

THE 60-DAY DECISION REQUIREMENT OF SECTION 15.99 AND THE WETLAND CONSERVATION ACT

Local government unit ("LGU") decisions under the Wetland Conservation Act ("WCA") must be made in compliance with Minn. Stat. § 15.99. Generally, this means that an application for a WCA decision must be approved or denied within 60 days or it will be deemed to be granted. The following provides general information on the application of Section 15.99 to WCA.

BASICS.

- Section 15.99 applies to WCA replacement plan, banking plan, exemption, no-loss, and wetland boundary or type decisions. *See* Minn. Stat. § 103G.2242, subs. 2a & 4.
- The LGU must approve or deny a written request for a WCA decision within 60 days of receipt of the request. *See* Minn. Stat. § 15.99, subs. 1 & 2; Minn. Stat. § 103G.2242, subs. 2a & 4.
- Failure to deny a written request within 60 days is approval of the request. *See* Minn. Stat. § 15.99, subd. 2.
- If a resolution or motion to approve a written request fails, the request is considered denied, provided that those voting against the motion state for the record their reasons for opposing the motion. *See* Minn. Stat. § 15.99, subd. 2(b).
- If the LGU denies a request, it must state in writing the reasons for the denial at the time it denies the request. *See* Minn. Stat. § 15.99, subd. 2.
- If a written request does not contain all required information, the LGU must send written notice within 15 business days of receipt of the request telling the requester what information is missing.
- If the LGU gives written notice that a request is incomplete within 15 business days of receipt, then the 60-day period starts over when all required information is received. If such notice is not given, the LGU must approve or deny the incomplete request within 60 days of the original receipt date. *See* Minn, Stat. § 15.99, subd. 3(a).
- The information required for an application must be defined in a previously adopted, rule, ordinance, or written policy of the local government unit. *See* Minn. Stat. § 15.99, subd. 3(a).
- A response meets the 60-day time limit if the LGU can document that the response was sent within 60 days of receipt of the written request. *See* Minn. Stat. § 15.99, subd. 3(c).
- The LGU may extend the time limit by written notice prior to the end of the initial 60-day period. The written notice must state the reasons for the extension and its anticipated length. The extension may not exceed 60 days unless approved by the applicant. *See* Minn. Stat. § 15.99, subd. 3 (f).

SUGGESTED "DOS" AND "DON'TS" FOR LGU STAFF MEMBERS.

Dos.

Do check the actual language of Section 15.99 frequently rather than relying on your memory *or this summary*.

Do consult with the attorney for your LGU on the application of Section 15.99 if you have any question in a particular circumstance. .

Do keep a log showing dates on which requests are received and responses are sent.

Do respond to all requests in writing rather than relying on oral communications.

Do deny requests that you intend not to approve. Not acting on a request will be treated as an approval after the passage of 60 days.

Do state the reasons for the denial of a request in writing at the time of the denial of the request.

Do adopt a written policy on the information required for each type of WCA application.

Don'ts

Don't assume that Section 15.99 will be interpreted leniently. The courts stringently apply subdivision 2 of Section 15.99 to require a decision within 60 days, unless there is an exception stated in Section 15.99.

Don't assume it's OK to enact a blanket extension to give you an automatic 60-day extension on all requests. You have the right to extend the response date by an additional 60 days, but this must be done in writing on a case-by-case basis after the request is received. *See American Tower, L.P. v. City of Grant*; 636 N.W.2d 309 (Minn. Ct. App. 2001).

Don't assume that you have an extension just because you have a verbal understanding with the applicant. Subdivision 3(f) of Section 15.99 requires a written notice of extension prior to the end of the initial period, If the extension will be more than 60 days, you must have the applicant's agreement in writing.

ADDITIONAL COMMENTS

WCA statutes and rules state that notice of various WCA decisions must be mailed to the landowner within ten days of the decision. *See* Minn. Stat. § 103G.2242, subd. 7; Minn. R. 8420.0210-.0230, 8420.0740. On the other hand, subdivision 3(c) of Section 15.99 says that the 60-day time limit is satisfied if the LGU can document that the response was sent within 60 days of the written request. To be on the safe side, don't wait a full ten days to send the response if this would take you past the 60 days allowed by Section 15.99.

Sometimes an application is received outside of the growing season but field investigation during the growing season is necessary to verify the information in the application. If it is not possible to extend the response date for an adequate period of time under subdivision 3(f) of Section 15.99, then the application must be denied before the end of the initial 60-day period or it will be deemed to be granted. If denied, the reasons for denial must be stated. If applicable, these reasons would include the LGU's analysis of why a field investigation is necessary.

Start counting the 60 days on the day after the receipt of the written request. You should count calendar days. If the 60th day is a Saturday, Sunday, or legal holiday, then the last day to act on the request is the next day that is not a Saturday, Sunday, or legal holiday. *See* Minn. Stat § 645.15; *Gun Lake Ass'n v. County of Aitkin*, 612 N.W.2d 177, 181(Minn. Ct. App. 2000).

Under Minn. Stat. § 15.99 an LGU must generally make a decision within 60 days, unless the time period is properly extended. A Minnesota Court of Appeals case (*See Moreno v. City of Minneapolis*, 676 N.W. 2d 1, March 9, 2004) holds that an LGU must make its FINAL decision within the same time period. For some matters the initial LGU decision may indeed be the final decision. However, as is often the case with WCA, if an LGU staff individual makes a decision and that decision is heard by, or appealed to, a local board (e.g. city council, county board, SWCD board), that board's FINAL decision must also be made within the same time period of 60 days unless properly extended. Therefore, especially in cases of denying applications, LGU's may want to extend the initial 60 day time period in writing by up to 60 days depending on the time needed to process a local appeal.

Further, if a decision on an application is not made timely under Minn. Stat. § 15.99, then the application is approved by default. However, the LGU must still issue a permit. If the LGU fails to issue a permit, the applicant's remedy is to file suit in district court for a writ of mandamus to compel the permit to be issued based on no timely decision (*See* Minn. Stat. § 586.01). The issuance of a permit would control the scope of the work and the length of time to complete the work.

This summary is provided for general information purposes only. LGU staff members and others should consult with their legal counsel for specific advice on application of Section 15.99 to any particular circumstance. This summary is not a rule of the Board of Water and Soil Resources ("BWSR") and is not binding on BWSR or any other party.

THE USE OF E-MAIL FOR NOTIFICATIONS AND THE WETLAND CONSERVATION ACT

The use of e-mail for official notifications under WCA could be problematic because the use of e-mail is not expressly stated in WCA statutes. BWSR attempted to allow for the use of e-mail with a rule change, however, that may not be sufficient. BWSR may seek statutory revisions, or further rule changes, to allow for the use of e-mail.

The WCA statutes state "mailed" for all notifications and the rules state "sent" for some items and "mailed" for others. The instances where "sent" is used could be argued, although probably unsuccessfully in consideration of case law, that e-mail would be satisfactory. Having evidence of the person receiving the e-mail could possibly strengthen the argument for satisfactory compliance with the intent of the law. However, the language in the WCA rules for the filing of appeals is based on a mailed notice of decision, so if decisions were e-mailed it could be an issue under an appeal or in litigation.

This summary is provided for general information purposes only. LGU staff members and others should consult with their legal counsel for specific advice on the use of e-mail in any particular circumstance. This summary is not a rule of the Board of Water and Soil Resources ("BWSR") and is not binding on BWSR or any other party.