



# Wetland Professionals Association

PO Box 131282, Roseville, MN 55113-0011



## September 2008 Newsletter [www.mnwetlandprofessionals.org](http://www.mnwetlandprofessionals.org)

Volume 13, Number 2

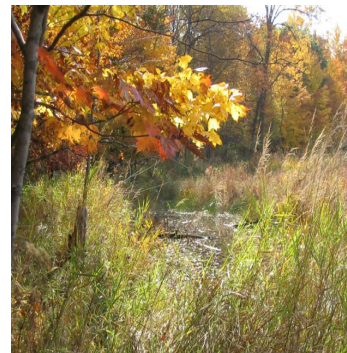
From the WPA President	Page 1
Out of Growing Season Wetland Delineations	2
Memberships Make This all Possible	3
WCA Rulemaking Update	3
A New Approach to Mitigation	4
WPA Forum & Events Schedule	6
Larson Retirement	6
How Much Credit for Upland Buffers	7
Reprints of WPA Comment Letters	9

### ATTENTION: Forum Location Change!

Our 2008/09 forums will start on October 1! Please note our new meeting location in the meeting room at REI in Bloomington at 750 W. American Boulevard just off of Lyndale and I-494 in Bloomington. The room is in the back of the store near footwear. See you then!

### From the WPA President by Allyz Kramer

As cool mornings arrive with the feel of fall in the air and summer field work is coming to a close, WPA looks ahead to our 2008-2009 season of educational forums and the 2<sup>nd</sup> Annual Minnesota Wetlands Conference. WPA has secured the large meeting room at REI in Bloomington (for free!) to host our 4 forums this season starting the first Wednesday of October. See the full schedule of forums in this newsletter. Planning for our 2<sup>nd</sup> Annual Wetlands Conference on January 21 is well underway – speakers have been secured and the U of M Continuing Education Conference Center has been reserved for the event. WPA is working with the U of M Wetland Delineator Certification Program (WDCP) for another great day of speakers. Thank you to Board Member Jyneen Thatcher for leading the WPA conference committee, Liz Wells from the WDCP, and all WPA members that have volunteered their time thus far for program development. See this issue of the newsletter for more details on the upcoming conference.



### Fall is in the Air

Photo by J. Thatcher

Despite a busy field season the Board has been closely watching the development of the WCA Draft Permanent Rule and has participated in the 2008 Stakeholder Meetings. In July 2008, the Board sent a comment letter to the BWSR on proposed Permanent Rule changes. This comment letter was sent to all WPA members via e-mail in July, and is again in this issue of the newsletter. Following the Board's letter to BWSR, the Board received a comment letter from a group of WPA members with a differing opinion. Through direct coordination with the group of WPA members, the Board recommended this group of WPA members also send their comments directly to the BWSR. Their letter is also included in this newsletter. The Board respects the opinions of its members and encourages all to get involved with the WCA Permanent Rule-making process. WPA will participate in the final three Stakeholder meetings (Sept 25, October 9, and Oct 23). With only a few weeks remaining for WPA to participate, the Board recommends that additional comments from its members be submitted directly to the BWSR as part of the permanent record. See the BWSR website ([www.bwsr.state.mn.us/wetlands](http://www.bwsr.state.mn.us/wetlands)) for all the updates on the WCA draft Permanent Rule and future opportunities to make formal comments.

The election of new WPA Board members is also on the horizon. The Board is now accepting nominations of WPA members in good standing for election to fill four Board positions starting January 2009. See more information on the upcoming Board election in this newsletter. As always, the current WPA Board encourages any of its Voting Members to run for election. As an elected member, you are instrumental in overseeing the actions of the association and directing educational programming for our membership. The future of WPA is only as strong as its elected Board and willing members to work together to achieve our Association's mission. If you have never served on the Board, your new perspective is a fitting addition to the Board. If you are a former Board member and are considering running again, your past experience and present perspective is welcomed.

Editor: Ken Powell, MN Board of Water & Soil Resources, Ph. 651-296-0874, [ken.powell@state.mn.us](mailto:ken.powell@state.mn.us)

Submissions of Wetland-Related Articles and News Items Welcome

## Out of Growing Season Wetland Delineations by Ken Powell

About this time every year we encounter a continuing controversy surrounding out-of-season wetland delineations. As we approach the end of the “official” growing season in Minnesota (first part of October) there are often conflicts between applicants/consultants trying to get delineations approved and local government units trying to review them before the growing season ends. In Minnesota, some local governments set a firm fall deadline for submittal of delineations, others base their deadline on weather conditions, and others are flexible with no firm deadline. Some wetland professionals maintain that delineations must be conducted and reviewed during the growing season because the 87 Manual and the Wetland Conservation Act say so. Others maintain that there should be no firm deadline and they cite the same sources. So, what is the truth?

Let’s first look at the 87 Manual for delineating wetlands. The Manual defines growing season and discusses its importance in relation to the definition of a wetland, but there is no direct discussion of conducting wetland delineations outside the growing season. It frequently discusses the importance of determining whether or not wetland hydrology exists during the growing season, but it goes on at great length to describe determination methods and procedures that do not necessarily involve inspection of the area during the growing season. In fact, many of the methods and data sources described in the Manual can be utilized for determining the 3 parameters without necessarily doing any field sampling regardless if it is within or outside the growing season. The “problem areas” section of the Manual probably comes the closest to discussing out-of-growing season delineations. In this section there are references to determining whether or not wetland indicators are “normally present during a portion of the growing season”. But again, references to ways of making this type of determination refer to methods and procedures that do not necessarily require examination during the growing season. So in summary, the 87 Manual does not directly address out of growing season delineations.

How about the Minnesota Wetland Conservation Act (WCA) Rules? The rules incorporate the 87 Manual by reference. Under wetland boundary and type determinations (8420.0225) the WCA rule states that the landowner requesting the determination must submit “wetland delineation field data” (among other things), but does not address when that data needs to be collected. So the WCA does not address this either.

Now let’s look at the joint BWSR-Corps 1996 guidance for submitting wetland delineations in Minnesota. Here are some highlights of what it says:

- “It is possible to conduct wetland delineation outside of the growing season, but severe limitations are often encountered.”
- “It may be possible during winter conditions to delineate wetlands with abrupt, obvious boundaries.”
- “In the absence of snow cover, delineations in October and November may not pose serious problems, but the onset of frozen soils conditions and snow cover may preclude identification of soils and certain herbaceous vegetation.....”
- “It is highly recommended that delineations conducted outside the growing season be field-checked during the growing season prior to final acceptance...”

Of the “official” documents related to completing wetland delineations in Minnesota, it appears that only the 1996 Corp-BWSR guidance addresses the out of season wetland delineation question. Clearly the message is to use common sense and if you deviate from the norm, be able to justify it. This is a theme that is constant throughout the 87 Manual. While wetland delineations are best performed during the growing season, there is nothing magic about the exact date the growing season officially ends.

As the 1996 Corps-BWSR guidance suggests, each delineator and regulatory review official should evaluate each situation on a case by case basis and determine if an out of growing season delineation and/or review is warranted. The bottom line is that local governments that set strict deadlines for delineation submittals in the fall based on growing season calendar dates are doing so as a matter of policy, not science or law. They may have legitimate policy reasons for doing so (staff workloads, seasonal schedules, etc.), but it should be clear that neither the WCA, 87 Manual, or applicable guidance requires or directs them to do so.

The **WPA Board** has been reviewing it’s **Bylaws** and will have some proposed changes to provide more direction and clarification. These changes need to be reviewed and voted on by the membership with our November elections. Proposed changes will be e-mailed to the membership soon. Voting members will be able to **vote** yes or no on these changes during the 2009 Board member elections in November. In the meantime, if you have questions, please contact Andi Moffatt at [amoffatt@wsbeng.com](mailto:amoffatt@wsbeng.com) or 763-287-7196.

## Memberships Make This all Possible by Barbara Walther, WPA Treasurer

2008 has been a good year financially for the WPA. In 2007, when the Board chose to schedule the first annual Minnesota Wetlands Conference in January 2008, they made the leap of faith that the finances of such a venture would work out. The WPA partnered with the Wetland Delineators Certification Program, agreeing to share the costs as well as split any profit. After all expenses were paid and all was said and done, the WPA cleared \$1631.73!

One of our annual expenses is the May field trip, which in 2008 was held at the University of Minnesota Cloquet Forestry Center. We were able to cover all but \$307 of the costs with the registration fees (Income of \$960 in member/non-member fees and expenses of \$1,267). The greatest cost for this year's field trip was the food, at a total of \$863. From what I heard, it was all worth it.

As reported previously, some of the typical costs that the WPA still has each year are as follows:

Web service \$20/monthly  
 Web hosting \$30/year  
 Domain registration \$190/5-year  
 Internet fee \$50/year  
 Web design \$300/year (approximate)  
 Snacks for forum \$25/forum average  
 Video supplies \$15/forum average  
 Post office box rent \$40/year

In January 2008, WPA changed banks mainly for cost savings. We have been very pleased with the service of the new bank, and our checking account balance has bumped up over \$9,000. Also early in the year, WPA upgraded our accounting software (which had been donated nearly 15 years ago) at a cost of \$160.

As of August 2008, we have a total of 175 members, most of whom are from Minnesota and Wisconsin. We have one member from North Dakota, two members from Michigan and this summer we received our first international membership - welcome Darin Brenner who joins us from Auckland, New Zealand. If Darin is ever able to make it to a forum, we'll have to buy him an extra cup of coffee. One of our student members, Matt Meyer, is completing his Master's in Ecology in Sweden at Linköping University. Matt is currently in the States finishing the work on his Master's, so be sure to ask him about it at one of our Forums.

If you have any questions or suggestions about any of our expenditures, please contact any of the Board Members. And remember, now is the time to be thinking about renewing your membership for 2009!

### WCA Permanent Rule-making Update

Stay tuned to the BWSR website ([www.bwsr.state.mn.us/wetlands](http://www.bwsr.state.mn.us/wetlands)) for regular updates on the WCA draft Permanent Rule. WPA's involvement on the Stakeholder Advisory Committee will continue until the end of October 2008. Final meetings are scheduled for September 25<sup>th</sup>, October 9<sup>th</sup>, and October 23<sup>rd</sup>.

BWSR anticipates full compilation of the draft Permanent Rule changes around mid-November 2008, which will then become available for formal public comment in January 2009.

The WPA Board strongly encourages you to submit comments to BWSR regarding the proposed WCA Permanent Rule changes. If you have any questions about the Permanent Rule-making process or WPA's involvement thereof, please contact Allyz Kramer, WPA President, at 651.490.2162 or via e-mail at [akramer@sehinc.com](mailto:akramer@sehinc.com).

### Call for Nominations to the WPA Board

Are you interested in getting more involved in wetlands in Minnesota? Want to meet more people in our profession? New ideas for the WPA? Then it is time to nominate yourself (or your friends) to run for the WPA Board. We have 4 positions open for 2009. We will be taking nominations through October 15, 2008.

Officers (president, vice president, etc.) and administrative positions (web site coordinator, etc.) are determined by the elected Board. Board members must make minimum time commitments to serve. Contact a current or past Board member for more information.

We will contact nominees to be sure they are interested in running and we will need a biography of those running for the Board. This is a great way to get involved and make a difference in your profession!

Please send your nominations (for yourself or someone else) to Andi Moffatt at [amoffatt@wsbeng.com](mailto:amoffatt@wsbeng.com) or 763-287-7196 by Oct 15.

**A New Approach to Wetland Mitigation (Change is Hard)**

By Ken Powell

There is much controversy surrounding proposed WCA rule changes, St. Paul District Corps mitigation guidance, and the current Memorandum of Understanding (MOU) between the Corps and BWSR. Policies related to buffer credit amounts, in advance replacement, and in-kind replacement have spawned much discussion. These issues are further complicated by the new Federal wetland mitigation rule which is interpreted differently by different people. I believe that much of the controversy boils down to a resistance on the part of many to change the way we look at, approach, and deal with mitigation. Related to this, I will discuss the following: big versus small picture mitigation approaches, functional replacement, and the concept of policy versus science.

**Big versus Small Picture Mitigation Approaches**

The Federal wetland mitigation rule emphasizes a “big picture” approach to mitigation. In particular, it prioritizes a “watershed approach” to mitigation. Simply put, the watershed approach involves an assessment of watershed needs and a subsequent tailoring of wetland mitigation to fulfill those needs. In essence it says, place the mitigation where it provides the most public value. Past and current wetland regulatory programs are still stuck in the old mode of trying to match characteristics of the mitigation with the characteristics of the impacted wetland. In addition, current regulations primarily deal with mitigation on a project by project basis without consideration of how it fits into the overall watershed goals, functions, and values, or how mitigation goals are accomplished on a programmatic basis.

The watershed approach and many other aspects of the Federal mitigation rule direct us to focus on the needs of the watershed in which the impact is taking place, while de-emphasizing a focus on the characteristics of the impacted wetland. Regardless, many of us are still focused on replacing vegetative type for type and wetland acre for wetland acre. In my opinion this is a result of our natural inclination to resist change. It is certainly easier to look at the impacted wetland vegetation type and set that as the mitigation goal. It is harder to look at mitigation more comprehensively by evaluating watershed functions, determining watershed needs, and setting mitigation goals based on those needs. However, if we want mitigation that “means something” in terms functions that we value as a society, then we need to start changing the way we look at mitigation. In addition, we need to think about mitigation in a broader, ecological context and get away from a strict project by project assessment. Too often mitigation is sited in areas that are not self-sustaining in the long term and have limited connectivity to other resources. In essence, we are creating a patchwork of disconnected mitigation areas that could have significantly greater functional value to us if they were integrated into a larger ecological context that focuses on watershed needs.

**Functional Replacement**

Replacement of wetland functions has long been a subject of debate. Some argue that we cannot adequately measure functions, so we should continue to utilize surrogates for functional replacement, such as replacing vegetative type for type and ensuring that not “too much” upland is used to replace impacted wetlands. I think that with the new approach to mitigation outlined in the Federal rule and our improved knowledge/thinking about functional replacement, these surrogates are increasingly ineffective and irrelevant. Many studies show that while wetland regulatory programs have reasonably replaced wetland acres that were impacted, they have not succeeded in replacing wetland functions that we value. So, how do we increase mitigation functionality and sustainability? I believe and current literature suggests two main ways: 1. Better siting of wetland mitigation to provide needed watershed functions (i.e. the watershed approach) and increased sustainability; 2. Increased buffers to improve wetland functionality and sustainability.

**Replacing Wetlands with Uplands (the upland buffer issue)**

We protect and conserve wetlands for the functions that they perform that provide value to society. We all know what those functions are (floodplain storage, wildlife, water quality, etc.). The distinction between what is wetland and what is upland is purely arbitrary. We use the 87 Manual to provide a scientific basis for categorizing a landscape feature as wetland or upland because of the assumption (that is generally true) that wetlands provide an array of functions that are different or at different levels than uplands. However, when we get to that “inbetween” area where wetlands and uplands meet, this assumption breaks down or is tenuous at best. In fact, many functions that wetlands provide are also provided by areas that are technically upland, sometimes even at higher levels depending on site conditions and the particular function. My point is that this issue of replacing wetlands with uplands is not that important if you look at the landscape as a continuum between upland and wetland. What is important is function and value. If you look more broadly at replacement as a functional unit, giving credit for what is technically upland is irrelevant as long as it contributes to the functions we are trying to replace. Upland buffer is necessary for wetlands to function at a high level. It is not just “the wetland” or “the buffer”, it is “the functional unit”. The buffer and wetland are dependent on one another and we should not be viewing them separately. Looking at this issue as black and white (only wetland

must replace wetland) is "old school" ecology that does not recognize the interactions of wetlands and uplands to provide the functions that we value as a society.

### **Policy Versus Science**

A common misconception in regard to establishing mitigation rules and guidelines is that everything is and should be science-based. Science tells us what is happening in nature or "on the ground". Policy is where goals are set and the actions necessary to achieve those goals are determined. I maintain that wetland regulatory programs are and should be a combination of science and public policy. Much of the debate about credit allocation for buffers can be attributed to the emphasis on maintaining a strictly scientific approach to wetland mitigation. The Federal mitigation rule clearly recognizes that other factors are and should be considered for wetland mitigation (i.e. economic, social, etc.).

In regard to the current debate among WPA members as to the amount of credit to allocate mitigation, there is a view that some mitigation actions (restoration of drained wetlands for example) provide more functional increase than others (buffers for example) and thus this is the reason to assign higher credit allocations for some and lower for others in accordance with their perceived level of functional benefits. I believe that this is a *narrow* approach that does not recognize the difference between policy and science, and again separates buffer and wetland rather than looking at them as a functional unit. In theory it may be appropriate to start with that general priority order, but we then have to look at how it does and will work in practice.

For example, many mitigation projects are unsuccessful in the long term or do not provide the desired level of function due to a lack of sufficient buffers. Why are the buffers lacking? Because establishing buffers involves taking away upland (typically buildable upland) which is a premium to many landowners. So, from a public policy perspective how can we get more buffer? One measure is to make it mandatory and another is to give it more credit. This is a complicated issue. There is a limit to the amount of buffer that can be required just due to law, fairness, established public policy, etc. Plus a mandatory buffer on one site may provide substantially more functional benefit than that same mandatory buffer on another site. How do we account for this and how do we provide incentives to do buffers when they are appropriate? One solution is to allow more credit for buffer and bigger buffers in situations where it can provide substantial functional benefits to the replacement wetland. This would of course violate the established "priority order" for credit allocation. So what? The reality is that we are still not going to get a large amount of buffer simply because uplands are a premium. If we look at the bigger picture of mitigation in the context of statewide resource benefits, then the reality is that a relatively few projects that choose to pursue more buffer will be substantially offset by the majority of projects that just do the minimum mandatory buffer (if one is imposed).

What I am suggesting above is a policy decision to give more credit for buffers in certain instances in order to raise the quality of mitigation knowing that buffers will still not be a large component of mitigation on a statewide basis. Arguments about using "too much" upland to offset wetland impacts on any particular project totally miss the points of bigger picture mitigation (as espoused in the watershed approach and Federal mitigation rule) and the concept of policy versus science. They also miss another major point of the new approach to mitigation—it is all about function and value. It is also about looking at mitigation from a larger perspective (from a programmatic view) and *not* from a narrow perspective (permit by permit). It is *not* about wetland versus upland or just acres of mitigation.

### **In Conclusion**

My point throughout this article is to emphasize the need to look at mitigation in a different way. The different way is articulated very well in the National Research Council's study on mitigation and the new Federal mitigation rule. It involves looking at wetland mitigation in the context of the public value that wetlands (via their functions) provide, basing mitigation on watershed needs instead of on the characteristics of the impacted wetland, and looking at mitigation as a functional unit rather than upland (i.e. buffer) versus wetland. Use of this new approach makes discussions about in-kind replacement and uplands replacing wetlands less relevant. My hope is that if we can break away from the old way of thinking about mitigation, then we can more easily make sound wetland policy decisions that get us better, more effective wetland mitigation in the context of statewide resources.

### 2008-09 WPA Forum & Events Schedule

- **October 1**— Forum on Reed Canary Grass Competition; speaker is Dr. Martha Phillips from St. Catherine University
- **November 5** — Forum on Wetland Hydrology Monitoring; speaker is Eric Mohring, hydrologist from the MN Board of Water & Soil Resources
- **November**— 2009 WPA Board Elections for 4 seats on the WPA Board.
- **January 21 (09)** — 2nd Annual Minnesota Wetlands Conference—St. Paul, MN
- **March 4 (09)** - Forum on Soils in Created and Reference Wetlands; speaker is Ben Meyer, Bonestroo Associates.
- **April 1 (09)** - Forum on Proposed WCA Rule Changes; speaker will be from the WCA Rule Team, MN Board of Water & Soil Resources.
- **May/June (09)** - Annual WPA Field Trip; time, location, and topic to be determined.

All Forums will be held at the meeting room of the REI store in Bloomington, Minnesota (750 W. American Blvd.—south side of I-494 at Lyndale Avenue). Registration and refreshments start at 2pm and forum presentations typically run from 2:30 to 4pm.

### Larson to Retire

Long-time State Soils Specialist **Greg Larson** with the MN Board of Water & Soil Resources will retire on November 25, 2008. Greg is one of the most well-know and respected professionals dealing with wetlands and soils in Minnesota. He has been instrumental in training wetland professionals in the State and has provided invaluable expertise on many projects and issues over the years. Greg intends to pursue “other interests” after retirement, many of which involve feathers, guns, and dogs. Please take the time to congratulate Greg on his remarkable career.



Greg Larson (center) teaching a wetland delineation class.  
Photo by J. Thatcher

### Return Forum Tapes to WPA Library

If you have borrowed VHS tapes or DVD copies of past WPA Forums, please return those ASAP! With the new Wetland Delineator Certification Program requiring educational forums, the WPA Board is receiving many more requests from members interested in viewing Forums to meet their educational requirements. Rather than making a new tape for every request, we prefer to make a few copies and lend them to our members. Two years ago, the Board investigated new video camera equipment that would allow taping directly to DVD, but the anticipated expense (\$800-\$1,000) was higher than we could justify at that time. With more requests for forum tapes, the Board will have to reconsider this expenditure over the next few months. In the meantime, please return the forum tapes you've borrowed to Allyz Kramer or Mark Perry.

## How Much Credit for Upland Buffers?

By Steve Eggers

(The views expressed in this article are the personal views of the author and do not necessarily represent the views of the U.S. Army Corps of Engineers or the Department of Defense.)

### Background

Minnesota's Wetland Conservation Act (WCA) splits credits for wetland replacement into two types: New Wetland Credits (NWC) and Public Value Credits (PVC). Upland buffers were placed in the PVC category and could only be used above 1:1 NWC. In other words, compensation sites would consist of a 1:1 replacement by wetland restoration/creation/enhancement. Upland buffers could only be applied over and above this baseline. Upland buffers were granted 1:1 credit (1 acre of upland buffer generates 1 Public Value Credit).

For Section 404 of the Clean Water Act, the Corps uses one sum of wetland credits, including upland buffers (upland buffers are so important that they are considered wetland credits). Each compensation technique (restoration, creation, enhancement, upland buffer, etc.) is assigned a crediting ratio based on the degree of "functional lift," or increase in wetland functions, generated by that technique.

The above situation requires that three columns of numbers be calculated and tracked for each compensation site: NWC, PVC and 404 wetland credits. Different ratios, time lines and terminology between WCA and 404 resulted in confusion and frustration. In response to this situation, the BWSR and the Corps conducted a 2.5-year process that culminated in a Memorandum of Understanding (MOU) signed in May 2007. Most significantly, both the state and federal wetland regulatory programs in Minnesota would adopt a single crediting system tracking only one column of numbers – wetland credits. Regulatory simplification would be achieved to the extent feasible. The MOU assigned upland buffers, in native vegetation and not manicured, 4:1 credit (4 acres of upland buffer generates 1 wetland credit).

This means a major change for WCA in terms of upland buffer crediting. PVC and the "over the 1:1" wetland replacement would no longer be used. Instead, upland buffers would be included in a single column of "wetland credits" along with wetland restoration, creation, etc. In addition to regulatory simplification, this approach would give bank sponsors more flexibility as there would no longer be separate NWC and PVC to sell; rather, all credits would be sold as wetland credits. However, opposition to this approach was expressed during the WCA rule-making process due to a concern that 4:1 wetland credit is an insufficient incentive for bank sponsors and permittees to do more than minimum upland buffers.

The two approaches above can be summarized as: (1) upland buffers given 4:1 wetland credit summed into a single column of credits that can be used with no restrictions/qualifications; versus, (2) upland buffers given 1:1 Public Value Credit that is restricted to situations "over the 1:1" wetland replacement, and tracked separately from NWC and 404 wetland credits.

### Crediting Upland Buffers<sup>1</sup>

There are two key factors to the upland buffer crediting issue: (1) what is the appropriate amount of credit for upland buffers; and (2) what is the minimum wetland/maximum upland percentage of credits at a wetland compensation site.

Credits are the currency of wetland compensatory mitigation with the amount of credit determined by the degree of functional lift provided by a compensation technique. In Minnesota, we currently lack a functional assessment method that scientifically quantifies the functional lift of various compensation techniques. The alternative is use of "acreage surrogates," which both WCA and 404 employ. As wetland scientists, we can identify and rank acreage surrogates according to their potential functional lift.

For example, fully restoring an effectively-drained wetland generates 1:1 credit (1 acre restored generates 1 wetland credit). Fully restoring a partially-drained wetland can generate 1:1 or 2:1 credit (2 acres restored generates 1 wetland credit). Creation of a fully functioning wetland can generate 2:1 credit, while enhancement of wetlands can generate 3:1 credit (3 acres enhanced generates 1 wetland credit).

Where does upland buffer fit in this hierarchy of crediting wetland compensation? The critical role of upland buffers is protecting and enhancing the functions of adjacent wetlands. This warrants compensation credit. However, upland buffers are not wetlands and as such do not function as wetlands; therefore, upland buffers are not credited with the functional lift of wetland restoration, wetland creation or wetland enhancement. One acre of upland buffer does not equate with the functional lift of fully restoring one acre of effectively-drained wetlands, or creating one acre of fully functioning wetlands.

The 4:1 credit for upland buffers under the MOU acknowledges the important role of upland buffers and appropriately places the functional lift of upland buffers behind that of wetland restoration

(1:1 to 2:1), wetland creation (1:1 to 2:1) and wetland enhancement (3:1), but ahead of wetland preservation (8:1) [ratios are from the MOU].

### **Minimum Wetland/Maximum Upland Percentages for Wetland Compensation Sites**

The role of upland buffers is so important that the BWSR/Corps MOU requires that compensation sites establish a minimum upland buffer (50-foot width in non-municipal areas, 25-foot width in municipal areas). This is not a trivial requirement. A 50-foot buffer around a 1-acre wetland doubles the size of the compensation site<sup>2</sup>. A 50-foot buffer around a 10-acre wetland adds nearly 3 acres to the compensation site. The MOU allows for additional upland buffer up to 25% of the total credits generated at a compensation site. This provides flexibility for designing compensation sites.

WCA and 404 are wetland regulatory programs with the goal of no net loss of wetland functions. The purpose of compensatory mitigation is to replace the wetland functions lost due to authorized projects; therefore, compensation sites need to be dominated by credits generated via wetland restoration/creation/enhancement (hereinafter, "wetland-derived compensation"). The BWSR/Corps MOU sets this minimum at 75% of the credits generated at a compensation site. A 75/25 split of credits generated by wetlands/uplands makes sense for wetland regulatory programs in Minnesota.

### **Alternative Approach for Upland Buffer Credit**

An alternative approach raised during the WCA rule-making process would grant 2:1 credit to upland buffers limited to twice the wetland acreage of the compensation site. This proposal inexplicably assigns upland buffers the functional lift of restoring partially-drained wetlands, or creating fully functioning wetlands. Elevating upland buffers to this level gives the impression of diminishing the functional lift provided by wetland restoration. Additionally, using acres instead of credits as the limiting factor is problematic.

A specific example: a compensation site consists of 10 acres of wetland restoration at 1:1 credit. The maximum upland buffer would generate 10 credits (10 acres of wetlands x 2 = 20 acres of upland buffer; 20 acres of buffer x 50% = 10 credits). This means that 67% of the acreage and 50% of the credits at this wetland compensation site would be composed of or generated by *uplands*.

In other scenarios using this approach, wetland-derived credits composed between 38% and 50% of the total credits at *wetland* compensation sites. This is a significant reduction compared to the 75% minimum for wetland-derived credits set by the MOU. The dominance of uplands allowable under the alternative approach is a stark indicator that it is not credible from a wetland science perspective, nor is it sound wetland policy.

### **Concerns Regarding Minimum Upland Buffer**

From an ecological standpoint, restoration, management and protection of large acreages encompassing the entire upland-wetland continuum would be ideal. While this goal is admirable, it cannot be the driving force in wetland regulatory policy. We are working within the confines of wetland regulatory programs and must not lose sight of the goal of replacing the wetland functions lost due to authorized projects. The focus is on wetlands and their immediate upland buffers. Other programs (e.g., CRP, CREP, RIM), conservation groups (e.g., Pheasants Forever, Ducks Unlimited), land trusts, legislation, and purchase/easement for wildlife management areas, are appropriate means to strive for setting aside larger blocks of uplands.

Given high land values, some are concerned that only the minimum upland buffer would be established at wetland compensation sites unless at least 2:1 credit is granted for upland buffers. First, as stated above, this level of credit (functional lift) for upland buffers is without merit and would deviate substantially from the goal of "no net loss." Second, the minimum buffers under the MOU are not trivial. Third, minimum buffers can be adequate if properly designed and installed. Fourth, it is inappropriate to contort wetland regulatory programs into a tool for leveraging set-aside of larger blocks of upland acreage.

### **Regulatory Simplification**

The MOU is non-binding and some have advocated that new WCA rules break away from this interagency agreement. There is a clear choice here. The MOU aligned two very different regulatory programs to the greatest extent feasible. With the MOU, regulatory simplification is achieved. Without the MOU, regulatory complication would persist, including calculating and tracking different numbers for the same compensation site.

<sup>1</sup> This discussion does not pertain to converting the remaining upland buffer PVC in the state banking system to wetland credits, which is a separate issue.

<sup>2</sup> Geometry plays a role here; the example calculations used circular polygons.

## WPA Board Comment Letter on WCA Rule Changes

Based on recent WCA Stakeholders Advisory Committee Meetings in May and June 2008 and information presented therein regarding Actions Eligible for Credit, the WPA Board has discussed the proposed changes for WCA Permanent Rules. On behalf of the WPA, I hereby provide the following formal comments regarding proposed WCA Rule changes for Actions Eligible for Credit, specifically credit allowed for "buffer" and how this relates to the interagency Memorandum of Understanding (MOU) established between BWSR and the St. Paul District of the U.S. Army Corps of Engineers in May 2007 for wetland replacement in Minnesota.

### Interagency Memorandum of Understanding (MOU)

Per WPA's involvement with the WCA Stakeholders Advisory Committee since 2006, it is the Association's understanding that the MOU established between BWSR and the St. Paul District of the U.S. Army Corps of Engineers in May 2007 was ultimately negotiated through over two years of inter-agency collaboration to clarify and simplify compensatory mitigation for wetland impacts in Minnesota. Furthermore, it is my personal understanding through my involvement on the BWSR WCA Stakeholders Advisory Committee since 2006 that a primary goal in re-writing WCA is *not only* to achieve the Governor's objective of no net-loss of wetlands in the state, but also to streamline the wetland permitting process in the state. On behalf of the WPA membership, the WPA Board believes that maintaining the MOU between inter-agencies is an effective, efficient, and necessary tool for streamlining wetland permitting in the state and applies wetland protection standards based on scientific/technical data from current wetland science. Furthermore, our understanding of the MOU is that it is in consort with other regulatory programs around the nation, meaning it is legally defensible.

In preparation of proposed WCA Permanent Rule, the WPA recommends that proposed changes not deviate from the interagency MOU. We believe that deviation from the MOU through Permanent Rule would bring wetland permitting in the state backwards by once again calculating two different mitigation requirements for impacts, only further confusing agencies, WCA administrators, consultants, applicants, bank owners, and legislators.

### Actions Eligible for Credit – Buffer Areas

A significant deviation from this MOU involves the proposed options for "buffer" credit under "Actions Eligible for Credit" (8420.0541, proposed Subp. 2 Buffer areas). At the May 22, 2008 WCA Advisory Committee, three options developed by the Technical Advisory Committee were presented for calculating credit achieved from "buffer" (which we understand could be defined as upland, or in some instances, "to allow for credit of wetland buffer where wetlands rather than uplands surround a restored wetland and their protection would add to the value of the project"). Regarding the options presented, the WPA makes the following recommendations:

- We believe Option 2 most closely aligns with the MOU approach and should be put forth into Permanent Rule.
- Option 1 is similar to the buffer approach in the current Exempt Rule, but does not align with the streamlined approach in the MOU, therefore we recommend rejecting this option. Option 3 blends portions of the MOU and the current WCA Rules, but allows options that would increase buffer credit from 25% to 50%, the maximum size of the buffer area would be reduced from four times the size of the replacement wetland to twice the size of the replacement wetland (maximum amount of credit would remain at 1:1 ratio to the replacement wetland).

We understand that the BWSR Technical Committee is recommending Option 3 for Permanent Rule. However, the WPA Board is concerned with several perceived problems with this option, as follows:

- The recommendation is confusing by mixing the terminology "acres" and "credits" (e.g., 50% *credit*; twice the *acreage*). As pointed out in several WCA Advisory Committee meetings, clear guidance as to what constitutes *credit* is needed and anticipated, therefore as much as possible, reference to "acres" should be removed from Rule language. WPA recommends creating a concise table of Actions Eligible for Credit and how they are to be calculated, and discontinue use of or reference to "acres" when in Rule.
- There is no distinction between high quality and low quality upland buffer. We believe that the 4:1 vs. 10:1 crediting of upland buffer described in the MOU provides substantive incentive, particularly for wetland bank owners, which could be lost under Option 3. It is essential that upland buffer crediting include an evaluation of, and distinction between, high and low quality buffers.

We are unclear as to the scientific and/or technical basis for the Technical Committee's recommendation for increasing buffer credit up to 50%. Allowing up to 25% credit for upland buffers gives the benefit of the doubt to the degree to which upland buffers enhance wetland functions. However, we question whether the Technical Committee's recommendation for granting 2:1 (50%) credit to upland buffers would be legally defensible, as it appears to be unprecedented compared to other regulatory frameworks nationwide. Furthermore, we wonder if this proposal

- detracts from the Governor's Clean Water Cabinet initiative striving toward no net-loss of wetlands. Lastly, we question whether this proposal is based on sound wetland science – consider that this would put upland buffer credit on par with hydrologic restoration of a partially drained wetland, and potentially give more credit to upland buffer than wetland enhancement (3:1 ratio or 33% credit).

We are concerned that Permanent Rule deviating from the established interagency MOU would require tracking different numbers of credits for the same compensation sites to meet the requirements of both the state and federal programs. We believe this would only perpetuate confusion in wetland permitting.

We hope that these comments will be considered by BWSR and those members of the Technical Committee, Advisory Committee, and others involved in development of WCA Permanent Rule. The WPA appreciates the opportunity to be involved in this important process. On behalf of the WPA, if you have any questions about these comments, please feel free to contact me directly at 651.490.2162 or via e-mail at [akramer@sehinc.com](mailto:akramer@sehinc.com). We appreciate your attention to these comments.

### Comment Letter from a group of WPA Members on WCA Rule Changes

WPA Members signing the letter include Melissa Barrett, Kelly Bopray, Rob Bouta, George Callow, Michael DeRuyter, Michael Graham, Mark Kjolhaug, Scott Krych, Beth Kunkel, Kelly Kunst, Lydia Nelson, Ron Peterson, Ken Powell, Frank Svoboda, Matt Volbrecht, Brian Watson, David Weetman, and Michael Whitt

As a group of WPA members which includes several past presidents and board members, we are writing to offer a contrary opinion to those expressed by the Wetland Professionals Association Board of Directors in a letter dated July 15, 2008. It is our belief that the comments submitted by the WPA Board do not reflect the opinions of a significant number of its members. We will be soliciting the WPA membership in the next week for additional signatories of support for our views. We have notified the WPA Board of our disagreement and intent to solicit the membership for support of our position.

Specifically, we disagree with comments regarding upland buffers and the proposed credit of 25% for such areas. The science supports that buffers are integral to wetland functions and values, and we believe that WCA rules should fairly encourage the establishment of wider buffers rather than discourage them. Regardless of USCOE policy, WCA has opportunity to allow credit for uplands at any ratio. In fact, WCA has been allowing 100% credit for uplands since 1991 above and beyond any USCOE required [1:1] replacement. Many wetland impacts in Minnesota are not currently jurisdictional under Section 404 and these present opportunities to continue to utilize uplands as credit for replacement above 1:1 and up to the mitigation ratio deemed appropriate by the TEP. Buffers require substantial cost and effort and serve several important functions. Regulatory agencies have tightened requirements for upland buffers concomitantly with proposals to reduce their credit to 25% of a wetland credit. This amount does not adequately compensate those that own and manage mitigation areas in the current economic climate, and discourages the establishment of buffers beyond the absolute minimum required.

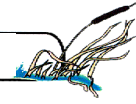
We have additional concerns regarding the MOU and its implications for the future direction of WCA. The permanent WCA rules process should not be constrained by the MOU. The MOU is a non-binding agreement that was implemented without a public review and comment process. While the ideas contained within the MOU certainly should be considered, we should not assume the agreement contains the best solutions to the final rule framework. Minnesota was one of the first states to implement a wetland law and that law has always been progressive and dynamic by dovetailing with federal regulations and requiring higher amounts of compensatory wetland mitigation. We are proud of that heritage and we think that it should continue especially as regards the many impacts that are not federally jurisdictional.

We have additional concerns regarding the proposed final rules and will be providing more comprehensive comments in the future.

Thank you for considering our comments.



# Wetland Professionals Association



PO Box 131282, Roseville, MN 55113-0011

## THE BOARD

### **Allyz Kramer, President**

SEH, Inc.  
3535 Vadnais Center drive  
St. Paul, MN 55110  
(651) 490-2162  
akramer@sehinc.com

### **Andrea Moffatt, Vice President**

WSB & Associates, Inc.,  
701 Xenia Avenue  
Minneapolis, MN 55416  
(763) 287-7196  
email: amoffatt@wsbeng.com

### **Barbara Walther, Treasurer**

U.S. Army Corps of Engineers  
190 Fifth Street E.  
St. Paul, MN 55101

### **Natasha DeVoe, Secretary**

BWSR  
520 Lafayette Rd. N.  
St. Paul, MN 55155  
(651) 205-4664  
Natasha.devoe@bwsr.state.mn.us

### **Peter Miller, Member-at-Large**

Wenck Associates  
1800 Pioneer Creek Center  
P.O. Box 249  
Maple Plain, Minnesota 55359  
(763)-479-5121  
pmiller@wenck.com

### **Mark Perry, Member at Large**

Bolton & Menk  
2638 Shadow Lane, Ste 200  
Chaska, MN 55318  
(952) 448-8838  
markpe@bolton-menk.com

### **Jyneen Thatcher, Member-at-Large**

Washington Conservation District  
1380 W. Frontage Rd; Hwy 36  
Stillwater, MN 55082  
651-275-1136 X 25  
jyneen.thatcher@mnwcd.org

### **Scott Milburn, Member-at-Large/Webpage Coord.**

Midwest Natural Resources, Inc.  
744 James Ave.  
St. Paul, MN 55102  
Scott.milburn@mnrinc.us

### **Rich Davis, Member-at-Large**

I&S Engineers & Architects  
1409 N. Riverfront Drive  
Mankato, MN 56001  
(507) 387-6651  
rdavis@is-ea.com

## CODE of ETHICS

Each member, in striving to meet the objectives of the WPA, pledges to:

- 1) subscribe to the highest standards of integrity and conduct;
- 2) recognize research and scientific methodology of wetland science;
- 3) disseminate information to promote the understanding of and appreciation for wetland science;
- 4) strive to increase knowledge and skills to advance the practice of wetland science;
- 5) promote confidence in the field of wetland science by supporting high standards of education, employment, and performance;
- 6) encourage the use of scientific information in regulatory decisions; and
- 7) support fair and uniform standards of employment and treatment of those professionally engaged in the practice of wetland science

## THE NEWSLETTER

The WPA newsletter is intended to convey relevant wetland information to Minnesota wetland professionals and to provide an open forum for professional discussion of wetland-related topics. Articles from the membership are welcomed and encouraged. Unless otherwise indicated, opinion articles represent the personal views of the author and should not be interpreted as representing any particular firm, organization, or entity.