



REPLY TO  
ATTENTION OF

## DEPARTMENT OF THE ARMY

ST. PAUL DISTRICT, CORPS OF ENGINEERS  
190 FIFTH STREET EAST  
ST. PAUL, MN 55101-1638

Operations Division  
Regulatory

5 May 2009

Subject: Corps Statement at WCA Rule Hearing of 5 May 2009

Good afternoon, my name is Tamara Cameron, and I recently became Chief of the St. Paul District Army Corps of Engineers (Corps) Regulatory Branch. We administer Section 404 of the Clean Water Act (CWA), which requires Corps authorization for discharges of dredged or fill material in waters of the U.S. My predecessor, Bob Whiting, and other key members of the Corps Regulatory staff, worked collaboratively with Ron Harnack, former director of the Board of Water and Soil Resources (BWSR), John Jaschke, current director, and other key BWSR staff, to better coordinate the state and federal wetland regulatory programs. They recognized that, although our programs are based on different laws, and take different approaches, many of the goals are the same. Their efforts at regulatory simplification culminated in a Memorandum of Understanding, referred to as the MOU, which was signed by the Corps and BWSR in May 2007.

The MOU resolved many key issues regarding wetland mitigation at the state and federal level, and it, along with our new Federal rule on compensatory mitigation, guided the development of the St. Paul District Policy for Wetland Compensatory Mitigation in Minnesota, which was finalized and published in January 2009. We owe a debt of gratitude to Mr. Whiting and Mr. Harnack for their patience and perseverance in executing an MOU that successfully aligns several aspects of the state and federal wetland regulatory programs.

Ultimately, there were some differences between the WCA and CWA Section 404 requirements that could not be resolved in the MOU, and remain unresolved in the proposed WCA rule. We believe it is good policy to keep our programmatic coordination efforts as transparent as possible. This approach adds predictability and efficiency to both programs. However, it is important to acknowledge those differences, and convey to the regulated public how those differences may affect them. To that end, I chose to speak at the hearing today. A written record of these comments, along with more detailed staff comments on the proposed rules, are provided for the record.

We understand that the proposed rule changes address several issues and constituencies and that better coordination of the state and federal regulatory programs is just one of several objectives of the proposed rule revisions. We offer our comments in acknowledgement of this broader context.

EXHIBIT

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Public

In a November 3, 2008 letter to BWSR, the Corps Regulatory Branch submitted comments on the draft WCA rules, along with a companion technical memorandum. Those comments identified portions of the proposed rule that were not consistent with federal wetland regulatory policy in Minnesota. The current proposed rule resolved some of our comments, but a few key differences remain. While respecting that the state has its own independent wetland regulatory program, we would like to call attention to these inconsistencies, as we understand them.

1. WCA Rules Section 8420.0522, subpart 4, regarding in-kind wetland replacement.

The Corps/BWSR MOU uses 12 wetland plant communities for determining "in-kind" wetland replacement. The proposed WCA Rule also uses the 12 plant communities, but has added two other options for "in-kind" replacement: one is "hydrology and landscape setting," the other is "historical loss." These options are not consistent with Corps regulations or the recently signed MOU. Allowing several definitions of "in-kind" replacement undermines our joint goal of regulatory simplification and will likely create confusion as applicants try to determine whether what they have proposed is "in-kind" compensation.

2. WCA Rules Section 8420.0522, subpart 3, regarding replacement ratios.

The proposed WCA Rule allows a reduction of the wetland replacement ratio by 0.5:1 if "a majority" of project-specific replacement is in-kind. A majority is undefined, and can therefore be as low as 51% of the replacement area, and up to 49% can be a different kind of wetland than the impacted resource. For CWA Section 404 evaluations, we must ensure that a sufficient amount of in-kind replacement is provided to obtain this credit reduction.

3. WCA Rules Section 8420.0526, subpart 2, regarding replacement credit for upland buffer.

We appreciate the decision to eliminate public value credit (PVC) as a separate wetland replacement category in favor of a single wetland replacement credit. This is a major advancement in coordination of the state and federal wetland regulatory program. That said, the option provided in the proposed WCA rule that allows up to 0.5:1 credit for upland buffer conflicts with the MOU and is not consistent with the St. Paul District Mitigation Policy published earlier this year. We agree that upland buffers are critical for enhancing and protecting wetland functions and should receive some credit as a component of a mitigation site. However, adjacent uplands do not function as wetlands and are not intended to replace wetland functions; therefore, our policy is that upland buffers do not warrant the same level of credit as wetland restoration or enhancement. A CWA Section 404 authorization <sup>can</sup> will allow up to 0.25:1 mitigation credit for upland buffer. Inconsistencies between the state and federal programs in the credit ratio for upland buffer may create difficulties for mitigation banking and confusion for the regulated public.

4. WCA Rules Section 8420.0526, subpart 9, regarding replacement credit for preservation of wetlands.

CWA Section 404 regulations and Corps St. Paul District Policy allow wetland credit for preservation as appropriate on private lands as well as public lands. The proposed WCA Rule would allow wetland credit for preservation on state/locally owned lands, not private lands. We understand that this limitation stems from state law. There may be situations in which it will be advantageous to propose wetland preservation on private lands as part of an applicant's CWA Section 404 authorization. Ultimately, we would like a coordinated process that would allow credit for wetland preservation that focuses on the potential ecological gains rather than land ownership.

*Finally,*  
We respect the need and right of the state to establish wetland regulations that will further the objective of the Wetland Conservation Act to achieve no net loss in the quantity, quality, and biological diversity of Minnesota's existing wetlands. Our comments today are intended to increase public awareness that, while the proposed WCA rule provides much improved coordination between state and federal regulations, differences remain that will affect permit applicants and wetland mitigation bank sponsors. If these differences remain in the final WCA rule, we strongly recommend the joint development and publication of clarifying guidance to better inform the public of these program differences.

Thank you for your time today.

Sincerely,



Tamara E. Cameron  
Chief, Regulatory Branch

## 1. In-kind Replacement:

- Issue: The WCA Rule proposes an “in-kind” definition that is so broad that “in-kind” is stripped of much of its meaning and intent.
- Programmatic Differences: Corps wetland regulations define “in-kind” compensation as a resource of a similar structural and functional type to the impacted resource. Compensation that is not the same wetland plant community is “out-of-kind.” The MOU and St. Paul District Policy, after four years of discussion, adopted the 12 wetland plant communities for the “in-kind” determination. The proposed WCA Rule also adopted the 12 plant communities as one option, but added two other options that are both vague and open to broad interpretation.

One of the options is “hydrology and landscape setting.” However, this is too broad for purposes of defining “in-kind.” Many types of wetland plant communities may have the same hydrology and landscape setting. For example, 6 of the 12 wetland plant communities, and 4 of 8 Circular 39 types, can have a hydrologic regime and landscape setting of “saturated, depressional” in spite of the fact that they range from acidic, nutrient-poor, open bogs to alkaline, nutrient-rich, forested swamps.

Another option proposed is that replacement is “in-kind” if it is a wetland type that has been historically lost. Acreages of every type of wetland (e.g., plant community, Circular 39 type) present in a particular county or watershed at the time of European settlement have since been degraded or destroyed. Therefore, any wetland type would fit the “historically lost” criteria, and the purpose of in-kind compensation would be lost.

- Conflict: Frequent cases will occur where mitigation bank sponsors, permit applicants and the regulatory agencies will need to calculate and track two sets of numbers because one regulatory program considers a particular replacement plan to be “in-kind” while another considers it “out-of-kind.”
- Resolution: Adopt the approach of the MOU and St. Paul District Policy by using the 12 wetland plant community types for the “in-kind” determination. Address the use of “out-of-kind” mitigation where “in-kind” is not practicable or environmentally preferable, or the proposed “out-of-kind” mitigation would restore key functions to the watershed, thereby making the proposed “out-of-kind” mitigation eligible for the same reduction in compensation ratio as “in-kind” replacement.

## 2. Replacement Ratios – Minimum Required Replacement

- Issue: WCA Rules allow a reduction of replacement ratio by 0.5 if “a majority” of project-specific replacement is in-kind. A majority is undefined, and can therefore be as low as 51 percent of the replacement area, and up to 49 percent can be a different kind of wetland than that impacted.
- Programmatic Difference: This is inconsistent with St. Paul District Policy. A determination that 51 percent “in-kind” replacement is adequate to consider the entire replacement “in-kind” would be without technical merit.
- Conflict: Different replacement ratios will be required for state and federal wetland regulatory programs.
- Resolution: Develop clarifying guidance for use in both WCA and Section 404 evaluations to ensure that a sufficient amount of in-kind replacement is provided to obtain the credit reduction.

## 3. Actions Eligible for Credit: Upland Buffers

- Issue: The proposed WCA Rule would allow upland buffer credit up to 50 percent per acre of upland.
- Programmatic Difference: The MOU agreed to by BWSR and the Corps, and St. Paul District Policy, establish that credit for upland buffers can be granted up to 25 percent per acre if established in native vegetation and non-manicured. The proposed WCA Rule doubling this credit to 50 percent is based on very broad and subjective professional judgments (e.g., the upland buffer is “valuable” or “important”). All parties agree that upland buffers are critical for enhancing and protecting wetland functions. But uplands do not function as wetlands; therefore, upland buffers do not warrant the crediting level of wetland restoration or wetland enhancement. Therefore, the Corps would not allow credit for upland buffer beyond 25 percent per acre.
- Conflict: Assigning 25 percent (CWA) and 50 percent (WCA) replacement credit to the same upland buffer would create a confusing and substantial difference in credits used by all parties working with wetland regulatory programs in Minnesota.
- Resolution: Adopt the MOU and St. Paul District Policy approach that allows up to 0.25:1 mitigation credit for upland buffer at a wetland replacement site, and the remainder of the wetland credit is established through wetland restoration, wetland creation, wetland enhancement and/or wetland preservation.

**4. Actions Eligible for Credit: Preservation of wetlands owned by state or local unit of government.**

- Issue: WCA only allows preservation on state/locally owned lands.
- Programmatic difference: State law has no effect on use of preservation for establishing compensation credits for use in the Corps regulatory program under the Clean Water Act. Further, wetlands do not need to be rare, exceptional or unique (e.g., ENRV) to qualify for wetland credits. Rather, the functional criterion for Clean Water Act purposes is providing important wetland functions.
- Conflict: The Corps regulatory program will allow credit for preservation as appropriate on private lands as well as public lands.
- Resolution: Adopt an approach to determining credits for preservation that focuses on the potential ecological gains or change due to preservation of a site rather than land ownership.