

August 12, 2024

Lewis Brockette
Minnesota Board of Water and Soil Resources
520 Lafayette Road North, St. Paul, MN 55155
lewis.brockette@state.mn.us; bwsr.wcarulemaking@state.mn.us

RE: TNC comments on the 2024 Wetland Conservation Act Rule-Making Process

Dear Lewis Brockette,

The Nature Conservancy (TNC) appreciates the opportunity to comment on the 2024 Wetland Conservation Act (WCA) statute changes, effective August 1, 2024. TNC is heartened that the State of Minnesota proactively implemented statutory changes to the WCA following the May 2023 decision by the U.S. Supreme Court (SCOTUS) in *Sackett v. Environmental Protection Agency* that significantly reduced federal wetland protections under the Clean Water Act (CWA) nationwide. TNC is working with states across the US to develop or defend wetland conservation laws that provide beyond-federal protection for wetlands since the decision. We support the 2024 statutory changes that intend to defend and enhance Wetland Conservation Act protections to existing as well as previously unregulated wetlands now no longer covered under the federal CWA following the SCOTUS decision.

The majority of the amendments smartly modernize prior statutory language reflecting updated science, wetland classification methodology, closing loopholes in regulatory authority, and the like. However, we believe there are areas for improvement and clarification. The following comments concern the implementation of the 2024 WCA statutory language to ensure holistic, robust implementation of the 2024 WCA for “no net loss” and maximum protection of the quality, quantity, and biodiversity of wetlands in Minnesota. Where our comments do not provide solutions for improvements, we identify areas of concern that the state could convene a process to address and resolve.

Concerns regarding agricultural exemptions in the 2024 Wetland Conservation Act

Whereas TNC supports the majority of the statutory amendments comprising 2024 WCA, we have concerns about the following agricultural exemptions in the amended Act:

1. There are currently inadequate data to evaluate the impact of the new state agricultural activities exemptions that were added in the 2024 legislative session given the 2022 amendments to the federal “Wetland Conservation” statute under Sec. 404 of the CWA (aka “Swampbuster”) which prohibit the Natural Resources Conservation Service (NRCS) from sharing confidential landowner information such as NRCS wetland delineations. This may therefore result in the inability for the state to identify what wetlands these new exemptions might apply to, such as seasonal wetlands and prairie pothole basins in the southern and western areas of the state. This potentially undermines or limits the stated “no net loss of wetlands” goal of the 2024 WCA amendments and should be resolved.
2. There are differences between the Minnesota’s WCA and the federal Food Security Act (FSA) that

appear unresolved and potentially conflict with the “no net loss of wetlands” 2024 WCA goal given the new state agricultural activities exemptions. As an example, there is a federal five-year abandonment criterion for prior converted cropland resolved between the pre-*Sackett* CWA and FSA. This creates a potential loophole that the state 2024 WCA amendments do not appear to address at the state level. In addition, there does not appear to be clear state-to-federal requirements for sharing wetland delineation data with Minnesota, potentially undermining the state’s ability to verify those data for future permitting considerations. Lastly, there also appears to create data access limitations for how the state or public can estimate how much of agriculture land statewide will potentially be impacted by this new exemption because one can only verify the status of impacted lands on a case-by-case basis. These and related data quality and sharing questions should be resolved to ensure the 2024 WCA wetland goals are best achieved.

Improving the assessment of wetland and stream values for implementing the 2024 Wetland Conservation Act

The 2024 amendments included language referencing the U.S. Army Corps of Engineer’s 1993 publication, *A Hydrogeomorphic Classification for Wetlands*, to update and modernize wetland classifications because this methodology better connects wetland classification with ecological function. Given the intent of the 2024 WCA for ensuring robust wetland protections, we believe that the state should also consider updating all parameters germane to assessing the holistic functions of wetlands to best ensure “no net loss” and maximum protection of the quality, quantity, and biodiversity of wetlands under the 2024 WCA. In particular, we recommend the following:

1. The state should utilize scientifically sound predictions of carbon sequestration and storage provided by wetlands to inform the replacement value for (1) wetlands lost, and (2) wetlands to be created, restored, etc. because of loss. The state recognizes the important value of carbon sequestration and storage for ameliorating the impacts of climate change¹. The “Wetland Restoration Effectiveness Tool (WRET)”², developed by the University of Minnesota and TNC, uses publicly available data on water quality, soil properties, and wetland-watershed relationships to estimate nitrogen removal, phosphorus removal, and carbon sequestration to maximize the benefits of wetland conservation and restoration. We recommend the state incorporate this or a similar tool to best account for these ecological benefits when considering how best to implement the 2024 WCA to meet its goals as stated above.
2. The state should use state-of-the-science engineering methods for constructing replacement wetlands that maximize the ecological/functional value of the wetlands being replaced. It is important that the functional values of wetlands being lost are properly assessed prior to replacement to ensure that (1) replacement wetlands are engineered and constructed in a way that provides the best chance to replicate or improve the ecological function of the wetland lost; and (2) all aspects of the Wisconsin-Minnesota Wetland Functional Assessment Initiative are accounted for in mitigation projects. The WRET tool as well as state guidelines³ are excellent resources to ensure the 2024 WCA to meet its goals as stated above.
3. Lastly, the state should consider additional actions to protect public ephemeral and intermittent streams that are not public watercourses currently protected by the state to address the loss of federal jurisdiction over these waters following the SCOTUS *Sackett* decision. Along with wetlands protected under the 2024 WCA, these undervalued headwaters comprise a surprisingly extensive

¹ <https://bwsr.state.mn.us/carbon-sequestration-wetlands>. Accessed 8/9/2024.

² <https://bbe.umn.edu/wret>. Accessed 8/9/2024.

³ <https://bwsr.state.mn.us/mn-wetland-restoration-guide>. Accessed 8/9/2024.

amount of the nation's waterways (~79%)⁴ and greatly influence the ecological function, fisheries, and water quality/quantity within their courses, as well as larger downstream rivers and lakes in the state. As with wetlands, the SCOTUS *Sackett* decision greatly weakens federal CWA protections of ephemeral and intermittent streams. The state should strongly consider creating or enhancing protections for these vulnerable waters to complement the enhanced protections provided to wetlands under the 2024 WCA.

TNC appreciates the opportunity to comment on the 2024 WCA statute changes and looks forward to working with the state and stakeholders to implement these recommendations to maximally protect the quality, quantity, and biodiversity of wetlands and other vulnerable waters for nature and Minnesotans alike.

Sincerely,



Steven J. Herrington, Ph.D.

Associate Director of Water, The Nature Conservancy, MN-ND-SD

sherrington@tnc.org

c: 850-381-1147

⁴ Colvin, S.A.R. and authors. 2019. Headwater streams and wetlands are critical for sustaining fish, fisheries, and ecosystem services. American Fisheries Society Special Report. Fisheries 44 (2), February 2019.