

August 12, 2024

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VIA E-MAIL ONLY

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Lewis Brockette
Minnesota Board of Water and Soil Resources,
520 Lafayette Road North,
St. Paul, MN 55155

Re: Proposed Wetland Conservation Act Rulemaking

Dear Mr. Brockette,

I submit these written comments on behalf of the Minnesota Corn Growers Association (MCGA) in response to the Request for Comments for possible amendment to rules governing wetland conservation, Minnesota Rules, Chapter 8420.

MCGA is a grassroots organization with nearly 7,000 members that advocates on behalf of and works in conjunction with the Minnesota Corn Research & Promotion Council to conduct and fund research and provide educational programs for the benefit of Minnesota's 24,000 corn farmers. Among other things, MCGA supports its members by encouraging sustainable practices that work with their farming operations, promoting research into new uses for corn in the production of polymers, ethanol, and other bio-based chemicals, and supporting best practices in nutrient management on farms. MCGA also communicates with regulatory agencies and policy makers on the unique challenges and many benefits of crop production, and encourages that laws, rules, and policies are developed and applied fairly for Minnesota's family farmers.

Minnesota's corn farmers face a web of overlapping regulations on wetlands, drainage, and public waters. The Wetland Conservation Act along with the "Swampbuster" laws applied by the Natural Resource Conservation Service of the U.S. Department of Ag provide set forth extensive wetland rules that corn farmers must comply with which can impact their farming operations significantly. MCGA believes it is important that the concerns of their members are addressed in any revised regulatory framework the Board

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of Water and Soil Resources (“BWSR”) may implement in Minnesota and offers the following comments in advance of any rulemaking.

I. Technical Changes to the WCA.

There have been numerous technical and other changes to the Wetland Conservation Act (“WCA”) over the past decade, including significant revisions to the agricultural and drainage exemptions made in 2024. Artificial drainage including drainage tiles and public and private ditch systems are an important part of the infrastructure that make modern agriculture possible in Minnesota. Because of improvements to drainage and other advancements in farming, Minnesota continues to be among the top producers of corn and soybeans in the country. However, much of Minnesota’s drainage infrastructure was constructed in the first half of the 20th century, and may be due for repairs, replacements, and upgrades to continue to provide important benefits for farmers. This infrastructure will remain vital for the continued success of Minnesota’s farm economy.

MCGA believes BWSR should consider the interests of corn farmers and importance of drainage infrastructure to farmers and Minnesota’s economy in crafting new rules for the WCA. If implemented properly, the statutory revisions to the WCA have the potential to simplify the WCA regulations for farmers and allow easier compliance. We encourage BWSR to ensure the rules fairly reflect statutory requirements, can be easily understood and applied, and do not unduly hinder beneficial drainage projects throughout the state.

Further, MCGA urges BWSR to be conscience of the multiple layers of regulation to ensure new Rules are drafted and applied consistently and uniformly to the extent possible, so corn farmers are not faced with conflicting wetland protections. As just a single example, utilizing consistent, science-based setback requirements for drainage tile near wetlands for both Swampbuster and WCA compliance would ensure farmers are able to follow one set of rules for compliance. Care should be taken so that WCA requirements are consistent with Swampbuster requirements.

II. SCOPE OF RULES UNDER MINN. STAT. § 103G.2242

BWSR should ensure in adopting new Rules that it follows the statute and does not attempt to regulate beyond the legislature’s directive, particularly with respect to the

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changes to the wetland replacement plan rules codified at Minn. Stat. § 103G.2242 subd. 1. The revisions to subdivision 1 are shown below:

Subdivision 1. Rules. (a) The board, in consultation with the commissioner, shall adopt rules governing the approval of wetland value replacement plans under this section and public-waters-work permits affecting public waters wetlands under section 103G.245. These rules must address the criteria, procedure, timing, and location of acceptable replacement of wetland values and may address the state establishment and administration of a wetland banking program for public and private projects, including provisions for an in-lieu fee program; mitigating and banking other water and water-related resources; the administrative, monitoring, and enforcement procedures to be used; provisions that protect, or mitigate impacts to, intermittent and perennial watercourses upstream of public waters identified under section 103G.005, subdivision 15, paragraph (a), clause (9) or (10); and a procedure for the review and appeal of decisions under this section. In the case of peatlands, the replacement plan rules must consider the impact on carbon. Any in-lieu fee program established by the board must conform with Code of Federal Regulations, title 33, section 332.8, as amended.

In recent presentations and statutory summaries published by BWSR, it appears that BWSR may be taking a very expansive view of this revised language. Specifically, BSWR has summarized the change as follows:

Effect of Change: Authorizes BWSR to amend the WCA rules *to regulate reaches of intermittent and perennial watercourses that are not identified as public waters*. The regulation of these watercourse reaches does not become effective until BWSR develops and adopts specific rules related to their protection and mitigation. (emphasis added)

As written, Subdivision 1 directs BWSR to adopt rules governing “wetland value replacement plans.” The following sentences of 103G.2242, subdivision 1 describe what the rules *governing replacement plans* must include, listing several items including acceptable replacement of wetland values, mitigating and banking other water resources, monitoring and enforcement, “provisions that protect...[other] watercourses upstream

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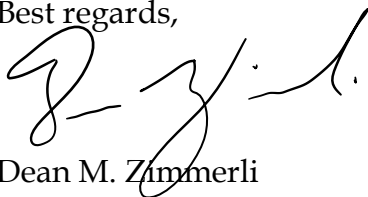
of public waters,” and finally appeal and review of decisions under that section. Thus, the new change to the statute provides that wetland replacement plans, when required to be followed, can include provisions to protect certain watercourses upstream of public waters. However, outside the context of required wetland replacement plans, Minn. Stat. § 103G.2242 subd. 1 does not grant a general power to BWSR to regulate such watercourses.

As set out elsewhere in the WCA, wetland replacement plans are only required in instances where there is an impact to a wetland that does not fall within some exemption to the statute. *See* Minn. Stat. § 103G.222 subd. 1. The WCA does not governs the regulation of water features other than wetlands or public waters wetlands, and, indeed, the exemptions set forth in the statute for drainage at Minn. Stat. § 103G.2241 specifically *exclude* certain drainage activities (in ditches that might lie upstream of certain public waters) from coverage of the WCA.

BWSR should ensure that in drafting new rules to implement the changes Minn. Stat. § 103G.2242 subd. 1, those rules do not exceed the authority delegated by the legislature.

Thank you for taking the time to consider these comments.

Best regards,



Dean M. Zimmerli

cc: Amanda Bilek (*via e-mail only*)