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## MINNESOTA LAWS

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### **PUBLIC WATER LAW (Minn. Stat. § 103G and Minn. R. 6115)**

*Minn. Stat is the codification of Minnesota Statutes. Minnesota regulations that guide agency decision making are found in the Minnesota Rules, abbreviated as Minn. R.. These laws and regulations are available in law libraries.*

**Purpose:** To control and supervise activities that may alter the course, current, or cross-section of waters of the state.

**Waterbodies Covered:** This statute protects certain waterbodies which are defined in the statute. Included in the definition are certain wetlands, specifically type 3, 4, and 5 wetlands<sup>1</sup>, which are 10 or more acres in size in unincorporated areas, or 2 ½ or more acres in size in incorporated areas. Other types of wetlands are not within the jurisdiction of this statute. The Department of Natural Resources (DNR) has inventoried and mapped all of these so-called “public waters wetlands” in the state, and maps are available for inspection at DNR regional and central offices, county soil and water conservation district offices, county auditor offices, and county zoning offices.

**Activities Regulated:** Any work done below the ordinary high water mark of protected waters is subject to regulation. A permit is required for projects such as draining; filling; dredging; channelizing; construction of dams, harbors, or permanent offshore structures; placement of bridges and culverts; and marinas. Some projects do not require permits under certain conditions, such as placement of beach sand, rock riprap for shore protection, and some docks and boat ramps; removal of debris (trees, logs, stumps, trash); repair of public drainage systems; and certain maintenance and installation of agricultural drain tile outlets.

**Responsible Agencies:** The DNR - Division of Waters (DNR-DOW) has authority to issue permits and enforce the statute.

**Decision Making Criteria:** The DNR-DOW follows decision making criteria specific to the type of activity contemplated. For example, standards specific to filling guide the DNR’s analysis of any proposed filling. The specific rules are found in Minn. R. 6115.0150 to 6115.0520. In general, the DNR attempts to balance reasonable use with resource protection and minimize impacts on wetlands.

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<sup>1</sup> Wetland Types (from U.S. Fish and Wildlife Circular 39):

*Type 1 - Seasonally flooded basin or flat*

*Type 2 - Inland fresh meadows*

*Type 3 - Inland shallow fresh marshes*

*Type 4 - Inland deep fresh marshes*

*Type 5 - Inland open fresh water*

*Type 6 - Shrub swamps*

*Type 7 - Forested swamps*

*Type 8 - Bogs*

**Public Role:** Typically, there is no public notice of permit applications and no formal public comment period. If you have questions about a project that may impact wetlands, you may contact the DNR-DOW to find out if a permit is under consideration. The DNR-DOW will informally consider comments submitted in writing or by telephone. The DNR-DOW solicits recommendations from soil and water conservation districts, watershed districts, counties, or cities, as well as the DNR 's Division of Fish and Wildlife, and the Army Corps of Engineers.

The DNR-DOW may hold a hearing at its discretion, but typically does not. After issuance or denial of a permit, a demand may be made for a hearing by the applicant, watershed district, soil and water conservation district, or mayor of a city with jurisdiction over the project application.

**Enforcement:** For questions about work in public waters wetlands, contact the DNR area hydrologist listed in your local telephone directory or the local DNR conservation officer or the DNR state Violations Coordinator at (651) 296-4800. The DNR can investigate and issue orders calling for restoration, stabilization, or stoppage of any work. Violations are misdemeanors punishable by fines or imprisonment.

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### WETLAND CONSERVATION ACT

*The Act amends and supplements several Minnesota statutes. The principal provisions are found at Minn. Stat. § 103A.201, 103B.3555, 103F.516, 103F.612, 103F.616, 103F.901-.905, 103G.221-.2242, 103G.2364-.2372. Minn. R. 8420 provides the operational framework for the WCA regulations.*

**Purpose:** The Wetland Conservation Act (WCA), passed in 1991, is the most comprehensive wetland protection ever attempted by the Minnesota legislature. It extended protection to wetlands not covered under previously existing state law. The WCA follows a “no net loss” policy - the draining or filling of wetlands is prohibited unless wetland areas of equal public value are restored or created. The Act also institutes procedures for establishing wetland preservation areas in high priority areas (allowing landowners to gain a tax exemption), and allows wetland owners to convey permanent easements for “at-risk” wetlands to the state in return for compensation.

**Waterbodies Covered:** The WCA defines wetlands, in accord with the Corps of Engineers Wetlands Delineation Manual (1987) as areas that have a predominance of hydric soils, are generally inundated or saturated above or below the surface, and support a prevalence of hydrophytic vegetation. This includes wetlands that are outside of the jurisdiction of the DNR under the Public Waters Law. However, there are several exemptions; including a “de minimis” amount that can be drained or filled without regulation, agricultural lands that have been cropped or set aside during six of ten years prior to January 1, 1991, type 1 wetland on agricultural land (except for bottomland hardwoods), and type 2 wetlands of two acres or less on agricultural land. Notably, the WCA does not preempt more restrictive local ordinances.

**Activities Regulated:** *Basic Requirements.* Wetlands must not be drained or filled unless (a)

drain or fill activity is exempt, or (b) wetlands are replaced by restoring or creating wetland areas of at least equal public value. Goal is no net loss of wetlands. (Rules 8420.0105)

*Exemptions:* The WCA specifies ten categories of exempt drain and fill activities. (Rules 8420.0122.) No permit or approval is necessary for exempt activities. Notable exemptions include those for certain agricultural activities, maintenance of existing public or private drainage systems, public utilities, road maintenance and previously approved developments. There is an absolute “de minimis” exemption for activities draining or filling less than 400 square feet. Other de minimis exemptions range from 2,000 to 10,000 square feet, depending upon wetland type, location, and ownership. (Rules 8420.0122, subp. 9.)

*Replacement Plans:* If an activity is not exempt, impacted wetlands must be replaced under a replacement plan approved by the LGU. The replacement plan must demonstrate compliance with “sequencing,” i.e., (a) that wetland impacts are avoided as much as possible, (b) that to the extent that the impacts cannot be avoided, the wetland impacts are minimized, and (c) that unavoidably impacted wetlands are replaced as required by the WCA Rules. (Rules 8420.0520.) The Rules include numerous specific requirements as to location, size, type, etc. of replacement wetlands. (Rules 8420.0540-.0550.) Minimum replacement is generally two acres of replaced wetland for each acre drained or filled. For wetlands on agricultural land or in counties where 80 percent or more of the presettlement wetlands exist, minimum replacement is one acre of replaced wetland for each acre drained or filled. (Rules 8420.0540, subp. 6.) Wetland replacement can be accomplished on a project-specific basis or through the state wetland bank.

**Responsible Agencies:** Under the rules developed by the Board of Water and Soil Resources (BWSR), local units of government (e.g., counties, cities, water management organizations) will consider applications for replacement plan approval. In the metropolitan area, this responsibility must be assumed by a city council, town board, or watershed management organization; in Greater Minnesota, by a city council or county board. Contact your local Soil and Water Conservation District (SWCD) office or the BWSR at (651) 296-3767 to obtain the name of the appropriate contact in your area. Appeal of decisions made by the local units of government may be made to BWSR, which will provide administrative and technical guidance to local governments as well. BWSR also manages the state wetland banking program. The DNR conservation officers have enforcement authority.

**Decision Making Criteria:** “Wetlands must not be drained or filled, wholly or partially, unless replaced by restoring or creating wetland areas of at least equal public value” under a replacement plan approved by the local government unit. The WCA requires that the following principles be followed: first, seek to avoid any impact on the wetland; second, minimize the impact by limiting the activity; and third, restore or replace the damaged wetland. Replacement generally should be in the same watershed or county as the impacted wetland.

In making its decision to approve or deny a proposed replacement plan, the local government relies on a technical evaluation panel (TEP) to answer questions concerning the location, type, size, or public value of the impacted wetland. The TEP is composed of a technical professional employee of BWSR, a technical professional employee of the local soil and water conservation

district, and a technical professional from the local government unit. The TEP reports to the governing body of the city, town, county, or watershed management organization, which has the authority to approve or deny the proposal. If a landowner's replacement plan that meets the requirements of the WCA is not approved, the landowner may apply for compensation.

Under changes made in 1996, some local governments have undertaken the development of comprehensive wetland protection and management plans to better match wetland regulations to the local community priorities. These plans, incorporated into local ordinances, contain minimum statewide standards which the BWSR oversees while providing for some regional flexibility in wetland management.

**Public Role:** The public can comment on proposed replacement plans and appeal approvals of replacement plans, exemption or banking plan decisions. Contact your local government unit (implementing the WCA) to be placed on the mailing list for notices of applications for replacement plan approval.

**Enforcement:** DNR conservation officers are primarily responsible for enforcement of the WCA. They can be reached through the sheriff's office or are listed in your local telephone directory. Conservation officers can issue cease and desist orders to halt illegal activities on wetlands or order restoration or replacement of a wetland. Violation of an order is a misdemeanor, to be prosecuted by city and county attorneys. The court can order restoration or replacement.

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### **STATE WATER QUALITY STANDARDS - Section 401 Certification (33 U.S.C. § 1341 and § 1313) (Minn. R. 7050 and 7001.1400 to 7001.1470)**

**Purpose:** State water quality standards are used to protect the chemical, physical, and biological integrity of waters within the state, under the authority and direction of Section 401 of the federal Clean Water Act. Section 401 water quality certification requirements apply only to activities requiring a federal permit, and the standards regulate discharges into state waters.

**Waterbodies Covered:** See description of activities regulated.

**Activities Regulated:** With respect to wetlands, the application of water quality standards is triggered by an application for a federal permit. If an applicant seeks a permit under Section 404 of the Clean Water Act that will result in the discharge of materials into waters or wetlands, Minnesota must certify that the proposed activity conforms to state water quality standards. If it does not, Minnesota can refuse certification and a permit cannot be issued.

**Responsible Agencies:** The U.S. Environmental Protection Agency (EPA) has overall responsibility. The Minnesota Pollution Control Agency (MPCA) administers the program in Minnesota pursuant to EPA guidance.

**Decision Making Criteria:** The MPCA reviews but often waives water quality certification for discharges into wetlands (pursuant to Section 404 permit applications under the Clean Water Act) because currently there are no applicable standards. The EPA is now requiring the MPCA to revise Minnesota's water quality standards to specifically include wetlands. The revised standards are expected to be issued in 1993 as part of Minnesota Rules Chapter 7050. The revised standards will include narrative biological and aesthetic criteria, under the authority of Section 303 of the Clean Water Act.

**Public Role:** Public notice of an application for Section 401 certification is required, although the MPCA can rely on the Army Corps of Engineers' notice of a dredge and fill permit application to fulfill this requirement. A public comment period is open for at least 10 days.

**Enforcement:** Because the MPCA's water quality certification becomes a part of a Section 404 permit, the MPCA relies on the Corps and the EPA for primary enforcement. The MPCA, however, also has the authority to take civil or criminal enforcement action.

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## **MINNESOTA ENVIRONMENTAL POLICY ACT (Minn. Stat. § 116D and Minn. R. Chapter 4410)**

**Purpose:** The Minnesota Environmental Policy Act (MEPA) establishes a formal process for reviewing the environmental impacts of major development projects that require some type of government action, such as permits or grants. The purpose is to provide information on environmental impacts before necessary approvals and permits are issued.

**Waterbodies Covered:** MEPA applies to many proposed development projects, whether they affect waterbodies or not. With respect to wetlands, MEPA generally requires review, under certain conditions, of project impacts on one acre or more of a public waters wetland (as defined by the Department of Natural Resources, see discussion on page 12) and some other wetlands of types 3 through 8 that are within a shoreland area, floodplain, wild and scenic rivers district, Minnesota River Project Riverbend area, or the Mississippi headwaters area.

**Activities Regulated:** Environmental review under MEPA is mandatory for certain projects (listed by project type and size in the Minnesota Rules) whose nature, size, or location makes it inevitable that there is a potential for significant environmental effects. Review may be obtainable for other projects, not listed in the rules, where a government unit determines in its discretion that there is the potential for significant environmental effects. Two types of review exist: the Environmental Assessment Worksheet (EAW) is a condensed worksheet that screens a project for significant environmental effects; the Environmental Impact Statement (EIS), which is less frequently done, is a thorough study of the environmental impacts of a project; comparative environmental, economic, and sociological impacts; reasonable alternatives; and mitigation measures.

**Responsible Agencies:** The state Environmental Quality Board (EQB) has prepared rules

governing the environmental review process. In most cases, the rules identify a particular governmental unit (either a local or state agency) that has the responsibility to conduct the environmental review. This is called the Responsible Governmental Unit (RGU). The EQB provides assistance to the RGU in interpreting the required procedures.

**Decision Making Criteria:** MEPA establishes a standardized public process designed to disclose information about the environmental effects of a proposed project and ways to avoid or minimize them. Information gathered in an environmental review should be integrated into the permitting and approval processes of local, state, and federal agencies in order to protect the environment. No state actions can be taken or permits issued where they are likely to cause impairment of natural resources if a feasible and prudent alternative exists.

**Public Role:** Citizens can review and comment on EAWs and EISs. They can petition for preparation of an EAW when one is not mandatory. (A petition requires signatures by 25 citizens; there is no residency requirement.) Citizens can also make suggestions for issues to be studied in an EIS during the EIS “scoping” process. Contact the Environmental Quality Board at (651) 296-8253 or (800) 657-3794 for more information.

**Enforcement:** If an EAW or EIS is required for a project or if a petition for an EAW is filed, the project may not be started and no final governmental decision may be made to grant a permit until the petition for an EAW is dismissed, a negative declaration on the need for an EIS is made, the EIS is deemed adequate, or a variance is granted.

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## **MINNESOTA ENVIRONMENTAL RIGHTS ACT (Minn. Stat. § 116B)**

The Minnesota Environmental Rights Act (MERA) allows citizens to bring actions in court or to intervene in agency proceedings to challenge any conduct that may result in “pollution, impairment, or destruction” of the environment. The court or agency must prevent the proposed conduct if a “feasible and prudent alternative exists.” MERA can be used to challenge government actions or the conduct of private citizens and corporations. One limitation in using MERA is the potential cost of the legal proceedings and required bonds.