Bogged Down in Wetlands?

Challenges & Recommendations for Wading through the Process

Sensible Land Use Coalition
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Panelists
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Kelly Kunst, Westwood Professional Services
Courtney Hall & James Wisker, Minnehaha Creek Watershed District
Regulatory Landscape in MN

- Wetlands and Waters of the U.S. (WOUS)
- What is a Wetland?
  - Must satisfy 3 factors
    - Hydrology (Water)
    - Hydric Soils
    - Hydrophytic Plants
- Who has jurisdiction?
Regulatory Landscape in MN

- **U.S. Army Corps of Engineers**
  - Permit Authority under Section 404 of Clean Water Act ("CWA")
    - Regional General Permits
    - Letter of Permission (LOP-MN-05) (0.5 acre to 3 acres of impact)
    - Individual Permit (3+ acres of impact)

- **Minnesota Pollution Control Agency**
  - Water Quality Certification under Section 401 of CWA
Regulatory Landscape in MN

- **Minnesota Department of Natural Resources**
  - Permit Authority under Minnesota Public Waters Program
    - Public Waters Work Permit
    - Public Waters Crossing License

- **Local Government Unit (“LGU”)**
  - Permit Authority under Minnesota Wetland Conservation Act (“WCA”)
    - *De Minimis*
    - Exemptions
    - Replacement
    - Technical Evaluation Panel (“TEP”)
Regulatory Landscape in MN

- WOUS 
  U.S. Army Corps

- LGU
  All wetlands except DNR public waters

- Public Waters 
  Minnesota DNR
Threatened or Endangered Species
Other Emerging Issues

- Proposed Buffer Legislation in Minnesota
Agency Introduction

- Recognition of functions and values of wetlands
- Historic loss of wetlands = loss of functions
Agency Introduction

- Legislature passed a policy of: No Net Loss
- Wetland Conservation Act, 1991 requires:
  - Avoid, minimize, replace
- BWSR’s role
- LGU decisions
Project Planning Stage

Applicant Perspective
Planning Challenges

• Which rules apply?
  – Who is the WCA LGU?
  – Is there a watershed management organization?
  – Does a LGU have additional wetland restrictions/requirements?

• Other Involved agencies?
  – USACE-Jurisdictional Determination?
  – MnDNR-OHWL established?
SECTION 11.51. THE PROTECTION OF WETLANDS

Subd. 1. Preamble.

This Code hereby incorporates by reference the Wetlands Conservation Act [Minnesota Statutes 103G.221 et seq. (herein after referred to as the WCA)] and Minnesota Rules Chapter 8420. All wetlands, as defined in Section 11.51, Subd. 3 of this Code, including Public Waters and Public Waters Wetlands governed by Minn. Stat. 103G.605 and those governed by the U.S. Army Corps of Engineers, are covered by this Code. If a conflict occurs, the Code language shall have preference over WCA in situations where the City Code is more restrictive than WCA. The following water-related criteria are stated in the City:

WHO RULES?

Westwood
PLANNING CHALLENGES

• Scoping uncertainty
• Regulatory unknowns
Example: Wetlands and Buffers

Preliminary Wetland Review

Westwood
Planning Successes

• Availability of Information
  – Wetland and soil mapping resources, aerial photography
  – Access to rules, guidance, agency personnel

• Value of early coordination
  – Identify and plan for issue resolution
Planning Recommendations

- Know the agencies involved
- Know the rules (or hire someone who does)
- Use available resources to get a realistic picture of water resource constraints and plan accordingly
Planning Stage

• Get an approved delineation
• Pre-application (value!)
• Ask questions/feedback
• Know rules
• Know regulatory contacts
Project Permitting Stage

Applicant Perspective

Westwood
Permitting Challenges

• Extent of regulated water resources unknown
• Application requirements of involved agencies
Extent of Water Resources

Delineation concurrence from all agencies?
Example: Delineation Approval

- TEP Panel scheduled and meet
- Not all parties attend as planned
- TEP concurs with boundaries
- (WCA) Formal approval issued ~9/10/2013
Example: Delineation Approval

- Second field meeting required
- Disagree with TEP boundaries
- More information required for non-regulated waters
- Boundary revision required
- Two versions of regulated wetlands

Formal approval issued
10/31/2013 and 3/26/2014
Is That Everything?

- Are there buffers?
- How are they determined?
- Additional local permitting requirements related to buffer?
Application Requirements?

- **Joint Application**
  Covers Federal Section 404 (USACE) and Minnesota WCA (BWSR)

- **Will you need a MnDNR Application?**

- **Is there a separate local application?**
  (City, Watershed District)

**Westwood**
Permitting Challenges

• Is that an impact, according to who, and does it require replacement?
• Accommodating program inconsistencies
Is that an impact?

Does it qualify for a no loss?, exemption?, is it regulated?

Who regulates it?

Does it require replacement?
Accommodating Inconsistencies

• Aligning permit timing among agencies

• A replacement plan for everyone
  - Additional local requirements for siting or replacement ratios?
Permitting Successes

- Application process with specific timelines for actions
- Benefit of early coordination
Permitting Recommendations

- Anticipate regulatory timelines for all application stages
- Have a realistic plan
- Identify areas of potential compromise
- Early agency coordination
Permitting Stage

• Early coordination
• Plan for and know timing of review and approvals
• Project complexity
  – no loss, exemption, banking, replacement plan
• Applicable rules (variability)
• Importance of Complete Application
  – Include plans, alternative analysis
Project Mitigation Stage

Applicant Perspective
Mitigation Challenges

- Anticipating replacement requirements
- Siting priority among different agencies
- Generating eligible replacement credits
Replacement Credit

What actions to take?
- Restoration?
- Creation?

Increase application complexity

Westwood
Mitigation Successes

• “Streamlining” among agencies to favor use of bank credits to replace small impacts
• Increase in credit generation for restoration
• Reduction in low-functioning, on-site replacement
Mitigation Recommendations

• Change the way site-specific performance standards are achieved?

• In Lieu Fee Program
  – Potentially better serve 7-County Metro

• Streamline application process for restoration activities

• Early agency coordination
Mitigation/Replacement

- Early coordination
- Local needs (may be more restrictive)
- Coordination with Corps
- WCA Rule requirements (actions and standards)
- Restoration first (onsite vs. banking)
- Banking preference, but siting sequencing
What’s Working and Future

• Currently working with Corps
  – Interagency personnel (IPA): transp., banking, rules
• BWSR Road Bank program
• Rule revisions (legislative changes 2015) rules to follow
SENSIBLE LAND USE
AND THE
MINNEHAHA CREEK WATERSHED DISTRICT

Bridging the Land-use Water Governance Gap
OUTLINE:

• What Have We Heard?

• The Land-Use Water Governance Gap

• A New Model for Watershed Planning and Implementation
WHAT HAVE WE HEARD?

- Complicated Regulatory Frameworks?
- Inconsistent Standards and Application of Rules?
- Weak Interagency Coordination?
- Undesirable Outcomes and Added Expense for Everyone?
WATERSHED DISTRICTS?
LAND-USE AND WATER
MUNICIPAL CONFLICT OF INTEREST
UPSTREAM - DOWNSTREAM NEIGHBORS
MINNESOTA WATERSHED ACT
WHAT GOVERNANCE GAP?

SILOS DON’T COME DOWN, THEY JUST AGE.
MINNESOTA RULES 8410

- Collect Data
- Diagnose Issues
- Establish Goals
- Public Engagement
- Implementation Plan
- Watershed District Planning & 10 Year CIP
- Establish Goals
- Public Engagement
- Implementation Plan
- Watershed District Planning & 10 Year CIP
- Diagnose Issues
- Collect Data
- Implement
INTEGRATION IS LACKING!

2007 Evaluation Report on Watershed Management (Legislative Auditor)

2009 Land and Water Policy Project (MEI)

2011 Water Governance Study (Hennepin County/Humphrey School)

2013 Water Regulation and Governance (MPCA)
BUILDING BRIDGES FOR EFFECTIVE PLANNING
BUILDING GOOD CITIES

“Central issues are not clean air and water, endangered species or environments, more money for housing, or urban renewal. Certainly not in their separate capacities. These issues are relevant, perhaps necessary, but not basic.

What is basic is the structure of the human environment, the city. Building a good city – a framework for all separate things to work harmoniously – is essential to alleviate each of the separate issues of development.”

Schnieder
MCWD’S PURSUIT OF A BALANCED URBAN ECOLOGY
Improving Quality of Water, Quality of Life
STRATEGIC PARTNERSHIPS
METHODIST HOSPITAL
MINNEHAHA PRESERVE
STRATEGIC PARTNERSHIPS
REGULATORY CASE STUDY

- First wetland bank in the District
  - 22 acres of restored wetland
  - Makes siting requirements easier

- Greatest potential economic return for landowners
  - Approximately $50,000 per acre
  - 10-lot subdivision vs 6-lots from standard zoning

- Meets tax base and conservation goals for City
  - 19.5 acres of high-value upland
CLOSING THOUGHTS:

1. Regulation doesn’t necessarily generate action or improvement, it serves as a safety net.

2. Agencies can and should partner with the development community with the goal of finding unique ways to achieve better outcomes across disciplines than regulation.

3. This requires a change in thinking and the acquisition of new knowledge and language to surmount cultural barriers.