

“Wetlands”

Presentation to the
Minnesota Society of Professional Surveyors
Ramada Mall of America
December 6, 2013

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What is a “wetland”?



- The label “wetland” has significant legal importance and is legally defined.
- Certain conditions legally exempt or prevent legal exemption from this definition and regulation.
- Generally: Wetlands are those areas that are inundated or saturated by surface or ground water at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions.

Surveyors



- First professionals to typically visit a property.
- Identify potential constraints early in project.
- Advise and guide land purchases on planning.
- Develop layout of site/make placement decisions.
- Ensure environmental compliance.

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Wetlands

- Among most protected/regulated land in country.
- Complex laws may prohibit/restrict development.
- A wrong determination that a wetland exists can unnecessarily delay projects and add unnecessary costs to development.
- Failure to identify a wetland can result in delays, penalties, and mandatory restoration.
- Surveyors that can accurately delineate a wetland boundary and correctly identify wetlands can provide great value to their clients.

Complex State and Federal Laws

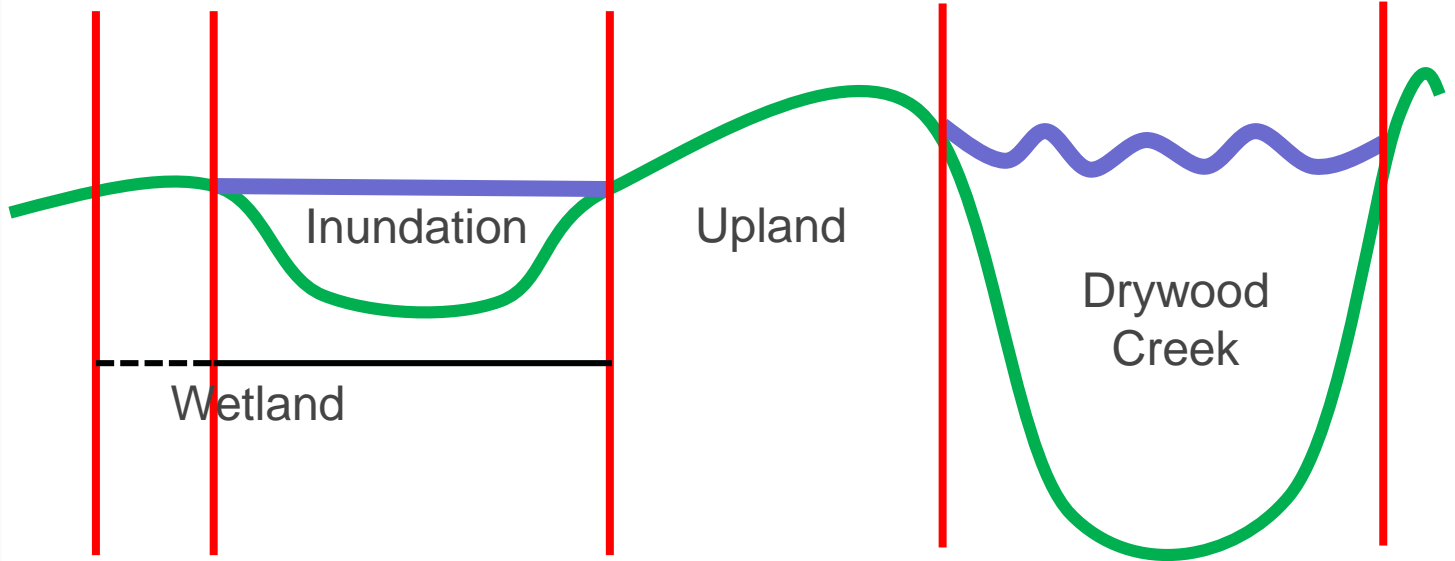


- Minnesota Wetland Conservation Act
- Minnesota Public Waters Wetlands
- Federal Clean Water Act
- Swampbuster – Federal Farm Bill
- Waterfowl Production Area – Federal Property

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Section 404 CWA – Corps?
isolated vs. adjacent

Section 404 CWA – Corps



WCA – LGU & BWSR

Swampbuster - NRCS

Public Wetland- DNR

Minn. Wetland Conservation Act

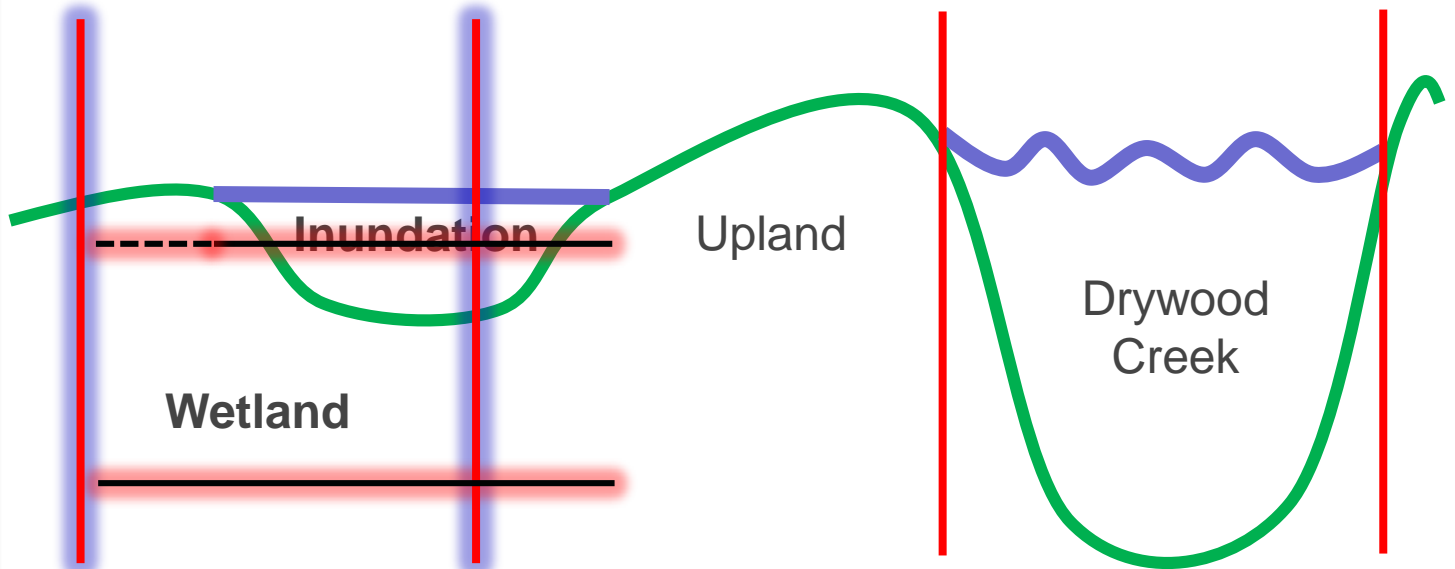


Purpose: “The legislature finds that the wetlands of Minnesota provide public value by conserving surface waters, maintaining and improving water quality, preserving wildlife habitat, providing recreational opportunities, reducing runoff, providing for floodwater retention, reducing stream sedimentation, 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).

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Minn. Wetland Conservation Act

- 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 (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



- *wetland* – BWSR Rules: Wetlands . . .
 - (1) have a predominance of hydric soils;
 - (2) are inundated or saturated by surface or groundwater at frequency/duration sufficient to support prevalence of hydrophytic vegetation typically adapted for life in saturated soil conditions; and
 - (3) under normal circumstances, support a prevalence of hydrophytic vegetation.Minn. R. 8420.0110, subp. 72(A).
- Boundary Delineation: 1987 Corps Manual.
- Wetland Type: 1971 USFWS Cir. 39.



Minn. Wetland Conservation Act

- Local Government Unit: makes decisions on applications for no-loss, exemption, replacement.
- Technical Evaluation Panel (TEP): answers technical questions concerning public value, location, size, and wetland type.
- Initial decisions may be made by staff, but must be appealable to LGU before appealing to BWSR.
- Calcareous fens, wetlands deposited into the state wetland bank, wetlands that have previously received replacement credit specifically not exempt; *De minimus exemptions*.

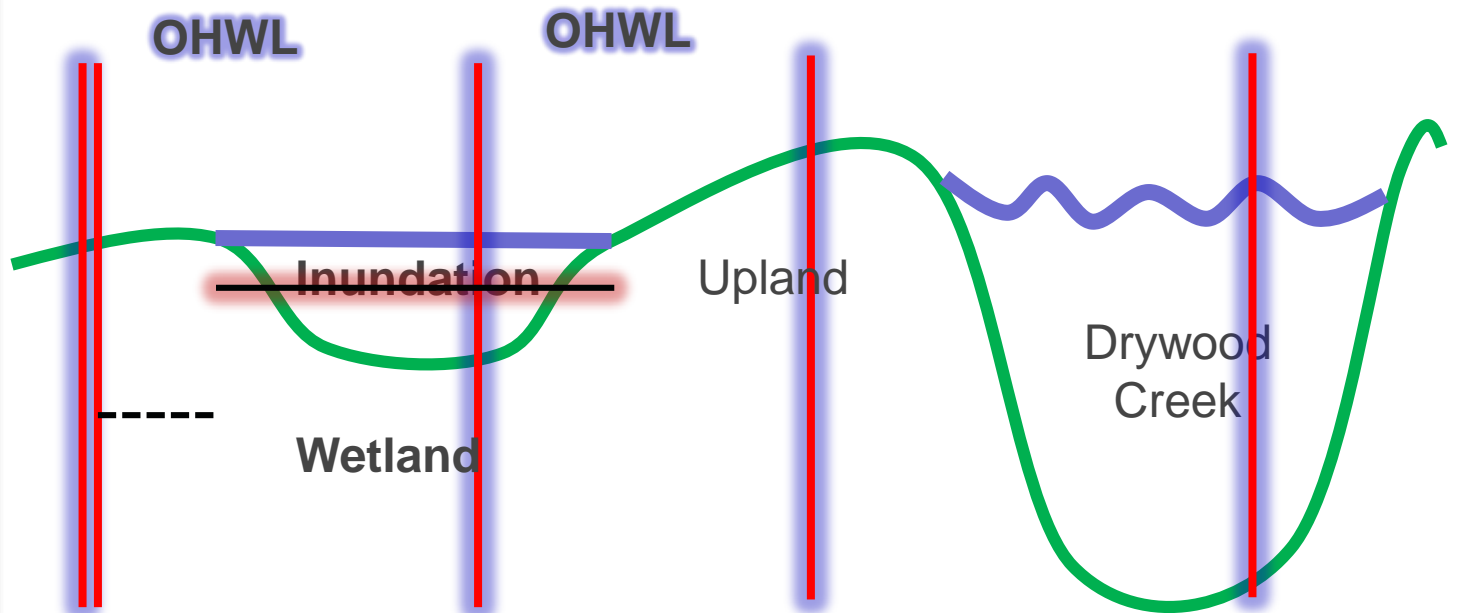
Minn. Public Waters Wetlands



- *public waters wetlands* – all type 3, 4, and 5 wetland as defined in the U.S. FWS Cir. No. 39 (1971), not included within the definition of public waters.
- Size of Wetland Determinative:
 - 10 acres or more in unincorporated areas.
 - 2.5 or more acres in incorporated areas.
- 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 landscape, commonly the point where vegetation changes from aquatic to terrestrial.

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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:
 - (1) construct, reconstruct, remove, abandon, transfer ownership of, or make any change in a reservoir, dam, or waterway obstruction on public waters; or
 - (2) 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.”

Minn. Public Waters Wetlands



- Public waters wetland inventory kept by DNR.
- Minn. Stat. ch. 103G.
- Minn. R. 6115.
- http://www.dnr.state.mn.us/waters/watermgmt_section/pwi/download.html.

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Clean Water Act

- Basic structure of federal law that regulates the discharge of pollutants into waters of the U.S. 33 U.S.C. § § 1251 et seq.
- CWA is about water quality, not wetland preservation.
- Objective: “restore and maintain the chemical, physical, and biological integrity of the Nation’s waters.” 33 U.S.C. § 1251(a).
- Section 404: requires permit from Corps to discharge dredged or fill material into “navigable waters.”

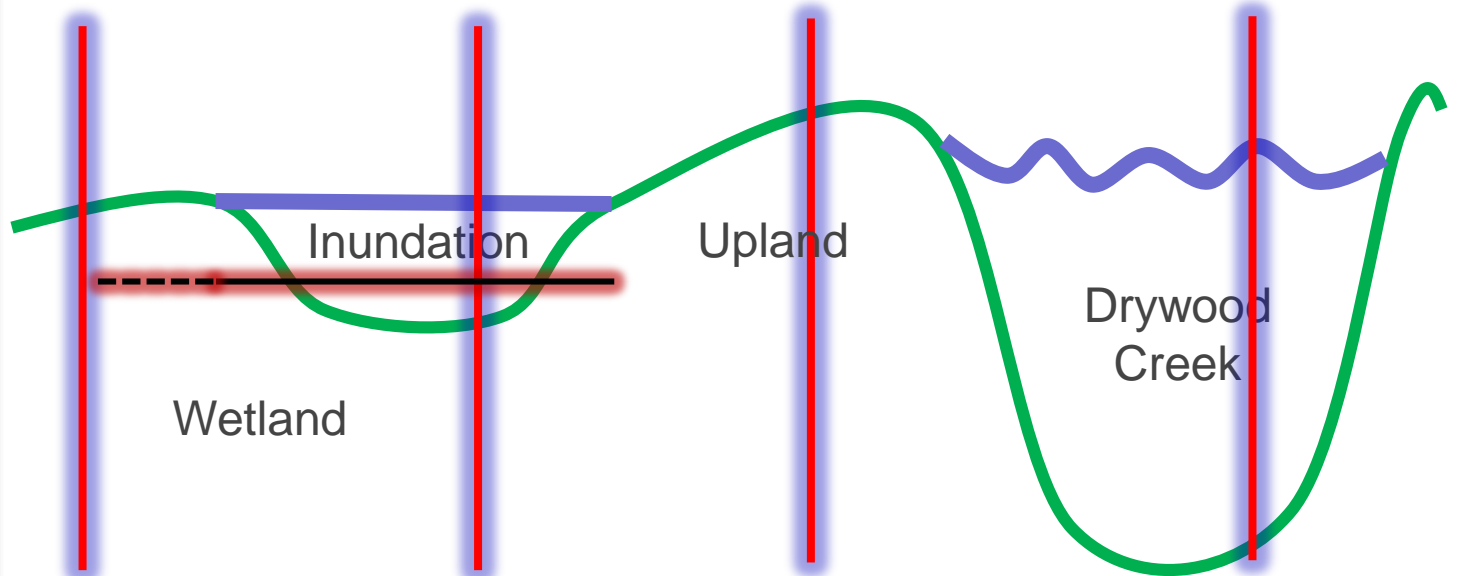


CWA: “Jurisdictional Wetlands”

- “navigable waters” are “waters of the U.S.”
- Corps sued in early years by environmental groups.
- Corps issued new regulations that broadly swept in aquatic resources, including many “wetlands.”
- *Riverside Bayview Homes, Inc. v. U.S.* – Corps has jurisdiction over wetlands immediately adjacent to navigable waters, interstate waters, or tributaries of navigable or interstate waters.
- *SWANCC v. Corps* – isolated waters are not subject to the CWA; wetlands not hydrologically connected to navigable waters are not regulated by the CWA.

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CWA: “Jurisdictional Wetlands”

- *Rapanos v. U.S.* (2006) – jurisdictional nightmare.
- 5 out of 9 Justices determined Corps was overreaching, but majority split 4 to 1 in defining test for “isolated vs. adjacent.”
- Corps claims jurisdiction over wetlands meeting either 4 Justice Plurality or 1 Justice Concurrence.
- Scalia Plurality: continuous surface connection.
- Kennedy Concurrence: “significant nexus”; affects chemical, physical, and biological integrity of jurisdictional waters.



CWA: Discharge of Dredged/Fill

- If wetland “jurisdictional,” a permit from Corps is required to discharge dredged or fill material in wetland itself.
- *Tulloch* Rule: incidental fallback vs. redeposit.
- Federal courts enjoined Corps from regulating “incidental fallback” based purely on volume.
- Two factors: (1) time material is held before being dropped to the earth; and (2) distance between place where material is collected and place where it is dropped.
- Corps recent shift in position on tiling plows.

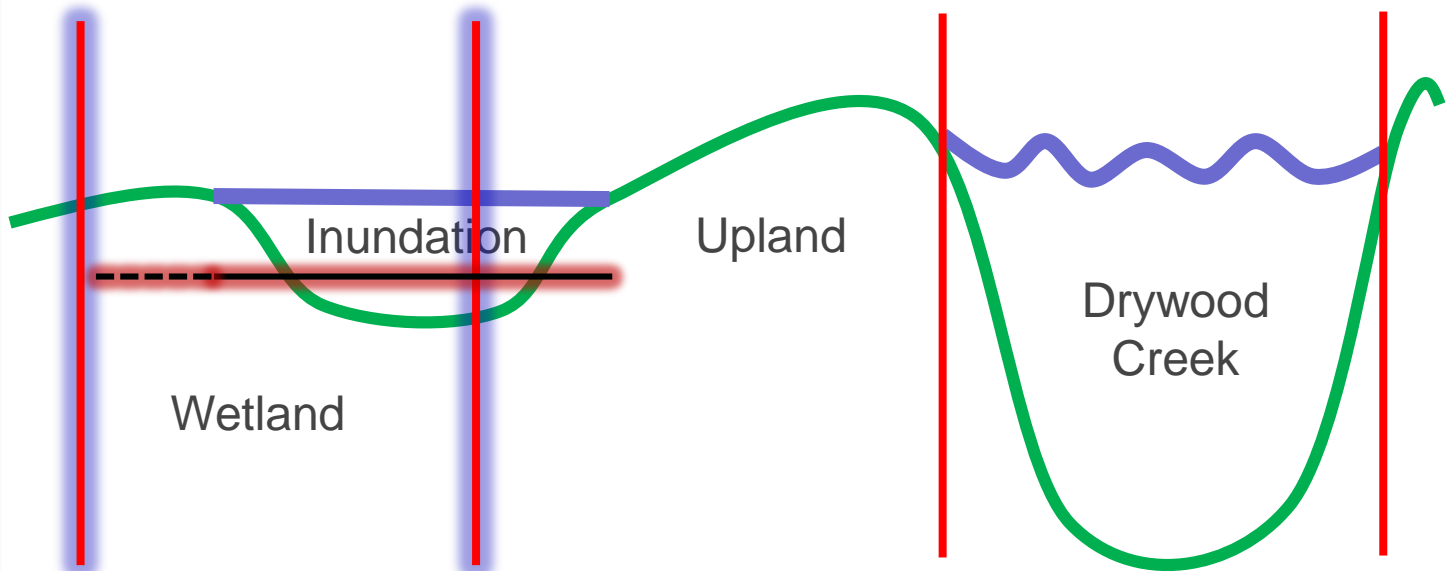
Swampbuster: FSA of 1985



- Applies only to landowners/operators enrolled in federal farm program – USDA.
- Federal wetland protection law, but not absolute like WCA; conditions receipt of public farm program funds on preserving wetlands as of December 23, 1985.
- Participant ineligible if he/she
 - (1) produces ag commodity on wetland converted after December 23, 1985; or
 - (2) converts wetland to make production of ag commodity “possible” after November 28, 1990.

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Swampbuster: FSA of 1985



- NRCS responsible for technical determinations.
- 7 CFR Part 12.
- Advance approval not required if “certified wetland determination” already exists.
- Certified Wetland Determinations:
 - 1985-1990: (1) appeal rights (2) CPA-026 (3) map delineating wetland type, location, size, and (4) actual appeal taken.
 - 1991-1995: (1) appeal rights (2) CPA-026 (3) map delineating wetland type, location, size
 - Post 1995: All determinations “certified.”

Swampbuster: Wetland Labels



- **Wetland:**
 - (1) hydrophytic vegetation
 - (2) hydric soils
 - (3) wetland hydrology – inundated/saturated of sufficient duration to support hydrophytic vegetation
- **Prior Converted:**
 - (1) manipulation prior to Dec. 23, 1985
 - (2) planted at least once prior to Dec. 23, 1985
 - (3) manipulation effectively removed wetland hydrology characteristics
- **Farmed Wetland:**
 - (1) manipulation prior to Dec. 23, 1985
 - (2) planted at least once prior to Dec. 23, 1985
 - (3) manipulation does not complete remove wetland hydrology characteristics

Waterfowl Production Areas



- U.S. Fish and Wildlife Service Easements.
- Check county recorder's office for:
 - (1) Easement Summary
 - (2) Wetland Delineation Map
- *U.S. v. Johansen*. U.S. FWS holds property interest in the wetlands as they existed at the date the easement was granted, not over the entire tract of property.
- (Civil) – breach of easement; federal property.
- (Criminal) – damaging/harming federal property.

#1 Hydric Soils

- Soils subject to persistent wet conditions go through biological and chemical processes that alter the soil color and cause organic matter to accumulate.
- *Typically*, hydric soils are gray or black and feature prominent orange or red iron stains.
- May have thick surface layer of peat or “muck.”
- Wetland boundary may be based on subtle changes in the color of soil.

#2 Hydrophytic Vegetation

- NRCS has list of hydrophytic plants per region.
- Some plants are purely hydrophytic, some can also grow in upland relatively easily (canary grass).
- Other plants are obvious wetland plants (cattails).
- Field identifiers for potential wetland plants:
 - shallow root systems.
 - buttressed or enlarged tree trunks.
 - inflated floating stems or leaves.
 - trees with multiple trunks from same base.

#3 Hydrology



- From a legal standpoint, typically the most debated criteria.
- Swampbuster – very specific requirements:
 - Farmed Wetlands: inundated for 15 consecutive days or more during growing season; anything less is “Prior Converted” and exempt.
 - Farmed Wetland Potholes: inundated for 7 days or more or saturated for 14 days or more.
- The number of days saturated/inundated during the growing season allows microorganisms to deplete most or all of the oxygen in the soil.
- Anaerobic condition allows only certain wetland adapted plants to grow.

Summary

- Look for Wetland Identifiers.
- If not sure, seek assistance from appropriate regulatory office or official.
- Do not delineate a wetland if not confident it meets the regulatory standard.
- State:
 - (1) Wetland Conservation Act – LGU
 - (2) Public Waters Wetlands – DNR
- Federal: *Firmly Committed.*
 - (1) Clean Water Act – Corps of Engineers
 - (2) Swampbuster – USDA – NRCS
 - (3) WPA – U.S. FWS



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Questions?

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