



Wright Soil & Water Conservation District

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Les Lemm
BWSR Wetlands Section Manager
520 Lafayette Road North
St. Paul, MN 55155

Dear Mr. Lemm,

I appreciate the opportunity to provide comments as a member of the Wetlands Advisory Committee. The scope of my review has been focused on the sweeping changes to the agricultural activities and drainage exemptions. The introduction of 103G.2241 Subdivision 1. (1) will fundamentally change the way WCA LGU's evaluate and respond to agricultural drainage projects. Given the specificity of the statutory language, I understand how drafting the WCA rule language is difficult.

Drafting rule language to address this issue is dependent on the overall goal of the statutory changes. If the intent of the statute is to reduce the likelihood of contradicting opinions between WCA and the USDA/NRCS for agricultural drainage activities, efforts should be made to remove ambiguity in a WCA LGU's scope of review. Rule language should be modified to remove any type of redundancy in review and opportunities for conflicting responses between programs. For example:

Remove provision (5):

(5) The board may provide guidance clarifying the validity of final certified wetland determinations for the purposes of this subpart.

If a final certified wetland determination is provided to the LGU there should be no further evaluation of its validity. This would eliminate the possibility of two different wetland determinations between WCA and NRCS.

Add the following provision:

(#) Drainage maintenance activities on areas labeled farmed wetland, farmed-wetland pasture, and wetland on a valid final certified wetland determination must be considered as authorized drainage maintenance by the LGU, notwithstanding provisions 1, 2, 3, and 4. The conclusion of drainage maintenance activities not being authorized must come from the USDA/NRCS.

The goal of this provision is to remove any ambiguity in the role of WCA LGU's for evaluating whether a project constitutes USDA/NRCS authorized maintenance. WCA LGU's should have no role making this determination to eliminate the possibility of conflicting responses between agencies. If WCA LGU's receive complaints regarding drainage activities that are occurring or have occurred that may not constitute USDA/NRCS authorized maintenance, a whistleblower complaint should be filed with the USDA/NRCS so it

can be reviewed in accordance with their procedures. In essence, drainage work occurring within qualifying labels is assumed to be exempt for WCA until deemed otherwise by the USDA/NRCS.

If, however, the intent of the statute is to maintain and/or increase WCA's jurisdiction over agricultural related drainage activities by serving as a "double check" on USDA/NRCS processes, rule language should be modified to reflect this intent. For example:

Add USDA/NRCS procedures within WCA Rule 8420.0112 Incorporation by Reference:

The methods and procedures used by the USDA/NRCS for completing wetland determinations and evaluating agricultural drainage projects should be formally incorporated for reference within WCA. This is needed if WCA LGU's will have a role in evaluating whether a project constitutes authorized drainage maintenance as defined by the USDA/NRCS or evaluating the validity of a wetland determination. This can only be accomplished if WCA applies the same standard of review as compared to the USDA/NRCS for the purposes of this exemption.

Add the following provision:

(#) In the absence of a project specific response from the USDA/NRCS regarding whether an activity constitutes authorized drainage maintenance, the LGU must make this determination in accordance with standards set out in parts 8420.0112 (insert documents incorporated by reference).

Given the USDA/NRCS rarely provides project specific responses regarding the authorization of drainage maintenance activities, it should be explicitly written that WCA LGU's must make this determination and what the standard of review is.

Maintain provision (5).

(5) The board may provide guidance clarifying the validity of final certified wetland determinations for the purposes of this subpart.

As I understand it, this provision would enable BWSR to add conditions for what is deemed "valid", preventing some wetland loss due to erroneous wetland determinations provided by the NRCS. This provision is critical as there are countless examples of wetland determinations inaccurately labeling wetlands as "Prior Converted" that would otherwise have been protected by WCA.

As a general comment, much of my concern stems from the following excerpt found in 8420.0420 Subp. 2. A.:

...and impacts to wetlands resulting from drainage maintenance activities authorized by the United States Department of Agriculture, Natural Resources Conservation Service, on areas labeled farmed wetland, farmed-wetland pasture, and wetland.

A plain reading of this would suggest that the USDA/NRCS authorizes drainage maintenance activities. As commonly defined, authorized means to give official permission for something, or for somebody to do something. One would assume that a landowner could present their drainage maintenance plan to the USDA/NRCS and receive documentation indicating what would/wouldn't be authorized which could then be shared with the LGU for confirming exemption qualification. In practice, however, the USDA/NRCS only provides generic fact sheets for maintaining program eligibility and drainage maintenance, even if the landowner is requesting a project specific response. Without a project specific response from the USDA/NRCS, the landowner and WCA LGU are left to determine what would constitute USDA/NRCS authorized maintenance while those agencies sit on the sidelines silently. Whether evaluating a proposed

project or work that has already been completed, WCA LGU's will always have to ask the question, "would this project be authorized by the USDA/NRCS?".

Administration of this exemption as currently written will be problematic for all parties involved. WCA administrators, USDA/NRCS staff, and landowners will be stuck in an awkward back and forth with each party looking to the next for an answer. Without knowing the origins and intent of these statutory changes in the first place, it is challenging to propose solutions. In my opinion it is critical that BWSR clarifies the desired outcome of this exemption and the role of WCA LGU's in administering it.

Sincerely,



Andrew Grean, Senior Wetland Resource Conservationist
Wright Soil and Water Conservation District

cc: Lewis Brochette, BWSR Wetlands Policy Coordinator
Ken Powell, Wetland Conservation Act Operations Supervisor
Luke Johnson, Wright SWCD Manager