



December 16, 2015

Mr. Les Lemm
Minnesota Board of Water and Soil Resources
520 Lafayette Rd
St. Paul, MN 55155

Re: Comments on Possible Amendment to the Rules Governing Wetland Conservation,
Minnesota Rules, Chapter 8420
Revisor's ID Number R-04356

Dear Mr. Lemm:

On behalf of the Iron Mining Association ("IMA"), we submit these comments to the Board of Water and Soil Resources pursuant to its Request for Comments on Possible Amendments to the Rules Governing Wetland Conservation, Minnesota Rules, Chapter 8420, Revisor's ID Number R-04356 ("Request for Comments") published in the Minnesota State Register on October 19, 2015.

The Request for Comments indicated that BWSR is considering amendments to reconcile the rules with legislative changes from 2011, 2012 and 2015. Most of our comments are aimed at the 2011 amendment, with some minor comments on the 2015 statutory changes. The Request for Comments also indicates BWSR will consider "other miscellaneous rule changes that will improve the efficiency, effectiveness, and/or outcomes of the rule." We are cautious about authority for such undefined changes to the rules and believe the Request for Comment for "miscellaneous rule changes" is too unclear and imprecise to request comment from the public on potential or anticipated changes to the administrative rules.

2011 Amendment: DNR authority over wetland banking conducted under a Permit to Mine

The Minnesota Legislature has conclusively and appropriately delegated oversight responsibilities of wetland replacement projects conducted under a Permit to Mine (PTM) to the Department of Natural Resources. Minnesota law is clear that DNR must *approve* wetland replacement projects developed in association with activities under a PTM and has sole authority to *manage* the credits that are generated from these projects.

DNR has been delegated authority to *approve* any and all wetland replacement projects conducted under a permit to mine. This includes projects where (1) all replacement credits are used immediately, (2) surplus credits are created and managed by DNR and released over time, and (3) surplus credits are deposited in the state wetland bank. If surplus wetland credits are

generated as indicated in item (2), the legislature has vested authority in DNR to *manage* excess wetland credits as long as they are not placed in the state wetland bank (or otherwise sold to the public) and are used only for mining related impacts authorized under a PTM.

The IMA understands the BWSR administrative rules have not been amended or changed to comport with the 2011, 2012 and 2015 legislative changes and that some changes may be necessary. However, the IMA cautions BWSR to remain focused on the rule amendments authorized by the legislative changes and not attempt to attain additional regulatory authority for BWSR and Local Government Units (LGUs) over wetland mitigation projects that are associated with permits to mine. Delegation to a state agency of its regulatory authority is reserved to the Legislature. As the Minnesota Legislature has made clear, approval authority over wetland mitigation projects associated with permits to mine is the domain of DNR.

There are several key statutory and rule provisions which firmly support the structure for regulatory oversight by DNR. The relevant provisions are cited below and are highlighted in the event BWSR contemplates changes to rules pertaining to DNR authority; it is critical that any rule changes are grounded in the directives laid out by the Minnesota Legislature.

Statutory provisions delegating authority to the Minnesota DNR

The grant to DNR of exclusive regulatory authority over wetlands that are impacted and replaced pursuant to activities associated with a permit to mine has long been statutorily established. *See* Minn. Stat. § 93.481, providing the commissioner as the sole regulatory authority over mining activity which includes reclamation and restoration activities. The Legislature has consistently granted DNR the exclusive regulatory authority over mining-related activities when they intersect with wetland replacement plans. *See* Wetland Conservation Act (“WCA”), Minn. Stat. § 103G.222, Subd.1, providing that wetlands may not be drained or filled unless replaced by restoring or creating wetlands of at least equal public value under a replacement plan approved pursuant to a mining reclamation plan approved by the commissioner under a permit to mine. Such legislative mandates providing DNR with sole regulatory authority over mining-related wetland mitigation projects cannot be altered by administrative rule changes.

The 2011 WCA Amendment defines DNR as an LGU for wetland banking projects and reinforces the Legislature’s resolve to ensure DNR is the sole regulatory authority over all wetland replacement projects associated with permits to mine, including projects approved for deposit in the state wetland bank. The 2011 Amendment to WCA modifies the definition of an LGU to include, “for wetland banking projects established solely for replacing wetland impacts under a permit to mine under section 93.481, the commissioner of natural resources.” Minn. Stat. § 103G.005, Subd. 10e(4). It provides some clarity that when a wetland mitigation project associated with a permit to mine is developed specifically to be deposited into the state wetland bank, the DNR commissioner is the LGU. This explicitly provides DNR authority to *approve* replacement projects where credits are deposited into the state wetland bank.

The 2011 Amendment had no effect, however, on other provisions within WCA and the rules that define DNR’s exclusive regulatory authority over wetland replacement projects that are part of a permit to mine. It did not, for example, alter BWSR’s administrative rule that endows

DNR with authority to approve surplus wetland credits (in the context of permits to mine). *See* Minn. R. 8420.0930, subp 4.A which provides that “[r]eplacement wetlands approved under this part must only be used for mining-related impacts covered under a permit to mine unless the credits are approved and deposited in the state wetland bank according to parts 8420.0700 to 8420.0755.” The 2011 Amendment did not alter DNR’s authority to hold surplus wetland credits for future use by the mines so long as these excess credits are not sold in the public market and are used solely for mining related purposes.

In short, the 2011 Amendment simply affirmed that DNR has the authority to approve projects where credits are deposited in a wetland bank. It did not alter other legal authority that reinforces DNR’s ability to approve and manage credits associated with project-specific mitigation.

Regulatory provisions delegating authority to DNR

1) Minn. R. 8420.0200, subp. 1D (defines DNR as the approval authority over wetland mitigation projects associated with permits to mine)

Minn. R. 8420.0200, subp. 1D, grants DNR the exclusive regulatory authority over all wetland activities associated with mining-related projects. It specifically provides,

“notwithstanding items A to G, the Department of Natural Resources is the *approving authority* for activities associated with projects requiring permits to mine under Minnesota Statutes, section 93.481, and for projects affecting calcareous fens” (Emphasis added).

Note that the rule language designating DNR as the *approval authority* is different from the 2011 Amendment defining DNR as the LGU solely for wetland banking projects. Approval authority over all wetland mitigation activities associated with a permit to mine (as provided in 8420.0200, subd. 1D) is distinct from the statute that explicitly affords DNR additional power to approve projects solely intended for the state wetland bank. The approval authority powers granted to DNR in 8420.0200, subd. 1D were in place at the time of the 2011 Amendment. At that time, DNR already had statutory authority to approve project-specific mitigation where credits were immediately used or held for future release by DNR.

Had the legislature intended the LGU definition pertaining to banking to be equivalent to the “approval authority” language of the rules, it would have expressly done so. Accordingly, the IMA requests that any potential proposed rule amendments with respect to Minn. R. 8420.0220, subp. 1D be aimed at clarifying DNR’s sole regulatory authority over all activities and projects related to wetland mitigation projects associated with a permit to mine, in accordance with legislative directive.

2) Minn. R. 8420.0200, subp. 1H (excludes DNR from provision that provides local government units with approval authority over wetland replacement plans)

Minn. R. 8420.0200, subp. 1H provides DNR with approval authority even where project-specific mitigation spans local government jurisdictions (i.e. replacement wetlands are located within one LGU and impacted wetlands are located in another LGU). This subpart provides that “for replacement plans where the project-specific replacement will occur in a different local government unit than the impact, approval of all government units involved *or as specified in items A to G* constitutes final approval of the replacement plan” (Emphasis added). Reference to 8420.0200, subp. 1A to G includes subp. D, which provides DNR with the “approval authority” over all wetland activities and projects associated with permits to mine.

The plain meaning of this administrative rule corresponds with the explicit legislative directive that DNR has statewide exclusive regulatory approval over wetland impacts, wetland replacements, surplus credits and wetland creations. The IMA requests that any potential BWSR rule amendment comply with the legislative mandate that DNR has exclusive jurisdiction to approve and otherwise regulate all wetland replacement plans regardless of their location. Revisions to the rules should clearly set forth DNR’s autonomy over wetland mitigation projects that involve all activities and projects associated with a permit to mine.

3) Minn. R. 8420.0111, subp. 55 (defines the term “project specific”)

Potential proposed rule amendments should ensure that “project-specific” is not redefined in a manner that limits DNR’s ability to approve wetland replacement projects; such a limitation would contradict statutory provisions. The definition of “project-specific” comports with DNR’s authority to approve project-specific proposals which also create surplus wetland credits to be used exclusively by the mines and managed by DNR.

Project-specific “means the applicant for a replacement plan approval provides the replacement as part of the project, rather than attain the replacement from a wetland bank.” Minn. R. 8420.0111, subp. 55. This definition places no temporal restrictions on when the replacement wetlands may be identified. Seeking the use of a replacement wetland site at the time the wetlands are restored or in the future when additional wetland impacts occur makes no difference under this definition. Regardless of when the surplus replacement wetland credits are applied to compensate for impacted wetlands, the regulatory approval process remains the same. Moreover, these surplus wetland credits do not fit the definition of credits available to be placed in the state wetland bank as they cannot be placed on the public market for sale and they must only be used for mining purposes.

2015 Amendment: Making the most of high priority areas

The identification of high priority areas was a keystone in the Siting of Wetlands in Northeast Minnesota Report prepared by an interagency task team and presented to the governor on March 7, 2014. Subsequently, identification of high priority areas was made a requirement in the 2015 Amendment. This change requires the identification of high priority areas for wetland replacement and encourages wetland replacement in these areas as a parallel option to existing

wetland mitigation requirements. High priority areas are being identified because it is increasingly difficult to locate feasible wetland mitigation sites in Northeast Minnesota, where greater than eighty percent of pre-settlement wetlands are intact. At the same time, regions of the state with historically high impacts to wetlands are not benefiting from the mitigation activity and watershed improvements taking place in wetland intensive areas of the state. The 2015 statutory changes will permit BWSR to establish replacement ratios and bank service area priorities for such high priority areas.

Historically, mines in Northeast Minnesota have developed wetland mitigation sites that are larger than those created by typical residential or industrial development projects. To the extent this trend continues, the mines have a unique opportunity to assist BWSR and other agencies in replacing or creating wetlands in high priority areas. However, the current administrative rules make wetland replacement in high priority areas difficult and, in most cases, simply impossible. To the extent the 2015 legislative amendments seek to site wetland replacement projects in high priority areas (allowing replacement wetlands to be developed further away from the impacted wetlands), we suggest that administrative rule amendments be designed to reflect realistic replacement ratios and restoration crediting. Thus, such projects will be economically viable and meet the intent of the high-priority siting goals to drive desired environmental benefits. It is also important that the administrative and oversight costs are minimized to encourage development in these areas. To encourage development in designated high priority areas, we urge BWSR to carefully consider incentives that will create practical options to foster large wetland replacement projects in such locations while aligning with federal wetland policies implemented by the U.S. Army Corp of Engineers.

Miscellaneous Changes

The Request for Comments on possible rule changes that are described as “miscellaneous changes that will improve the efficiency, effectiveness, and/or outcomes of the rule,” is so unclear and ambiguous that it is impossible to comment upon. Further explanation must be provided if these proposed changes are anything other than very minor, insignificant corrections to the rules. Minn. Stat. § 14.101, Subd. 1 requires that,

In addition to seeking information by other methods designed to reach persons or classes of persons who might be affected by the proposal, an agency, at least 60 days before publication of a notice of intent to adopt or a notice of hearing, shall solicit comments from the public on *the subject matter of a possible rulemaking proposal under active consideration within the agency* by causing notice to be published in the State Register. The notice must include a description of the subject matter of the proposal and the types of groups and individuals likely to be affected, and must indicate where, when, and how persons may comment on the proposal and whether and how drafts of any proposal may be obtained from the agency. (Emphasis added).

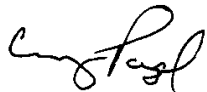
Changes to rules must be identified if BWSR has internally identified rule proposals “under active consideration within the agency.” Without further explanation regarding suggested

“miscellaneous” changes, we are unable to provide further comments. We note, however, that the term “miscellaneous” changes suggest such changes are insignificant or inconsequential.

In conclusion, we reiterate the Legislature’s express statutory mandate that DNR is the exclusive regulatory agency over wetland mitigation activities associated with permits to mine. Any potential rule amendments should be aimed at ensuring DNR’s exclusive regulatory authority over wetland replacement projects in the context of permits to mine. Additionally, we encourage BWSR to work with the regulated community to ensure that the collective goal of developing replacement wetlands in high priority areas is met.

Thank you in advance for your consideration of these comments.

Respectfully,

A handwritten signature in black ink, appearing to read "Craig Pagel". The signature is fluid and cursive, with the first name "Craig" written in a larger, more prominent script than the last name "Pagel".

Craig Pagel
President
Iron Mining Association of Minnesota