

Wetland Protection & Drainage Development

A publication of the Association of Minnesota Counties

Drainage of water from land has a long tradition in Minnesota, with an emphasis on making agriculture more productive. Starting in the late 1980s, the tide began turning toward greater restrictions on land altering activities to promote environmental diversity through protecting wetlands.

Wetland protection and drainage are managed under various authorities and numerous agencies at the federal, state and local level. The number of agencies with differing involvement and authority has led to considerable confusion among landowners. The list of agencies involved include the U.S. Army Corp of Engineers, U.S. Environmental Protection Agency, U.S. Fish and Wildlife Service, Natural Resources Conservation Service, Farm Services Agency, MN Department of Natural Resources, MN Pollution Control Agency, MN Board of Water and Soil Resources, MN Department of Agriculture, watershed districts, soil water conservation districts, cities, townships and, of course, counties.

County Authority

Counties play an important and increasing role in wetland protection and drainage management. The state drainage law and Wetland Conservation Act of 1991 place counties in a prominent position to manage wetland and drainage activities. County authority to engage in land use management activities and to develop and implement comprehensive local water plans or groundwater plans also provide counties with the ability to manage drainage and wetlands.

Wetland Conservation Act

Administration

In addition to serving as drainage authorities, counties also have responsibilities specified by the Wetland Conservation Act (WCA). Under the direction of the Board of Water and Soil Resources (BWSR), counties and other designated local governments are responsible for regulating projects which propose to drain or fill wetlands.

Enacted in 1991, the WCA is intended to fill gaps in wetland protection left by other state and federal programs. In addition, the WCA is intended to ensure a "no net loss" in existing wetlands.

Under the WCA, the responsible local government is: (1) outside of the seven county metropolitan area, a county or a city; and (2) in the seven-county metropolitan area, a city, a town, or a water management organization. However, soil and water conservation districts (SWCD) also are involved in the program through landowner assistance and record keeping. Many counties have delegated administration of the WCA to their SWCD.

Finally, the state is responsible for applying the WCA to state projects or to activities on state land.

Decision Making Processes

Any time a project proposes to impact a wetland, there are three decision making processes that will have to be considered: exemption determinations, no-loss determination, and replacement plan determinations. There are several questions that will have to be answered under these decision making processes: Will the project impact a wetland? How large is the wetland, where does the wetland begin and end? What type of wetland is it? These and other questions bring

landowners to counties for assistance in determining the applicability of the WCA to their project.

The WCA contains 10 categories of exemptions to the wetland replacement requirements. These exemptions were established to minimize overlap with other state and federal programs, and to ensure a reasonable application of the WCA in certain situations. The exemption categories are as follows: agricultural activities; drainage; federal approvals; wetland restoration; incidental wetlands; utilities, public works; forestry; approved development; de minimus or the amount of wetland which can be drained or filled without replacement; and wildlife habitat. Local governments advise landowners if their project meets the exemption criteria and, if the project qualifies, grant an exemption certificate. Being exempt from the WCA does not exempt a project from other state and federal wetland and water regulatory programs.

A landowner may apply for a non-loss determination if they are unsure if a project will impact a wetland. Certain specified and limited activities are authorized under a no-loss determination.

If a project does not qualify for an exemption certificate, then the project proposer must develop a wetland replacement plan and seek the local government's approval of the plan. The replacement plan must specify how the project proposer attempted to avoid the wetland, minimized the impact to the wetland and proposes to replace the "public values" that are to be unavoidably impacted. This is called "sequencing" in the law.

Wetland banking is being increasingly used to replace wetland impacts. The rules for the WCA allow use of wetland banking to replace wetlands, with certain restrictions. Wetland banking occurs in two ways: (1) more wetland is created or restored than is needed for an individual project and the excess wetland is "banked" to offset future wetland impacts or sell to other individuals needing wetland credits; or (2) wetlands are created or restored with the express purpose to sell to others who need wetland credits to replace that which is impacted through a project.

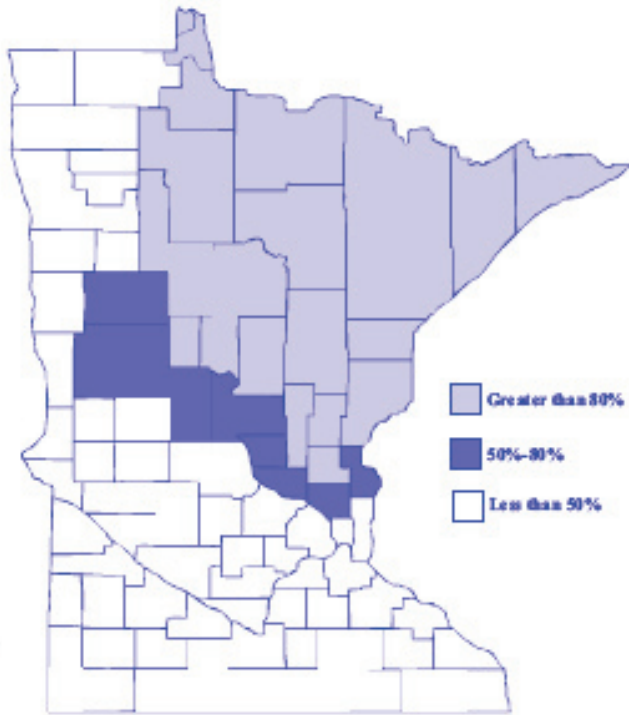
The amount of pre-settlement wetlands remaining in a county is used to determine the wetland protection standards that apply to wetland impacts within a given county. Generally, counties with more than 80 percent of its presettlement wetlands remaining have lesser replacement standards than counties with less than 80 percent. Under the law, counties have been divided into three categories: (1) 80 percent or more pre-settlement wetlands remaining; (2) between 50 and 80 percent pre-settlement wetlands remaining; and (3) less than 50 percent of the pre-settlement wetlands remaining. The amount of pre-settlement wetlands a county has was determined by a study conducted in the early 1980s.

Local governments are authorized to develop a comprehensive wetland protection and management plan as an alternative to the BWSR rules. Local governments choosing to develop a wetland plan must make efforts to involve state agencies and implement the plan by ordinance. Wetland plans may classify wetlands, vary application of sequencing, vary replacement standards, and in greater than 80 percent areas, allow replacement credit for upland adjacent to a wetland and expand the application of certain exemptions.

The state is required to pay the costs associated with wetland replacement resulting from county, city and township road projects. This option is available for projects on existing roads, not new roads or the expansion of existing roads. In order to qualify, the road authority must minimize wetland impacts, mitigate important site specific wetland functions, and report by January 15 of each year wetland impacts for the previous year and an estimate of wetland impacts for the coming year.

NO INFORMATION FOR YOUR KNOW

DISTRIBUTION OF REMAINING ACREAGE OF PRESETTLEMENT WETLANDS



Other parts of the WCA include state paid compensation for denied wetland replacement plans; formation of technical evaluation panels in each responsible local government to address questions relating to public value, location, size or type; opportunities to appeal local government decisions to the BWSR; enforcement by county sheriffs and DNR conservation officers; designation of high priority regions and areas for wetland creation and restoration; and a wetland property tax exemption program.

Wetland protection and the management of impacts to wetlands has been a controversial issue throughout the late 1980's and into the mid-1990's. Debate over state wetland laws and policies has been limited since major amendments were enacted to the WCA in 1996.

Drainage Management

Counties have authority for managing drainage systems (under MN Stat. 106A) within a county, or a joint county drainage authority for drainage systems that are within two or more counties. Counties have the option to delegate authority over drainage systems to watershed districts, where they exist. Counties, when acting as the drainage authority, may establish, improve or repair drainage systems and similar activities related to drainage. However, these authorities are regulated by a variety of federal and state agencies.

There are three different types of drainage projects: **establishment, improvements and repairs**. An *establishment* refers to the original construction of the drainage ditch. An *improvement* will institute a change from the original construction, which usually means expanding the ditches' capacity. *Repairs* are intended to maintain a drainage ditch to its original construction or as subsequently improved. State law has established extensive procedures to manage these activities.

Projects are begun by a petition brought forward by landowners wishing either a ditch be established, improved or repaired. Counties can initiate repairs if an inspection reveals that work is necessary. State law requires an annual inspection of each drainage system, public hearings, appointing of "viewers" to determine benefits and damages of the proposed project, and engineering reports.

If the project is determined to be feasible and to have greater benefits than damages, it can be allowed to proceed to construction. The costs of the project are assessed to landowners, within the drainage area of the ditch, who are determined to benefit from the project.

In recent years, drainage has become a controversial issue at the Capitol, as well as in many county courthouses. This is due to major floods in recent years which have been attributed by some to be influenced by drainage, increased activity in laying subsurface drainage tile throughout large areas of the state, and concerns over the impact of drainage on water quality and wildlife habitat. These and other issues will ensure that drainage remains an important management activity for counties.

Other State and Federal Programs That Address Wetland and Water Management

State

Minnesota Statutes, Chapter 103G establishes the Protected Waters Permit Program. Under this program, approval must be obtained from the Department of Natural Resources-Division of Waters before work begins on any project which affects the bed of a protected water or wetland.

Federal

Sections 404 and 401 of the Clean Water Act provide for the regulation of wetland and water impacts.

Section 404 regulates the discharge of dredge or fill material into waters of the United States, making it unlawful to discharge dredged or fill materials without first obtaining a permit. The Environmental Protection Agency (EPA) has overall responsibility for the Clean Water Act, but the U.S. Army Corps of Engineers has primary responsibility for administering and enforcing section 404.

Section 401 emphasizes water quality and sets up a water quality certification program. Under the guidance of the EPA, the Minnesota Pollution Control Agency administers the Minnesota program and reviews section 404 permit applications sent to the Army Corps of Engineers which may result in the degradation of water quality of wetlands.

Swampbuster is a program of the 1985 Food Security Act, amended by the 1990 and 1996 farm bills. Under this program, farmers who impact wetlands become ineligible for certain federal government price and income support programs. The U.S. Department of Agriculture, through the Natural Resources Conservation Service and Farm Service Agency administer this program.

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