist order must promptly submit copies to the soil and water conservation district, local government unit, and Department of Natural Resources.

127

Cease & Desist Orders (8420.0900 Subp. 2.)

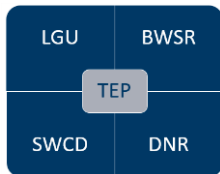
- D. If an application is triggered by a cease and desist order, the local government unit must make the decision according to WCA standards.
- E. If the decision is that the activity is exempt or qualifies as a no-loss, the local government unit must request that the enforcement authority rescind the cease and desist order.
- F. If the application is denied, the local government unit must immediately notify the soil and water conservation district, the enforcement authority, and the landowner.



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SWCD Role in a violation

- Landowner contact for CDO or RPN
- Site visit- gather information/evidence
- Prepare Restoration/Replacement Order
- Monitor restoration/ replacement site.
- Certificate of Satisfactory Completion
- Track the cases.



129

Restoration and Replacement Orders

- Subp. 3. **Restoration and replacement orders.**
- A. The enforcement authority must issue a restoration order or replacement order when:
- (1) the impact has already been completed when discovered or, after a cease and desist order has been issued, the landowner does not apply for a replacement plan, exemption, or no-loss within three weeks;
 - (2) the local government unit approves the application but it is reversed on appeal; or
 - (3) the local government unit denies the application.

130

8420.0900 Subp. 3. Restoration and Replacement orders.

B. Promptly upon being informed by the enforcement authority or the local government unit of the need, a soil and water conservation district staff person **must** inspect the site and prepare a plan in consultation with the local government unit and the enforcement authority for restoring the site to its pre-altered condition.

[Violations and Restoration/Replacement Orders Topic of the Week](#)

131

Data Collection

Where – Property location (critical), jurisdiction, but also landscape position, slope, etc.

When – estimated time of activity occurrence
 Helpful in determining responsible party if ownership change has occurred
 Aerial photos/PID information
 Did the activity work?



132

Data Collection

Who – landowner and/or responsible party, contractor

- RO will go to all

What – type of disturbance or activity that occurred

- Fill, drainage, excavation resulting in fill
- Need to know when determining impact

Why – purpose of action? Were goals achieved? (i.e. some drainage is not effective...)



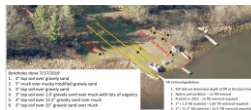
133

Use offsite resources



134

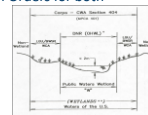
Soil borings for determining fill



135

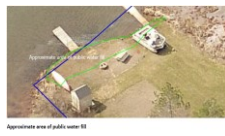
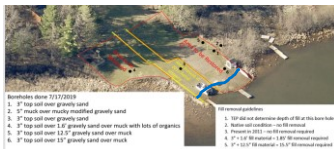
Public Waters & WCA Violations

- DNR present during initial site visit to make jurisdiction determination
- Define WCA and Public Waters Impacts
- Work with Area Hydrologist to issue Restoration Orders for both programs



136

Data Collection



137

Data Collection

- Maps
- Illustrations
- TEP Findings and Recommendation
- Discussions with landowner/responsible party
- Survey information
- You may only have one opportunity to be on site

138

The RO

Restoration Order Gives the Landowner Options

- Restore
- Apply for replacement, exemption, no-loss
- Appeal- w/in 30 days + \$500 fee
- Court/Deed Restriction if no action is taken by landowner



After-the-fact replacement ratio must be twice the ratio otherwise required

139

Contents of the Order

8420.0900 Subpart 4

Subp. 4. Contents of order.

- A. A restoration order must specify dates by which the landowner or responsible party must:
- (1) restore the wetland according to the soil and water conservation district plan and obtain a certificate of satisfactory restoration from the soil and water conservation district; or
 - (2) submit a complete replacement plan, exemption, or no-loss application to the local government unit.
- B. If an application submitted is denied, the landowner or responsible party must restore the wetland as specified in the order.
- C. The restoration order must be rescinded if the landowner or responsible party obtains approval of an after-the-fact replacement plan, exemption, or no-loss from the local government unit that is not reversed on appeal.

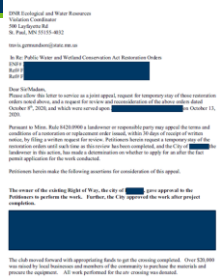
Contents of the Order



140

Contents of the Order

- D. ...The restoration or replacement order must specify a time period of at least 30 days for submittal of a complete application under this subpart.
- E. If a complete application is not submitted within the time period specified in the restoration order, or as properly extended, the landowner or responsible party must restore the wetland as specified in the order (2), unless the local government unit and the enforcement authority agree otherwise or unless allowed under appeal.



141

Tips for writing a good Restoration Order

- Findings can and should be technical
- Stick to the findings but use plain language in actual Order
- Be specific in what, where, how much
- Include maps with labels for non-wetland professionals
- Include clear timelines
- Include conditions and BMPs
- What to do if plans change



142

The RO

- Send RO to the Officer OR WREO ASAP Enforcement will serve the order (must be served in person or certified mail)
 - We recommend to officers to use only certified mail
 - Easy for everyone to track time line
- **MAKE SURE YOU SIGN YOUR COPY BEFORE SENDING IT TO CO OR WREO.**
- Extensions are issued **only** by enforcement and if:
 - The landowner has a good reason for not getting it done
 - Has made some progress
 - Maybe weather related (heavy rains, early freeze)
 - Submitted application
 - Filed an Appeal

143

After-the-fact Replacement

Subp. 6. **After-the-fact replacement.** If a landowner or responsible party seeks approval of a replacement plan after the proposed project has already impacted the wetland or if an approved replacement plan has not been implemented in advance of or concurrent with the impact, the **local government unit must require the landowner or responsible party to replace the impacted wetland at a ratio twice the replacement ratio otherwise required**, unless the local government unit and enforcement authority concur that a lesser ratio is acceptable.

Location of Impact	Replacement	Minimum replacement ratio
≥80% area or agricultural land	Outside bank service area	1.5:1
	Within bank service area	1:1
≥10% area, 50-80% area, and nonagricultural land	Outside bank service area	1.5:1
	Within bank service area	2:1

X 2
ATF

144

Voluntary Restoration

WASHINGTON CONSERVATION DISTRICT

Map showing restoration site with various colored zones and a legend.

151

Certificate of Successful Restoration

MINNESOTA Wetland Conservation Act
Deformation Notice Form

Form with various fields for project information and restoration details.

152

RO Non-Compliance

The landowner does not comply with the RO. Now what?

- Enforcement authority will take lead in the following steps:
 - CO Sends a Letter
 - CO Makes a Phone call
 - Deed restriction (in some cases)
 - Landowner Served a Criminal Citation
 - Court

If case goes to court:

- You may be asked to testify
- Work with County Attorney
- Stick to the findings
- Have good timeline of events
- Compile all documents (including communications)

153

Communication is key

Diagram showing a central circle labeled 'SWCD' surrounded by four other circles: 'LGU', 'Landowner', 'BWSR', and 'DNR'.

Flowchart showing the process from 'Activity identified' to 'SWCD Compliance'.

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BOARD OF WATER AND SOIL RESOURCES

Questions?

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General Overview

Appeals MN Rule Chapter 8420.0905

Travis Germundson
Appeals and Regulatory Compliance Coordinator

BOARD OF WATER AND SOIL RESOURCES

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Restoration/Replacement Orders vs LGU Decisions

- Restoration/Replacement Orders



- LGU Decisions

157

Full and Fair Opportunity to be Heard

- An agency/LGU commencing an enforcement action



- Person seeking an approval of an application/permit

158

What Actions/Decisions can be Appeal

- Restoration/Replacement Orders
- Exemption Decisions
- No-loss Decisions
- Wetland Boundary/Type Determinations
- Replacement Plan Decisions
- Sequencing Decisions
- Wetland Banking Decisions
- Public Road Project (minimization, delineation, and on-site replacement)
- Monitoring of Bank Sites (restrictions, credit deposits, withdrawals, etc.)



159

Appeals of Restoration/Replacement Orders

- The written request to appeal (petition) must be received within 30 days of receipt of the order
- Timeframe can be extended (mutual agreement)
- Landowner or Responsible Party has standing to appeal
- Supporting Evidence/Filing Fee (\$500 nonrefundable)
- Decision Executive Director –within 60 days (no hearing)



160

Appeals of LGU Decisions

- A petition must be sent to BWSR within 30 days after the date the decision was sent to those required to receive notice, unless mutually extended
- Petitioner must pay a \$500 nonrefundable filing fee
- Petitioner may be a landowner, anyone required to receive notice, or 100 residents of the county
- BWSR will send copy of the petition to the LGU
- Within 30 days the Executive Director (or Board or Dispute Resolution Committee) must make a decision.

161

Appeals of LGU Decisions Cont.



- Before coming to BWSR all local administrative appeal options must be exhausted
- TEP recommendation not necessary for all decisions, but necessary for appeals
- Written findings should be developed to support the decision and address any disagreement with TEP findings/recommendation
- Decision is based on the record

162

BWSR Petition Process LGU Decision (if appeal is accepted)

- Request a copy of the LGU Record on the decision- 30 days to comply
- Schedule a Pre-Hearing Conference
- Filing of Written Briefs (written legal arguments)
- Hearing before the Dispute Resolution Committee (oral arguments)
- Attorney General Office Support
- BWSR Board Decision

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Dispute Resolution Committee

- Statutory Authority (§103B.0101, Subd. 10)
- Membership/Powers and Authorities
- Hear and Resolve -disputes, appeals, interventions
- Make recommendations (just like TEP)
- Decisions made by full BWSR Board



164

How do you prepare for an Appeal

- Assume all decisions will be appeal
- Compile detailed findings-all relevant facts should be clearly explained and supported by evidence (timeline)
- Clear communication/correspondence
- Preparedness



165

Petition for Appeal denied if:

- Deemed without significant merit
- Trivial
- Brought solely for the purpose of delay
- Filed beyond the 30-day appeal window
- Failure to pay the required filing fee



166

Petition for appeal remanded if:

- Local administrative remedies not exhausted
- Expanded technical review needed
- LGU record not adequate (develop record)



167

Petition for appeal placed in abeyance if:

- If the appellant submitted an after-the-fact application
- Has retained a wetland consultant to refute the findings
- TEP has not been on site, etc. (technical questions/concerns)
- BWSR has this general authority (to put a hold on the process) until the appeal is resolved (request for submittal of additional documentation in support of the appeal)



168

Decision- Affirm LGU decision if:

- LGU findings of fact are not clearly erroneous
- LGU correctly applied the law to the facts
- LGU made no procedural errors prejudicial to a party



169

Court of Appeals

- WCA Appeal decisions made by BWSR may be appealed to MN Court of Appeals
- Court of Appeals currently taking over a year for a decision on appeals

The Court will not affirm if decision

- 1) violates constitution
- 2) exceeds statutory authority of agency
- 3) is made upon unlawful procedure
- 4) is affected by other error of law
- 5) is unsupported by substantial evidence
- 6) is arbitrary or capricious (represents agency's will, not judgment)



170

Incidental Wetlands - Definition

8420.0100 Scope Subp. 2 Applicability D.

WCA does not regulate impacts to incidental wetlands. They "are wetland areas that the landowner can demonstrate, to the satisfaction of the LGU, were created in nonwetland areas solely by actions, the purpose of which was not to create wetland."

171

Incidental Wetlands - Definition

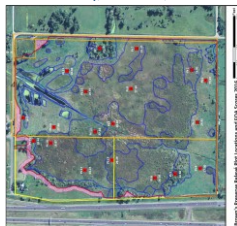
"Incidental wetlands include: effluent, stormwater, drainage, SWCD practices"



172

Incidental Wetlands - Definition

- "...and not as part of a wetland replacement process that may, over time, take on wetland characteristics."



173

Role in determination

"...to the satisfaction of the LGU"

2. LOCAL GOVERNMENT UNIT DECISION

Date of Decision: 06/04/2018

Approved Approved with conditions (include below) Denied

LGU Findings and Conclusions (attach additional sheets as necessary):

The applicant claims that delineated Wetland 3 grew between 1998 and 2014 caused by filling and grading activities that occurred near the property. This determination was based on current site conditions, historic aerial photos, adjacent filling and grading plans, and the RCWD original approval for the fill of the wetland in 1998. The approximate size of the wetland was 9,583 square feet in 1998 and was delineated at approximately 20,089 square feet in 2014. The LGU finds that the 11,456 square feet of Wetland 3 qualifies as incidental wetland per WCA 8420.0105 Subpart 2.D.

- LGU role in determination
 - TEP review
 - Findings
 - Make decision
- Applicant role in determination: provide exhibits, do research

174

Documentation constructed in upland

- “to the satisfaction of
- NWI, Soils, Historic aer

175

Use of aerials



176

Construction plans

- Previous plans

177

Stormwater Ponds and WCA

- [WCA Topic of Week - Stormwater Ponds and Wetlands 3-1-2021.pdf \(state.mn.us\)](#)
- Are they wetlands?
- Are they regulated under WCA?
- How do you determine?
- Maintenance

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How are they regulated?

Key Concepts

- Constructed or created in (historic/existing) wetland
- Constructed in upland
 - Use soil surveys, aerial photos, topography

179

How do you determine if they can be maintained?

MN Rule 8420.0415 No Loss E. excavation limited to removal of deposited sediment in wetlands that are currently utilized as storm water management basins...

The LGU finds the proposed excavation within Wetland 3 not under the scope of the Minnesota Wetland Conservation Act per 8420.0105 subp. 1. The LGU also finds the proposed sediment removal within Wetland 1 to meet no-loss under 8420.0415 parts A and E, whereas, the portion of the proposed work outside of the historic wetland boundary meets no-loss under 8420.0415 part A and the proposed work within the historic wetland boundary meets 8420.0415 part E. The no-loss finding is conditional on the following:

- Appropriate erosion control measures are taken to prevent sedimentation of the wetland or of any

180

How to map ditches

- Delineate if meets 3 parameters
- If not wetland, identify as OAR
Refer to TOTW



181

Ditches

WCA Wetland Determinations for Channels, Streams, Ditches 12-14-22

MN BOARD OF WATER AND SOIL RESOURCES

Wetland Conservation Act (WCA) Topic of the Week

WCA Wetland Determinations for Channels, Ditches, Streams

December 16, 2022

WCA is a part of the wetland conservation act that allows for certain agricultural and other activities to be exempt from the WCA. However, there are certain conditions that must be met for an activity to be exempt. The following are the conditions that must be met for an activity to be exempt from the WCA:

1. The Channel is a Public Watercourse in the State's Public Water System?
 - If Yes, the Channel is not subject to WCA. If No, proceed to 2.
2. The Channel is a Channel that was created or altered by a person or persons for the purpose of agriculture, aquaculture, or other agricultural or related activity?
 - If Yes, the Channel is not subject to WCA. If No, proceed to 3.
3. The Channel is a Channel that is a Channel of a Public Water System and is being exempted?
 - If Yes, the Channel is not subject to WCA. If No, proceed to 4.
4. The Channel is a Channel that is a Channel of a Public Water System and is being exempted?
 - If Yes, the Channel is not subject to WCA. If No, proceed to 5.
5. The Channel is a Channel that is a Channel of a Public Water System and is being exempted?
 - If Yes, the Channel is not subject to WCA. If No, then there is a...

182

Ditch through wetland

Legally maintained as ditch under MN Rule 8420.0420 Subp. 3 A



183

Ditch through upland

- Landscape position
- What is adjacent?
- What is across the road?
- Mapped soils?



184

Maintaining ditches

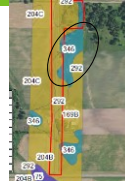
- Drainage exemption per MN Rule 8420.0420 Subp. 3 A.



185

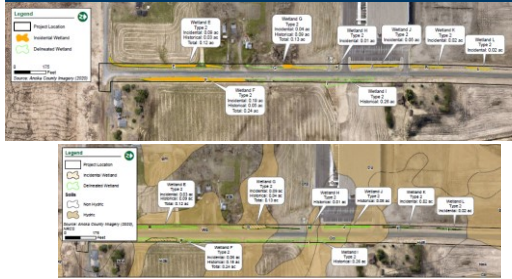
Using mapping tools for determination

- Soils
- LIDAR
- Aerial
- NWI



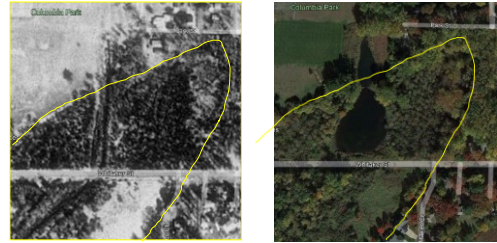
186

Example of wet ditch



187

Wetlands utilized as storm ponds

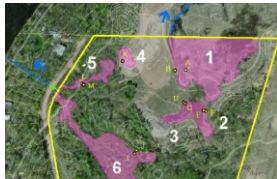


188

Gravel pit example



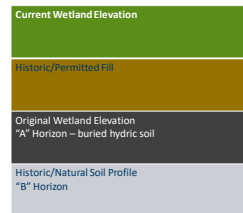
- Legally permitted gravel/sand pits



189

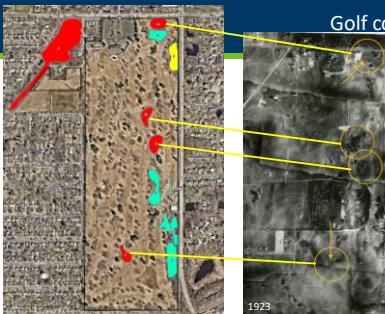
Wetland on filled area

- Legal fill – changed to upland
- Pre-WCA



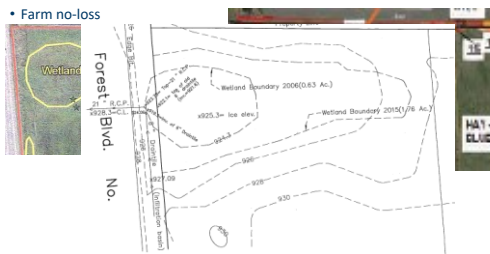
190

Golf course example



191

Wetland legally drained then comes back example



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MWPCP Class Portal

Questions?

bwsr.state.mn.us/minnesota-wetland-professional-certification-program



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