



Minnesota Pollution Control Agency PROGRAM MANAGEMENT DECISION MEMO

Effective Date: April 4, 2012

ISSUE:

Use of wetland preservation as part of the wetland mitigation sequence

DECISION

This Program Management Decision clarifies the Minnesota Pollution Control Agency's (MPCA) intended application of Minn. R. 7050.0186 regarding the use of wetland preservation as mitigation of wetland impacts in areas where there are limited opportunities for wetland replacement, especially in those counties identified as retaining greater than 80 percent of their pre-settlement wetlands. Wetland "preservation" is defined by Board of Water and Soil Resources (BWSR) rules in Minn. R. 8420.0526 subp. 9. This rule describes a number of conditions that must be met before allowing use of wetland preservation. Conditions include:

- Wetland preservation may only be granted after considering other alternatives in the wetland mitigation sequence.
- Impacted wetlands must be in counties with more than 80 percent of pre-settlement wetlands remaining.
- Wetlands eligible for preservation must be owned by state or local government; protected by a permanent conservation easement, have a high probability of degradation and contain or benefit an exceptional resource.

The MPCA intends to apply the same criteria as outlined by BWSR Rules (see Minn. R. 8420.0526 subd. 9) in deciding the conditions under which preservation can be allowed as part of the wetland impact mitigation sequence for a proposed project that requires a Clean Water Act Section 401 Water Quality Certification determination or is otherwise required to comply with Minn. R. 7050.0186. When the opportunity arises, this clarification should be incorporated into a water quality standards rule revision. The MPCA will review this decision as necessary. More details regarding this Program Management Decision, especially where preservation fits into the wetland impact mitigation sequence, are described in the Rationale Section.

BACKGROUND

For several years there has been discussion among regulated parties, BWSR, and the United States Army Corps of Engineers (ACOE) regarding mitigation of wetland impacts in parts of northern Minnesota where wetlands are prevalent and opportunities for replacement are limited. These discussions resulted in amendments to state law (Minn. Stat. § 103G.222), to BWSR rules (Minn. R. 8420.0526) and to ACOE compensatory mitigation policy (2007-1101-SDE), to clarify regulatory expectations. The purpose of this document is to acknowledge these discussions and decisions, and clarify the MPCA regulatory position on these matters.

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RATIONALE

The MPCA emphasizes that wetland preservation is not intended to become a substitute for the overall wetland mitigation sequencing criteria found in the MPCA's narrative water quality standards, as set out in Minn. R. 7050.0186. Under these provisions, the first obligation of regulated parties is to avoid impact, the second is to minimize impact, and the third is to provide compensatory mitigation for unavoidable wetland impacts by replacing the diminished or lost designated uses of the wetland as close to the impacted wetland as possible. Further, the required compensatory mitigation to offset unavoidable wetland impacts is required to be of the same type and in the same watershed as the impacted wetland, to the extent prudent and feasible. Therefore, preservation should only be considered as acceptable mitigation after determining that these three options are not prudent and feasible. Regulated parties will be expected to provide documentation supporting this conclusion. The MPCA will make its final Section 401 Water Quality Certification determination on an applicant's request to use preservation credits to compensate for a proposed project's wetland impacts on a case-by-case basis.

The BWSR and ACOE recently provided similar regulatory clarification regarding the use of wetland preservation as a method for mitigating a project's proposed wetland impacts in those areas of Minnesota with greater than 80 percent of their pre-settlement wetlands remaining. The rationale for this approach is described in guidance developed by BWSR at:

http://www.bwsr.state.mn.us/wetlands/wca/Preservation_Guidance7-1-10.pdf

This guidance includes a map showing the location of the counties with greater than 80 percent remaining wetlands. The MPCA generally agrees with the guidance provided by BWSR in its 2010 guidance document.

The MPCA takes a strong position on the location of wetland mitigation because wetlands provide valuable functions that are integral to the overall water quality of a watershed, and related designated uses of lakes or streams. A good example of this is wetlands that are headwaters of trout streams along Minnesota's North Shore of Lake Superior. Wetlands provide storage during wet periods and provide low flow augmentation during dry periods. Adequate flows are crucial to sustaining the biotic community. Without wetlands moderating the flow, many streams may be vulnerable to inadequate flows during dry periods and may lead to loss of biotic community due to freezing of the entire stream channel in winter. These valuable wetland water quality functions are lost to a specific waterbody when a project, which will impact wetlands, is allowed to occur and the compensatory mitigation is allowed to be exported to another watershed. The MPCA's interpretation of the Clean Water Act and MPCA Nondegradation Rules does not allow this incremental degradation of water quality, except as a last resort.

For these reasons, the MPCA views use of preservation as a last resort after other approaches to mitigation have been considered and demonstrated to be not prudent and feasible. The MPCA policy is to consider preservation as part of a sequential order for mitigation. The sequence is meant to progress to lower options only after use of higher options is demonstrated to not be prudent and feasible. The sequence is:

1. Avoid impact
2. Minimize impact
3. Mitigate impact through wetland restoration or creation in the same watershed
4. Mitigate impacts in watersheds in the same basin

5. Preserve through permanent conservation easement exceptional resource value wetlands owned by local or state government in the same watershed or as close as prudent and feasible to the same watershed.

APPROVAL

I have reviewed this program management decision and I concur:

Signed:

Gaylen Reetz
Director, Watershed Division
April 2, 2012

Signed:

Mike Sandusky
Director, Environmental Assessment and
Outcomes Division
March 27, 2012

Signed:

Lisa Thorvig
Director, Municipal Division
March 27, 2012

Signed:

Rebecca Flood
Assistant Commissioner
April 4, 2012

Signed:

Dave Richfield
401 Certification Supervisor
March 26, 2012