

“Rare Natural Communities”

Authority, Issues, and Potential WCA Rule Language

This document summarizes information relating to the Rare Natural Communities (RNCs) provision contained in the MN Wetland Conservation Act (WCA) rules (Chapter 8420), including statutory authority, problems identified with the existing language and associated implementation, and recently developed draft rule language. This document was prepared by staff of the Board of Water and Soil Resources (BWSR).

Current Rule Language

MN Rule Chapter 8420.0515 (Special Considerations), Subp. 3.

A replacement plan for activities that involve the modification of a rare natural community as determined by the Department of Natural Resources' natural heritage program must be denied if the local government unit determines that the proposed activities will permanently adversely affect the natural community.

Statutory Authority

- 1) **Minn. Stat. 103G.2242, Subd. 1(d)** was added to statute in 2017, compelling local government units to consider mitigation related to RNCs, something that was not allowed in the current WCA rule language (see the “*must be denied*” language in the current rule cited above). It contains the only specific reference to RNCs in statute:

When making a determination under rules adopted pursuant to this subdivision on whether a rare natural community will be permanently adversely affected, consideration of measures to mitigate any adverse effect on the community must be considered.

- The statute requires that mitigation measures be considered when determining whether an RNC will be permanently adversely affected if the rules adopted under 103G.2242, Subd. 1(a) include provisions specific to RNCs.
- 2) The statutory authority for the Rare Natural Communities (RNCs) provision in the current WCA rule is necessarily connected to **Minn. Stat. 103G.2242, Subd. 1(a)**, which directs BWSR to adopt rules governing the approval of replacement plans:

“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.”

- If the presence of an RNC affects the value of the impacted wetland, the rules can address what constitutes adequate replacement. There is no requirement for the rules to address RNCs specifically, and no authority for the rules to address RNCs separate from the wetland's value.
- 3) **Minn. Stat. 103B.3355(a)** specifies that *“the public value of wetlands must be determined based upon the functions of wetlands,”* including *“fish, wildlife, native plant habitats.”* Minn. Stat. 103B.3355(b)(2) then directs BWSR to adopt rules establishing *“criteria for determining the resulting public values of wetlands.”*
- Similar to 103G.2242 above, this statute does not specifically address RNCs, but does specify that native plant habitats (in general) are included in the functions of wetlands that form the basis for a wetland's value.
- ❖ Taken together, the statutes above can be summarized as follows: The presence of native plant communities, including RNCs, can affect the value of a wetland. A replacement plan must provide for the replacement of the public value lost to the wetland impact in accordance with the WCA rules. If the WCA rules include provisions specifically relating to RNCs, proposed mitigation must be considered. In addition, other statutes already require that impacts to wetlands cannot be allowed unless replaced by actions that provide at least equal public value, and that wetland impacts and replacement must be considered in terms of avoidance, minimization, rectification, reducing/eliminating impacts over time, and compensating for the impact.

Issues to Address

BWSR contends that any specific provision for RNCs contained in the WCA rule should be written in a way that addresses the following deficiencies that have been identified through stakeholder engagement during the current rulemaking process:

- **Lack of a Definition.** RNCs are not defined in statute or rule. Current guidance lays out a process for identifying RNCs but stops short of defining them. Identifying an RNC is currently accomplished via a DNR staff determination made on a case-by-case basis.
- **Extent of Jurisdiction.** The extent to which adverse effects on a RNC occurring outside of the wetland boundary are regulated under the current WCA rule is unclear. WCA's statutory authority is limited to impacts to wetlands and the replacement of wetland values, but RNCs commonly extend beyond the wetland boundary. WCA also generally does not regulate modifications to vegetation alone unless they involve wetland filling, draining, or (in certain circumstances) excavation.
- **Applicability of Minn. Stat. 15.99.** It is unclear how decision timeframe requirements (15.99) apply to projects that potentially affect an RNC under the current rule. For RNC determinations (i.e. identifying an RNC), there is no permit or any type of formal outcome of the process and no timeline. The determination of the presence of an RNC at an impact or replacement site is not made by the Local Government Unit (LGU); consequently they have no ability to make a decision within the required timeline if the determination is not completed. LGUs have found it nearly impossible for a decision to be made on a replacement plan potentially involving an RNC in conformance with 15.99 even under

the best circumstances. Minn. Stat. 15.99 applies regardless of whether the applicant coordinated with the LGU and/or DNR prior to submitting the application.

- **Determining Permanent Adverse Effects.** Current rule provides no standards for an LGU to base its decision regarding whether the RNC will be permanently adversely affected. The 2017 statute language is confusing as mitigation is considered in determining whether there is a permanent adverse effect, not to offset the permanent adverse effect (despite the fact that in practice that's what it means).
- **Adequate Replacement.** When compensatory mitigation/replacement is proposed, it's unclear what is allowable and sufficient replacement. Consequently, the applicant can, at best, only blindly propose replacement actions without knowing what the LGU may consider adequate. While it is an LGU decision, in practice DNR's recommendation on adequate replacement is heavily relied upon as the expertise related to RNCs currently lies solely with DNR. Neither the current rule nor statute provide any direction in this regard. Guidance provides some direction on potential mitigation options, but those options are not consistent with the actions eligible for credit contained in the WCA rule. Therefore, it is unclear whether the replacement standards of the WCA rule apply to these actions or not, despite there being no authority granted to deviate from the rule in this regard.
- **Appeals.** It is unclear how an appeal of an RNC determination by DNR would be processed. Is this staff determination appealable? Who hears the appeal if it concerns the presence of an RNC which is solely a DNR staff determination according to current rule? What is the basis of the appeal, and standard for deciding on the appeal, if there is no definition of an RNC? Further, how can an LGU decision be defended under appeal when the rule contains no standards for determining permanent adverse effects and mitigation?
- **Confusing Terminology.** The current RNC rule provision and other special considerations use "*must be denied*" language. As used in the current rule is generally inconsistent with language used elsewhere in the rule and is potentially inconsistent with statute. Denial of a replacement plan that does not adequately replace the functions lost to an impact is an overarching standard for all replacement plans.
- **Clarity for Applicants and LGUs.** Currently, it can be difficult for applicants to know if an RNC exists on their project site and, if so, what the boundaries of the RNC are. Consequently, they often don't know how their project can be designed to avoid adverse effects on an RNC, or if an RNC even exists, until after the replacement plan has been submitted. It is also not possible for applicants to know what the replacement requirements will be for such projects as they are undefined. Further, LGUs typically do not have enough information to make a decision (approval or denial) due to the lack of clear standards in the rule.

Draft Rule Language

8420.0111, Subp. 59a. **Rare natural community.** "*Rare natural community*" means a native plant community in good or exceptional condition that is imperiled or vulnerable to extirpation in the state due to a restricted range, few occurrences, steep declines in occurrences, or severe threats.

8420.0515, Subp. 3. **Rare natural communities.**

- A. A replacement plan for wetland impacts that result in a permanent adverse effect on a rare natural community must include provisions to replace the associated loss of public value.
- B. A rare natural community is permanently adversely affected when a wetland impact results in a significant adverse change in the size or condition of the community. When determining whether a permanent adverse effect on the community exists, the local government unit must consider:
- (1) the size of the area affected by the impact relative to overall size of the community;
 - (2) the extent to which the impact will alter the community's character and quality; and
 - (3) any adverse effects to the community that are likely to occur after the initial impact.
- C. Replacement for wetland impacts that permanently adversely affect a rare natural community must include credits obtained through:
- (1) the actions in part 8420.0526 when associated with the restoration or protection of a rare natural community or the restoration of a native plant community to an exceptional ecological condition; or
 - (2) the restoration and protection of an exceptional natural resource under part 8420.0526, subpart 8.
- A replacement plan that does not provide for adequate replacement of the public value lost as a result of a wetland impact that permanently adversely affects a rare natural community must be denied.
- D. When making a decision on a replacement plan under this subpart, the local government unit must consult with the commissioner. Any comments received from the commissioner must be considered in accordance with part 8420.0255, Subp. 4A(4).

Intended Outcomes of the Draft Language

The draft language is intended to address all of the issues identified above. The new language:

- ✓ provides a clear definition of an RNC that LGU staff and consultants can understand and implement. It is based on existing native plant community definitions and guidance for Minnesota, state native plant community conservation status rank definitions, and wetland condition rankings stemming from Minnesota's Floristic Quality Assessment method;
- ✓ clarifies its applicability to "wetland impacts that result in a permanent adverse effect on a rare natural community," consistent with the extent of WCA's jurisdiction;
- ✓ does not refer to or otherwise require an LGU to wait for a determination from a state agency to move forward with a decision on a replacement plan within the timeframe requirements of 15.99;
- ✓ provides a basis for determining whether a permanent adverse effect on the community exists;
- ✓ specifies what may be acceptable replacement at a minimum, utilizing replacement actions already established in rule and statute;
- ✓ requires the LGU to consult with DNR, the agency with the recognized expertise on RNCs, regardless of whether they are a member of the technical evaluation panel (TEP) or not;

- ✓ provides a clear path for appeals, as all aspects of the RNC provision are encompassed in the LGU decision;
- ✓ reiterates the requirement that all replacement plans must adequately replace lost public values or be denied, maintaining the “must be denied” language but in locating it proper sequential order (after sequencing, adverse effects, and mitigation has been considered); and
- ✓ substantially improves clarity for applicants and LGUs by providing a definition and explicit standards for replacement plans as outlined above, while aligning the review and decision process for replacement plans involving RNCs with how all other replacement plans are reviewed and decided upon by the LGU.

Non-Rule Actions

Existing guidance can be updated or an “alternative evaluation method” can be developed under MN Rule 8420.0500. Subp. 3 to assist LGUs and TEPs in assessing the adequacy of wetland replacement when an RNC is permanently adversely affected. This would build off existing guidance, the new functional assessment method, data-based information on various rare natural communities, and the new rule language.