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State and Federal Regulation of Agricultural Property, Drainage and Wetlands

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LANDOWNER PROPERTY RIGHTS

- Common Enemy Rule, Reasonable Use Rule, Civil Law Rule
- Drainage Easements and Prescriptive Easements
- U.S. Fish & Wildlife Service (Waterfowl Production Area) Easements

STATE & LOCAL LAND USE CONTROLS

- County Ordinances (Drainage/Soil Loss)
- Watershed District Permitting
- Chapter 103E – Public Drainage Authorities
- Groundwater Appropriation Permits

STATE ENVIRONMENTAL REGULATIONS

- Wetland Conservation Act
- Minnesota Environmental Protection Act
- Public Waters and Public Waters Work Permits
- Shoreland Management Program
- Buffer Law

FEDERAL ENVIRONMENTAL REGULATIONS

- Clean Water Act (Section 404 Permits & WOTUS)
- Clean Water Act (Section 401 Pollutant Discharges)
- Food Security Act (“Swampbuster”)



Common Drainage Disputes

- Upstream owner drains land and floods downstream owner.
- Downstream owner blocks waterway and floods upstream owner.
- Upstream owner impounds or diverts water from downstream owner
- Upstream owner directs water to downstream owner's drainage system



Reasonable Use: General Principles

- Is the drainage, diversion or impoundment reasonably necessary?
- Does the utility or benefit to the active owner outweigh the harm to the passive owner?
- Did the active owner take care to avoid harm to the passive owner?
- Did the active owner merely improve an existing natural system?



Fact Intensive Inquiry

- Infinite variety of factors and circumstances.
- Cannot be reduced to a cut-and-dried formula.
- Must remain flexible.
- Allow for a consideration of each individual case according to its own peculiar facts.
- No one factor or circumstance is controlling.
- What is reasonable use is a question of fact.



General Principles

- May not collect surface water and divert it from its natural channel to discharge it where it would not otherwise have gone.
- May drain land by ditching or tiling (even pumping) although the effect, may be to accelerate the movement and to increase the volume of water.
- Owner is legally privileged to make a reasonable use of his land, even though the flow of surface waters is altered and causes some harm to others.
- Liability attaches only when harmful interference with the flow of surface water is unreasonable.
- Reasonableness or unreasonableness can include such factors as:
 - The amount of harm caused;
 - The foreseeability of the harm; and
 - The purpose or motive of the action.



Minnesota State Regulations

- Wetland Conservation Act (Stat. 103G; Rule 8420)
- Public Waters Law (Stat. 103G; Rule 6115)
- Buffer Requirements (Stat. 103F.48)



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Minn. Wetland Conservation Act (WCA)

Purpose: “The legislature finds that the wetlands of Minnesota provide public value by conserving surface waters, maintaining and improving water quality, preserving wildlife habitat, providing recreational opportunities, reducing runoff, providing for floodwater retention, reducing stream sedimentation, contributing to improved subsurface moisture, helping moderate climatic change, and enhancing the natural beauty of the landscape, and are important to comprehensive water management, and that it is in the public interest to:

- (1) achieve no net loss in the quantity, quality, and biological diversity of Minnesota’s existing wetlands;
- (2) increase the quantity, quality, and biological diversity of Minnesota’s wetlands by restoring or enhancing diminished or drained wetlands;
- (3) avoid direct or indirect impacts from activities that destroy or diminish the quantity, quality, and biological diversity of wetlands; and
- (4) replace wetland values where avoidance of activity is not feasible and prudent. **Minn. Stat. §103A.201, subd. 2(b).**



Minn. Wetland Conservation Act (WCA)

- ▶ Prohibits draining or filling of wetlands unless the person taking such action “replaces” the impacted wetland areas by restoring or creating other wetlands of at least equal public value. Minn. Stat. §103G.222.
- ▶ WCA administered by local officials (LGU—counties, cities, WMOs, SWCDs) and state officials (Board of Soil and Water Resources (BWSR)), with LGU bearing responsibility for approval of replacement plans.
- ▶ DNR may issue cease-and-desist orders for activities not exempted or approved.



Minn. Wetland Conservation Act (WCA)

- Agricultural Exemptions from Replacement Requirements**
 - Planting History (6 of 10 prior to 1991; 8 of 10 prior to impact)
 - Small quantities of marginal wetlands on pasture and hay ground
 - Maintenance of existing drainage manipulations



Minn. Public Waters Wetlands

- ▶ Based on Public Waters Inventory (1979-1984).
 - ▶ Reflected in by-county inventory lists and maps depicting what is included on the lists.
 - ▶ Minn. Stat. ch. 103G.
 - ▶ Minn. R. 6115
 - ▶ http://www.dnr.state.mn.us/waters/watermgmt_section/pwi/download.html
- ▶ Inventory of water basins, water courses and wetlands.
- ▶ OHWL: the boundary of public water wetlands; elevation delineating the highest water level that has been maintained for a sufficient period of time to leave evidence upon the landscape; commonly the point where vegetation changes from aquatic to terrestrial.

LEGEND

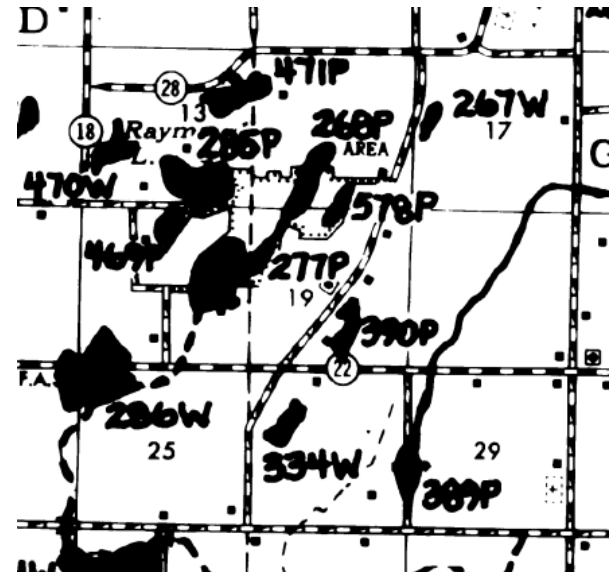
Protected Waters:

- Basins are identified with a number and the letter "P".
- Watercourses are identified with a heavy, dark line.
- Public ditches are identified with a dashed line.

Protected Wetlands:

- Identified with a number and the letter "W".

This map is intended for use with a separate descriptive list. The boundaries of the protected water bodies shown on this map are plotted as accurately as possible, consistent with the map scale, but are still approximate. A protected water body boundary coincides with the ordinary high water mark of the water body as defined in Minnesota Statutes, Section 105.37 and is determined through DNR field inspection or survey.





Minn. Public Waters Wetlands

- ▶ “[T]he state, a political subdivision of the state, a public or private corporation, or a person must have a public waters work permit to:
 - ▶ construct, reconstruct, remove, abandon, transfer ownership of, or make any change in a reservoir, dam, or waterway obstruction on public waters; or
 - ▶ change or diminish the course, current, or cross section of public waters, entirely or partially within the state, by any means, including filling, excavating, or placing materials in or on the bed of public waters.



Wetland Mitigation

- ▶ wetland replacement must replace the public value of wetlands lost as a result of an impact.
- ▶ replacement of wetland function and value may occur at more than one location.
- ▶ the public value of wetlands is based upon the functions of wetlands, including:
 - ▶ water quality, trapping sediments, protecting shoreline, and recharging groundwater; flood water and storm water retention; public recreation and education; commercial uses; fish, wildlife, and native plant habitats; low-flow augmentation; and other functions and public uses as identified in wetland evaluation methods demonstrated to reasonably identify appropriate candidates for wetland replacement.



Federal Regulation

- Clean Water Act – applies to “Waters of the United States” and adjacent wetlands and tributaries
- Food Security Act – “Swampbuster” conservation provisions apply to naturally occurring wetlands existing on December 23, 1985
- United State Fish and Wildlife Service – conservation easements restrict some adjacent upland uses and drainage



Clean Water Act

- Establishes the basic structure for regulating discharges of pollutants into the waters of the United States and regulating quality standards for surface waters.
- Authorizes the Army Corps to issue permits for the **discharge of dredged or fill material** into **navigable waters**.

In the absence of an exemption:

- If area is **WATERS OF THE UNITED STATES**; and
- If proposed activity is **DISCHARGE OF DREDGED OR FILL MATERIAL**; then

U.S. ARMY CORPS JURISDICTION UNDER CLEAN WATER ACT



Waters of the United States

- “waters of the United States” means:
 - All waters currently used, were used, or may be used in interstate or foreign commerce, including all waters subject to ebb and flow of tide.
 - All interstate waters, including interstate wetlands.
 - The territorial seas.
 - All impoundments of main waters (1-3) (above) and tributaries.
 - **All tributaries of the above waters.**
 - **All waters, including wetlands, adjacent to the above waters.**



SCOTUS Trilogy on “Adjacent Wetlands”

1. U.S. v. Riverside Bayview Homes, 474 U.S. 121 (1985) – SCOTUS upheld Army Corps/EPA 1975 rule that included adjacent wetlands within the definition of waters of the U.S.; Court upheld jurisdiction over 80 acres of low, marshy-land adjacent to navigable tributary of Lake St. Clair in Michigan.
2. SWANCC v. U.S. Army Corps, 531 U.S. 199 (2001) – SCOTUS invalidates Army Corps’ “Migratory Bird Rule”; Held: text of the CWA does not allow a ruling that jurisdiction can extend to ponds that are not “adjacent” to open water.
3. Rapanos v. United States, 547 U.S. 715 (2006) – SCOTUS agreed 5-1 that the Army Corps/EPA did not have jurisdiction, but the Justices split 4-1 as to the proper test to determine whether wetland is “waters of the United States.”



Rapanos Tests

- **Plurality** - Clean Water Act confers federal jurisdiction over non-navigable waters only if they exhibit a relatively permanent flow, such as a river, lake, or stream.
 - a wetland is jurisdictional if there exists **a continuous surface water connection** between it and a relatively permanent waterbody, such that it is difficult to determine where the waterbody ends and the wetland begins.
- **Kennedy's** - a wetland or non-navigable waterbody falls within the Clean Water Act's ambit if it bears a "significant nexus" to a traditional navigable waterway.
 - Such a nexus exists where the wetland or waterbody, either by itself or in combination with other similar sites, **significantly affects the physical, biological, and chemical integrity of the downstream navigable waterway.**
- Both tests currently apply in Minnesota when determining whether the Clean Water Act applies.



2015 CWA Rules (Rescinded, for now)

- EPA and Corps Attempt Rule Consistent with Rapanos
- Define “Waters of the United States” (WOTUS)
 - Traditional navigable waters
 - Interstate waters
 - Other / Isolated Waters (sig. nexus)
 - Tributaries (to NW) are now defined
 - The territorial seas,
 - Adjacent wetlands are now defined
- Created a “case by case” process for determining CWA jurisdiction.



CWA Administrative Wrangling

- February 28, 2017: President Trump issues EO 13778 directing EPA and Corps to review Clean Water Rule under a “Two Step” Approach
- July 27, 2017: Proposed rule rescinding the 2015 WOTUS rule and reinstating the prior regulations.
- December 11, 2018: EPA and Corps issue a pre-publication version of the new definition of Waters of the United States. The new definition is based on Justice Scalia’s opinion in the Rapanos decision.
- January 20, 2021: President Biden revoked President Trump’s EO to reconsider WOTUS.
- June 9, 2021: Notice of Intent to revise WOTUS
- August 4, 2021: Announcement of new rulemaking process.
 - Step 1: Rescind the 2018 proposed rule and temporarily replace it with the 1982 rule.
 - Step 2: Undertake a new process to propose a new WOTUS definition.
- August 30, 2021: Federal court in Arizona strikes down the 2018 Rule.
- November 18, 2021: EPA and the Corps announced its proposal to return to the 1982 Rule (with the modifications from the Rapanos decision).
- December 7, 2021: the proposed rule was published in the Federal Register. The public comment period is now open and will close on February 7, 2022.



Challenging Jurisdictional Determinations

Hawkes Co., Inc. v. U.S. Army Corps of Eng'rs, 963 F. Supp. 2d 868 (D. Minn. 2013); 782 F.3d 994 (8th 2015); 136 S. Ct. 1807(May 31, 2016); U.S. District of Minnesota (Jan. 24, 2017) :

- Hobson's Choice:
 - (1) proceed without approval and risk enforcement;
 - (2) proceed with seeking approval even if you disagree with jurisdiction; or
 - (3) abandon your project.
- Corps failed to document actual evidence regarding the volume, duration, and frequency of water flow from wetlands to Red River; Corps also failed to document the hydrologic, ecologic, and other functions performed by the tributary and all of its adjacent wetlands.
- Federal District Court Judge held that the Corps jurisdictional determination was "arbitrary and capricious"; although the typical remedy is to remand for further investigation, Court held that the Corps already had two opportunities and was undeserving of a "third bite at the apple."



Section 404 Permitting Exemptions

- **33 U.S.C. §1344(f)**

- (1)(A) The discharge of dredge or fill material from normal farming, silviculture, and ranching activities such as plowing, seeding, cultivating, **minor drainage**, harvesting for the production of food, fiber, and forest products, or upland soil and water conservation practices is not prohibited by or otherwise subject to regulation.
- (1)(C) The discharge of dredged or fill material **for the purpose of the maintenance of drainage ditches** is not prohibited by or otherwise subject to regulation.
- (2) Any discharge of dredged or fill material into the navigable waters incidental to any activity **having as its purpose** bringing an area of the navigable waters into a use to which it was not previously subject, where the flow or circulation of navigable waters may be impaired or the reach of such waters be reduced, shall be required to have a permit under this section.



Food Security Act – Swampbuster

Two events result in ineligibility:

- Persons who **plant an agricultural commodity on wetlands that were converted between December 23, 1985 and November 28, 1990** will be ineligible for program benefits in any year an agricultural commodity is planted unless an exemption applies. 16 U.S.C. § 3821(a).
- Persons who **convert a wetland making production of an agricultural commodity possible after November 28, 1990**, will be ineligible for program benefits until the functions of the wetland that was converted is mitigated or restored, unless an exemption applies. 16 U.S.C. § 3821(d).



Wetland Labels

- Wetland (W):
 1. predominance of hydric soils;
 2. inundated or saturated by surface or groundwater at a frequency and duration sufficient to support a prevalence of hydrophytic vegetation typically adapted for life in saturated soil conditions; and
 3. under normal circumstances does support a prevalence of such vegetation.
- Converted Wetland (CW):
 1. a wetland that has been drained, dredged, filled, leveled, or otherwise manipulated (including the removal of woody vegetation or any activity that results in impairing or reducing the flow and circulation of water) **for the purpose of or to have the effect of making possible the production of an agricultural commodity** without further application of the manipulations described herein if:
 2. such production would not have been possible but for such action; and
 3. before such action, such land was wetland, farmed wetland, or farmed-wetland pasture and **was neither highly erodible land nor highly erodible cropland.**



Wetland Labels

- Farmed Wetland (FW):
 1. a wetland that prior to December 23, 1985, was manipulated and used to produce an agricultural commodity, and on December 23, 1985, did not support woody vegetation and met the following hydrologic criteria:
 2. is inundated for 15 consecutive days or more during the growing season or 10 percent of the growing season, whichever is less, in most years (50 percent chance or more); or
 3. if a pothole, playa, or pocosin, is ponded for 7 or more consecutive days during the growing season in most years (50 percent chance or more) or is saturated for 14 or more consecutive days during the growing season in most years (50 percent chance or more).
- Farmed Wetland Pasture (FWP):
 1. a wetland that was manipulated and managed for pasture or hayland prior to December 23, 1985, and on December 23, 1985, met the following hydrologic criteria:
 2. inundated or ponded for 7 or more consecutive days during the growing season on most years (50 percent chance or more); or
 3. saturated for 14 or more consecutive days during the growing season in most years (50 percent chance or more).



Wetland Labels

- **Prior Converted (PC):**
 1. a converted wetland where the conversion occurred prior to December 23, 1985, an agricultural commodity had been produced at least once before December 23, 1985, and as of December 23, 1985, the converted wetland did not support woody vegetation and met the following hydrologic criteria:
 2. inundation was less than 15 consecutive days during the growing season or 10 percent of the growing season, whichever is less, in most years (50 percent chance or more); and
 3. if a pothole, playa or pocosin, ponding was less than 7 consecutive days during the growing season in most years (50 percent chance or more) and saturation was less than 14 consecutive days during the growing season in most years (50 percent chance or more).



Certified Wetland Determinations

- Once NRCS has made a certified wetland determination, it remains binding unless a person affected by the certification requests a review by completing form CPA-038 or the tract is no longer used for agricultural production.
- An affected person may request a review of a certified wetland determination only if a natural event alters the topography or the hydrology of the tract to the extent that the certified determination is no longer a reliable indicator of site conditions **or if the NRCS concurs that an error exists in the current wetland determination.**
- When a producer files form AD-1026 and reports he/she will create new drainage systems or improve or modify existing drainage systems not yet evaluated by NRCS, **the agency should first review the tract file to determine if it contains a certified wetland determination.**



Certified Wetland Determinations

- **“If NRCS certified a wetland determination prior to July 3, 1996, the certification will remain valid.”** A certified wetland determination means that the determination is of “sufficient quality to make a determination of ineligibility for program benefits under these regulations.” 61 Fed. Reg. 47019 (Sept. 6, 1996).
- **Post July 3, 1996 Determinations:** All determinations completed after July 3, 1996 are certified wetland determinations.
- **November 28, 1990 to July 3, 1996 Determinations:** Participant must have received a CPA-026 or other notification that a wetland determination was made; a map delineating the wetland location and size; the right to appeal the determination.
- **Pre-November 28, 1990 Determinations:** Participant must have received a CPA-026 or other notification that a wetland determination was made; a map delineating the wetland location and size; the right to appeal the determination; completion of an actual wetland determination appeal.



Pre-November 28, 1990 Determinations

- Determination must have met the **PROCEDURAL** and **QUALITY** mandates to be sufficient for purposes of determining eligibility.
- **Procedural** mandates required by NRCS:
 - Producer issued (1) map; (2) CPA-026; and (3) given appeal rights.
 - Producer actually filed an appeal.
 - A field visit occurred in conjunction with that appeal.
 - Final administrative decision in response to appeal.
- Qualifying for procedural mandate issues arise when:
 - Pre-November 28, 1990 determination was not adverse (i.e. all PC/NW);
 - Record of producer appealing determination but no record of site visit.
- **Quality** mandates required by NRCS – unspecified; BUT, *compare* 7 C.F.R. § 12.31 (1989) *with* 7 C.F.R. § 12.31 (1992) – language is identical.
- Technical determinations completed under pre-November 28, 1990 rules had same quality mandate criteria as determinations completed under post-November 28, 1990 rules.



Federal Swampbuster Cases

- Clark v. USDA (8th Cir. 2008) – “for the purpose or to have the effect of making production of an agricultural commodity possible” includes manipulation which allows production of an agricultural commodity where the production was not previously possible, by making an area farmable more years than previously possible, or by reducing crop stress or increasing yield.
- Koshman v. Vilsack (E.D. Cal. 2012) – court held that the word “possible” is not ambiguous; land that produced a viable commodity prior to the manipulation is not converted if crop stress is reduced or yield improved. “Viable commodity” does not include technical growth of one or two ears of corn, for example.



Federal Swampbuster Cases

- Barthel v. USDA (8th Cir. 1999) – Swampbuster permits landowners to farm wetlands at the level achieved prior to the act; changes in the watershed caused by human activity that increases the water regime can result in a person being allowed to adjust the existing drainage system to accommodate the increased water regime.
- Bass v. Vilsack (4th Cir.) – where a determination has been made that a wetland was converted, producer cannot challenge whether the area was a wetland if the appeals process has expired on the underlying certified determination; producer can request new certified wetland determination and use that process to challenge the wetland assertion.



Regulatory Update (Food Security Act)

Food Security Act of 1985: August 28, 2020 NRCS issued its final rule on Highly Erodible Land and Wetlands Conservation provisions. This revised the interim final rule issued and implemented in December 2018. The interim and final rule codified many positive things from USDA policy developed in the upper Midwest states in 2015-2018

Wetland Certification: Interim final rule and final rule codified USDA policy from the upper Midwest regarding certification of wetland determinations. 7 C.F.R. § 12.30(c)(1) now states wetland determinations will be certified if:

- Nov. 28, 1990-July 2, 1996: Determination issued on June 1991 version of CPA-026; person was notified that determination has been certified; map of sufficient quality to determine ineligibility for program benefits.
- If determination not issued on June 1991 version of CPA-026 (usually the other one is the 1989 version of the form) it will still be considered certified if there is other documentation that the person was notified of the certification and provided appeal rights and the map is of sufficient quality to make the determination. NOTE: Most 1989 026 forms I have seen have appeal rights on the front just above the NRCS-DC signature.
- July 3, 1996: All determinations issued after July 2, 1996 are considered certified.
- Pre-Nov. 28, 1990 Determinations: No clarity provided in the codified rule and application is different state to state.



Regulatory Update (Food Security Act)

Best-Drained Condition: The “best-drained condition” concept from the State Offsite Methods developed in the upper Midwest in 2014/2015 has been codified in 7 C.F.R. § 12.31(c)(2). Participants with certified determinations that are older than 2015 (but really older than 2018) should consider whether any areas marked “FW” or “FWP” would really qualify for a PC label under a request for recertification using the 2014/2015 SOSM and newly codified rules.

Request for Recertification: Previously, there was some risk in doing a request for recertification to correct an error on a certified wetland determination map because determinations were done on a tract basis and correcting an error on one wetland might add a wetland or expand wetlands elsewhere on the tract.

- The interim final rule and final rule changed the CFR to allow determinations to be done on the “tract, field, or sub-field” level; so now, participants can request recertification of an error on a specific wetland (sub-field) without opening up the entire certified determination for review. (7 C.F.R. § 12.30(a)(3)).



U.S. Fish & Wildlife Service WPA Easements

- 1958-1976
 - “. . . covenant and agree that they will cooperate in the maintenance of the aforesaid lands as a waterfowl production area **by not draining or permitting the draining**, through the transfer of appurtenant water rights or otherwise, of any surface water . . .”
 - “. . . **now existing or reoccurring** due to natural causes on the above-described tract . . .”
 - “. . . **By ditching or any other means; by not filling in with earth or any other material or leveling**, any part or portion of the above-described tract on which surface water or marsh vegetation is now existing or hereafter reoccurs due to natural causes . . .”
 - “. . . And **by not burning** any areas covered with marsh vegetation . . .”



U.S. Fish & Wildlife Service WPA Easements

- maintenance of drainage ditches and waterways is not typically allowed unless specifically exempted in the easement.
- “Excepted are certain drainage ditches which the parties of the first part may maintain and/or wetlands which are deleted from provisions of this easement. The above exceptions are shown on a map certified by the Regional Director **at the time of acceptance.**”
- look for easement summaries



U.S. v. Johansen (8th Cir. 1996)

- The U.S. FWS is clearly prohibited from restricting ditching and tiling on upland portions of field property.
- U.S. FWS may only protect and restrict the draining or filling of wetlands that existed on the date the easement was granted by the landowner to the federal government.
- To convict someone of damaging a federal wetland easement, the government must “prove beyond a reasonable doubt that identifiable, covered wetlands (as existing at the time of the easement’s conveyance and described in the easement summary) were damaged and that the defendant knew that the parcel was subject to a federal easement.



Regulatory Update (USFWS Easements)

U.S. FWS issued a memorandum on December 23, 2019 titled “Template for a Revised Format for Pre-1976 Wetland Easement Maps” which instructed local refuge managers to develop wetland easement maps and issue to owners of land with waterfowl production area easements that did not have concurrent maps negotiated and recorded with the easement. Owners of land are then given a number of days to appeal the map to the local refuge manager. Once the local refuge manager reviews and issues a final map, that map can be appealed to the Regional Director in Denver, and the Regional Director’s decision can be appealed to the Director in Washington, D.C. The 2019 Memo states that the maps, once finalized through the internal agency’s administrative process, will be used by the agency for enforcement decisions.



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Regulatory Update (USFWS Easements)

On February 26, 2020, the US FWS issued a memorandum titled “Drain Tile Setbacks and Legal Action on U.S. Fish and Wildlife Service Wetland Easements.” It provides instruction for providing tile setback recommendations on wetland easement tracts utilizing the van Schilfgaarde equation to computer the lateral effect distance of drain tile. The instruction states that if the setback distance calculated using van Schilfgaarde lies beyond the up-gradient catchment boundary of a wetland area, the US FWS sets the setback for that wetland area at the catchment boundary. And if the distance calculated using van Schilfgaarde lies within the up-gradient catchment boundary of a wetland area, the setback distance is applied. The distance calculated using van Schilfgaarde is used down gradient of a wetland area.



Wetland Mitigation

► Wetlands can generally be mitigated under:

- NRCS conservation compliance rules (Swampbuster).
- For activities requiring a Section 404 permit from the U.S. Army Corps (Clean Water Act).
- In Minnesota, for projects impacting wetlands covered under the Wetland Conservation Act or Public Waters Wetlands under the Public Waters Law.

► Wetlands can generally not be mitigated when:

- covered by a U.S. Fish & Wildlife Service WPA easement.



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Questions and Answers (If I Know Them)





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Thank you!

Please feel free to contact
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