STATEMENT OF NEED AND REASONABLENESS

In the Matter of Proposed Amendments to Rules Relating to the Wetland Conservation Act; Minnesota Rules 8420; Revisor's ID Number: RD-4356

Board of Water and Soil Resources
August, 2026

Revisor's ID Number: RD-4356

General information:

- Availability: The State Register notice, this Statement of Need and Reasonableness (SONAR), and the proposed rule will be available during the public comment period on the board's website for this rulemaking: https://bwsr.state.mn.us/wca-rulemaking
- View older rule records at: https://www.revisor.mn.gov/rules/status/
- Board contact for information, documents, or alternative formats: Upon request, this SONAR can be made available in an alternative format, such as large print, braille, or audio. To make a request, contact Lewis Brockette, Wetlands Policy Coordinator, Minnesota Board of Water and Soil Resources, 525 Lake Ave. S., Suite 400, Duluth, MN 55802; telephone 651-539-2590; 800-657-3864; email lewis.brockette@state.mn.us; or use your preferred telecommunications relay service.
- How to read a sample Minnesota Statutes citation: Minn. Stat. § 116.07, subdivision 2(f)(2)(ii)(A) is read as Minnesota Statutes section 116.07, subdivision 2, paragraph (f), clause (2), item (ii), subitem (A).
- How to read a sample Minnesota Rules citation: Minn. R., part 7150.0205, subpart 3(B)(3)(b)(i) is read as Minnesota Rules, chapter 7150, part 0205, subpart 3, item B, subitem (3), unit (b), subunit (i).

CONTENTS

Acronyms, abbreviations, and definitions

APA – Administrative Procedure Act
ALJ – Administrative Law Judge
Board or BWSR – The Minnesota Board of Water and Soil Resources
BSA – Bank Service Area
CFR – Code of Federal Regulations
Commissioner – The commissioner of the Minnesota Department of Natural Resources
CWA – Clean Water Act. The primary federal law governing water pollution in the U.S.
CWD – A Certified Wetland Determination issued by the Natural Resources Conservation Service
CWMPP – Comprehensive Wetland Protection and Management Plan
DNR – Minnesota Department of Natural Resources
EPA – United States Environmental Protection Agency
Federal Mitigation Rule – The 2008 Compensatory Mitigation Rule (33 CFR Part 332). A joint regulation from the EPA and U.S. Army Corps of Engineers that establishes standards for compensatory mitigation to offset unavoidable impacts to wetlands, streams, and other aquatic resources authorized by Clean Water Act Section 404 permits.
FW – an area identified as Farmed Wetland on a Natural Resources Conservation Service Certified Wetland Determination
FWP - an area identified as Farmed Wetland Pasture on a Natural Resources Conservation Service Certified Wetland Determination
HGM – Hydrogeomorphic classification system. A classification system classifies wetlands based on their landscape position, source of water, and hydrodynamics.
LAM – Minnesota Department of Natural Resources, Lands and Minerals Division
LGU – Local Government Unit
MDA – Minnesota Department of Agriculture
Minn. R. pt. – Minnesota Rules part
Minn. Stat. – Minnesota Statutes
MMB – Minnesota Management and Budget
MnDOT – Minnesota Department of Transportation
MNTEC – Minnesota Tribal Environmental Committee
MPCA – Minnesota Pollution Control Agency
NRCS – Natural Resources Conservation Service
NW – An area identified as Non-Wetland on a Natural Resources Conservation Service Certified Wetland Determination
NWI – National Wetlands Inventory
OAH – Office of Administrative Hearings
PC - an area identified as Prior Converted Cropland on a Natural Resources Conservation Service Certified Wetland Determination
RFC – Request for Comments
§ – Section
Section 404 – The provisions of the CWA that regulate the discharge of dredged or fill material into waters of the United States, including wetlands. 33 U.S.C. § 1344.
SONAR – Statement of Need and Reasonableness
SWCD – A Soil and Water Conservation District as defined in Minn. Stat. § 103C.101, subdivision 10.
TEP – Technical Evaluation Panel

USACE – United States Army Corps of Engineers
USDA – United States Department of Agriculture
W - an area identified as a Wetland on a Natural Resources Conservation Service Certified Wetland Determination
WAC – Wetland Advisory Committee
WC or WC Provisions – The Wetland Conservation Compliance provisions of the Food Security Act of 1985, as amended, administered and implemented by the NRCS.
WCA – Wetland Conservation Act

Introduction and overview

Introduction

The Minnesota Board of Water and Soil Resources (BWSR), hereafter referred to as the “board,” is proposing amendments to the rules for administering the Wetland Conservation Act (WCA), located at Chapter 8420 of Minnesota Rules. The purpose of WCA is to maintain and protect Minnesota’s wetlands and the benefits they provide. This purpose is achieved by requiring persons proposing to impact a wetland to first attempt to avoid the impact, to minimize impacts that cannot be avoided, and finally, to replace any impacted wetland area with another wetland area of at least equal function and value. Certain wetland activities are exempt from WCA, allowing projects with minimal impact or projects located on land where certain pre- established land uses are present to proceed without regulation.

WCA is implemented by Local Government Units (LGU), with the board being responsible for administration of the program. In fulfilling its administrative responsibilities, the board provides oversight and training to ensure proper WCA implementation by LGUs, promulgates administrative rules for the program, participates on technical evaluation panels, and hears appeals of LGU decisions.

The current WCA rulemaking process was initiated in 2015 when an initial request for comments was published in the State Register, with supplemental requests being published at later dates. The early stages of rulemaking consisted largely of coordination with local governments and stakeholders to obtain feedback and advice on potential rulemaking topics. The proposed rule was then drafted by board staff, with Tribal governments, multiple interest groups, persons, state agencies, and members of the board providing substantial input and review.

More specific information concerning the purpose of WCA, the roles of the LGUs and the board, the process used to develop the proposed rule, and the purposes of its amendments, may be viewed in Section 2, Background, of this document.

Statement of General Need

There are several general reasons why the proposed rules are necessary. First, the proposed rules are necessary to conform the rule to statute changes that occurred after the adoption of the current rule, and to other existing provisions of statute that the rule is not otherwise in conformance with. For example, amendments made in 2011 to Minn. Stat. § 103G.2242, subdivision 2(A) eliminated the requirement for LGUs to establish a local appeal process. However, while local government units are implementing this provision consistent with the statute, the current rule makes the contradictory prescription that “...the local government unit must establish a local appeal process....” The 2011 amendments also authorized electronic transmission as a method for sending notices and other documents. For example, Minn. Stat. § 103G.2242, subdivision 9 was amended to allow the appeal period to be defined by the date of sending the petition by electronic transmission. However, the current Minn. R. part 8420.0905, subpart 2C requires mailing of the petition.

Second, the proposed rules are needed to satisfy an explicit legislative directive. Specifically, Minn. Stat. § 103G.2242, subdivision 2a(c) requires the Board to establish, by rule, “...timelines for project review and comment for wetland banking projects.” The proposed rule establishes those timelines and the procedures to implement them.

Third, amendments to the rule are needed to improve the efficiency, effectiveness, and/or outcomes of the rule by clarifying certain requirements and procedures. For example, a proposed amendment to the sequencing flexibility provision eliminates an unnecessary procedural step that required an applicant to request that an LGU exercise sequencing flexibility before that LGU could exercise such flexibility. The proposed amendment allows the LGU to simply exercise such flexibility when the project meets certain qualifying conditions, streamlining the process and removing an undue procedural burden from the regulated party.

Finally, the existing rule contains errors that occurred during prior rulemakings, and contains many grammatical, lexical, citational, and structural deficiencies that impair the accuracy and clarity of the rule. For example, Minn. R., part 8420.0255, subpart 5, Notice of Decision, incorrectly states that a decision must be mailed to the landowner within 10 business days of the decision having been made. This appears to be a typographical error made during a prior rulemaking. The proposed amendments correct this error, as the decision timeline must be compliant with Minn. Stat. § 103G.2242, subdivision 7, which prescribes a time limit of “ten days,” not “ten business days.” Another example is inconsistency in the use of multiple terms across parts and subparts of the rule. The proposed rules are needed to correct such errors, improve the rule's structure, eliminate redundant and/or superfluous language, improve the accuracy of terminology, improve word choice and arrangement, and so on.

The type of and need for the proposed amendments are identified and described in greater detail in the rule-by-rule analysis in Section 6(B) of this document.

Scope of the Proposed Amendments:

The following parts of Minn. R., Chapter 8420 are being affected by the proposed changes:

Purpose and Scope

1) Minn. R. 8420.0100, Purpose
2) Minn. R. 8420.0105, Scope
3) Minn. R. 8420.0111, Definitions
4) Minn. R. 8420.0112, Incorporation by Reference
5) Minn. R. 8420.0117, Presettlement Wetland Acres and Areas

Local Government Unit Duties and Procedures

6) Minn. R. 8420.0200, Determining Local Government Unit; Duties
7) Minn. R. 8420.0240, Technical Evaluation Panel Procedures
8) Minn. R. 8420.0255, Local Government Unit Application and Decision Procedures

Application Procedures

9) Minn. R. 8420.0305, General Application Requirements
10) Minn. R. 8420.0310, Wetland Boundary or Type Applications
11) Minn. R. 8420.0315, No-Loss Applications
12) Minn. R. 8420.0320, Exemption Applications
13) Minn. R. 8420.0330, Replacement Plan Applications

Boundary or Type, No-Loss, and Exemption Standards

14) Minn. R. 8420.0405, Boundary or Type

15) Minn. R. 8420.0410, No-Loss and Exemption Conditions

16) Minn. R. 8420.0415, No-Loss Criteria

17) Minn. R. 8420.0420, Exemption Standards

Wetland Replacement

18) Minn. R. 8420.0500, Purpose and Requirement

19) Minn. R. 8420.0515, Special Considerations

20) Minn. R. 8420.0520, Sequencing

21) Minn. R. 8420.0522, Replacement Standards

22) Minn. R. 8420.0526, Actions Eligible for Credit

23) Minn. R. 8420.0528, Replacement Wetland Construction Standards

24) Minn. R. 8420.0544, Replacement for Public Transportation Projects

Wetland Banking

25) Minn. R. 8420.0700, Purpose of Wetland Banking

26) Minn. R. 8420.0705, Establishing Wetland Bank Site

27) Minn. R. 8420.0725, Certification and Deposit of Credits

28) Minn. R. 8420.0735, Monitoring and Corrective Actions

29) Minn. R. 8420.0745, Withdrawals and Transfers

30) Minn. R. 8420.0755, Bank Account Administration and Management

31) Minn. R. 8420.0800, Replacement Wetland Construction Certification

32) Minn. R. 8420.0810, Replacement Wetland Monitoring

33) Minn. R. 8420.0820, Local Government Unit Monitoring Responsibilities

34) Minn. R. 8420.0830, Comprehensive Wetland Protection and Management Plans

35) Minn. R. 8420.0835, High Priority Regions and Areas

Wetland Planning

36) Minn. R. 8420.0840, Wetland Preservation Areas

Enforcement, Appeals, and Compensation

37) Minn. R. 8420.0900, Enforcement Procedures

38) Minn. R. 8420.0905, Appeals

Activities Under Department of Natural Resources Authority

39) Minn. R. 8420.0930, Mining

40) Minn. R. 8420.0935, Standards and Criteria for Identification, Protection and Management of Calcareous Fens

Background

In 1991, the Minnesota Legislature approved, and Governor Arne Carlson signed WCA, one of the most sweeping wetlands protection laws in the country, with the purpose of maintaining and protecting Minnesota's wetlands and the benefits they provide. The regulatory provisions of WCA are primarily administered by LGUs, with the Board fulfilling certain responsibilities, such as the promulgation of Minnesota Rules chapter 8420, providing technical assistance to LGUs, administering the State wetland bank, and hearing appeals of LGU decisions. Enforcement of WCA is provided by Minnesota Department of Natural Resources (DNR) enforcement officers and other licensed peace officers.

The board is the state's administrative agency for soil and water conservation districts (SWCDs), watershed districts, metropolitan watershed management organizations, and counties responsible for land and water management. The board sets a policy agenda designed to enhance conservation delivery through these governmental partners. The board's core functions include implementing the state's soil and water conservation policy, comprehensive local water management, and WCA as it relates to the 41.7 million acres of private land in Minnesota. Board members, including the board chair, are appointed by the governor to staggered four-year terms. The 20-member board is established under Minn. Stat. § 103B.101 and includes:

- three county commissioners;
- three soil and water conservation district supervisors;
- three watershed district or watershed management organization representatives;
- three citizens who are not employed by, or the appointed or elected officials of, a state governmental office, board, or agency;
- one township officer;
- two elected city officials, one of whom must be from a city located in the metropolitan area, as defined under section 473.121, subdivision 2;
- the commissioner of agriculture;
- the commissioner of health;
- the commissioner of natural resources;
- the commissioner of the Pollution Control Agency; and
- the director of the University of Minnesota Extension Service.

The board employs staff dedicated to administration of the rules and providing assistance and oversight for the LGU implementation of WCA. In accordance with Minn. Stat. § 103G.005, subdivision 10i, LGUs consist of cities, counties, SWCDs, certain townships and watershed management organizations in the seven-county metropolitan area, state agencies with administrative responsibility for land management and/or regulation, and, for wetland banking projects established solely for replacing wetland impacts under a permit to mine under section 93.481, the commissioner of natural resources. Each LGU has an associated Technical Evaluation Panel (TEP) to provide technical expertise and recommendations to the LGU. Each TEP includes a board technical staff person.

Rulemaking in Minnesota follows the procedures outlined in the Minnesota Administrative Procedure Act (APA), Minnesota Statutes, section 14. Board staff utilize the Minnesota Rulemaking Manual as a procedural guide for WCA Rulemaking.

The current WCA Rulemaking process was initiated in 2015 when an initial request for comments was published in the State Register. An additional notice was published on January 18, 2022, continuing the rulemaking process, with a subsequent notice being published on July 8, 2024, to address changes to the scope of rulemaking resulting from the 2024 WCA statute changes (Exhibit 1). The proposed rule was drafted by board staff, with substantial input and review of the proposed rule being provided by Tribal governments, multiple interest groups, persons, state and federal agencies, and a subcommittee of the board. Board staff also met on an individual basis with a number of interest groups. Additionally, the board proactively made multiple preliminary drafts of the rule available for public review and comment across a period of approximately two years preceding the board's publication of the Notice of Intent to Adopt these rules. Additional information on the rulemaking process and public involvement may be viewed in Section 3, Public Participation and Stakeholder Involvement, of this document.

Public Participation and Stakeholder Involvement

During its August 27, 2026, meeting, board members discussed and decided to proceed to adopt new and amended administrative rules in order to improve the board's administration of Minnesota Statutes under the board's jurisdiction for wetland protection, primarily contained within Minn. Stat. § 103G. In accordance with the requirements of the APA, Minn. Stat. § 14, and the requirements of Minnesota Rules, Chapter 1400, the board sought input and comments from the public, stakeholders, and individuals affected by these rules. This WCA rulemaking was initiated on October 9, 2015, when a request for comments was published in the State Register, with additional supplemental requests being published at later dates. All written comments received in response to these notices are part of the rulemaking record and were considered during the development of the proposed rule (Exhibit 1). All verbal feedback received through the mechanisms listed below was also considered.

In addition to the State Register requests for comments, the board utilized multiple mechanisms to engage with the public and stakeholders, to share information with and obtain feedback on the development of the rules in a fair, orderly, and effective manner. Those mechanisms included the following, with additional details including event dates and attendees, being included in Exhibit 2:

1. <u>Formation of a WCA rulemaking advisory committee</u>. The Board formed a rulemaking advisory committee, the Wetlands Advisory Committee (WAC), through which invited organizations advised the board on the development of the rules. Consistent with the guidance in the Minnesota Rulemaking Manual, the WAC held neither voting nor decision-making authority but provided important advice on draft rule language. Members were expected to share information with their members and partner organizations; to keep the committee manageable, input from organizations not on the WAC was solicited separately through the mechanisms described below. Following two open interested-organization and individual meetings in 2016, the WAC met eight times between 2022 and 2026. Meetings were recorded and posted on the rulemaking webpage (https://bwsr.state.mn.us/wca-rulemaking). The WAC included representatives from statewide groups and organizations with an interest in the WCA rules, spanning the following sectors:
    - **Agriculture:** Minnesota Farm Bureau; Minnesota Farmers Union; Minnesota Agricultural Water Resources Center

- **Environment / Natural Resources:** Minnesota Center for Environmental Advocacy; Sierra Club; Minnesota Environmental Partnership; Freshwater
- **Local Government:** Association of Minnesota Counties; League of Minnesota Cities; Minnesota Rural Counties Caucus; Minnesota County Engineers Association; Minnesota Inter-County Association; Minnesota Watersheds; Red River Watershed Management Board; Minnesota Association of Soil and Water Conservation Districts; Minnesota Department of Transportation (MnDOT)
- **Business and Industry:** Mining Minnesota; Builders Association of Minnesota; Aggregate & Ready-Mix Association of Minnesota; Iron Mining Association of Minnesota; Minnesota Chamber of Commerce
- **Wetland Professionals:** Minnesota Wetland Professionals Association; Soil and Water Conservation District wetland staff; county wetland staff

2. WCA implementation and technical review. To inform the technical aspects of the rules, the board convened an ad hoc workgroup of local government staff and wetland professionals with direct responsibility for implementing and ensuring compliance with the WCA. The workgroup provided input on select rulemaking topics prior to development of the draft rule language and developed recommendations on technical implementation and compliance matters, which were later presented during WAC meetings. The workgroup was convened by email, met three times in 2018, and individual members were consulted as needed during rule development. In addition, the board conducted two listening sessions for LGUs to present the draft rules and gather feedback from staff directly involved in implementation and held webinars and presentations for local government staff on WCA-related statute changes to seek input on the corresponding rules. Finally, board staff met directly with the MN Wetland Professionals Association to present draft rules and seek feedback on rule topics,
3. State and federal agency coordination. Board staff coordinated directly with state and federal agency staff throughout the rule development process, including meetings to discuss rulemaking topics and progress, sharing of rule drafts, and seeking feedback on draft rule language options. Coordination began in 2016 and continued through rule development with, among others:

   - **Federa**l: U.S. Army Corps of Engineers (USACE); U.S. Environmental Protection Agency (EPA); U.S. Fish and Wildlife Service (USFWS); U.S. Department of Agriculture (USDA) – Natural Resources Conservation Service (NRCS)
   - **State of Minnesota**: DNR; Minnesota Pollution Control Agency (MPCA); MnDOT; Department of Agriculture (MDA)

   Coordination consisted of the sharing of rule drafts and information, joint meetings with staff from all state and federal agencies listed above, and meetings with staff from single agencies regarding specific rule topics relevant to those agencies. For example, multiple meetings were held with DNR staff to discuss and develop draft language regarding rare natural communities (8420.0515, subp. 3), enforcement procedures (8420.0900), mining (8420.0930), calcareous fens (8420.0935), and other topics.

   Additionally, further consultation with DNR and the MDA occurred through the board's Wetland Conservation Committee as described in No. 9, below.

4. Individual meetings with interested organizations. Board staff met individually with organizations to present and discuss rulemaking topics of interest to them — both organizations not represented through other mechanisms (such as the WAC) and those represented elsewhere that requested additional communication on specific topics or directly with their members. Organizations engaged included:
   - Minnesota Rural Counties Caucus
   - Northern Counties Land Use Coordinating Board
   - Minnesota Association of Planning and Zoning Administrators
   - Minnesota Association of Watershed Administrators
   - Minnesota Water Resources Conference
   - Minnesota County Engineers Association
   - The Drainage Work Group
   - Minnesota Association of Townships
   - Red River Basin Commission
   - Basin Alliance for the Lower Mississippi River in Minnesota
   - Metropolitan Area Conservation District Managers
   - Wetland bank account owners and interagency Mitigation Banking Newsletter subscribers
   - Committees and members of organizations represented on the WAC
5. Early sharing of draft rule language. The board voluntarily made three preliminary draft versions of the rule available for public review and comment across a period of almost two years preceding the agency's publication of the Notice of Intent to Adopt these rules. Following the publication of each preliminary draft on the board's website, the board notified interested individuals and organizations through direct e-mail and other means. The board sought input through meetings of the WAC and through other mechanisms described here. Further, the board accepted written comments following each preliminary draft rule publication, with comments being recorded and posted on the board's rulemaking website. The board provided direct responses to most comments. Additional details related to the publication of the preliminary drafts and the comments received may be viewed in Exhibit 3.
6. Creation of WCA Rulemaking website. To ensure transparency and to increase accessibility and opportunity for feedback, the board created a webpage presenting comprehensive information on the rulemaking process and progress and providing an opportunity to comment. The page includes, but is not limited to, the rulemaking plan, the rulemaking timeline, the rule development process, copies of all comments received, recordings of meetings and presentations held with local government staff and the WAC, preliminary draft versions of the rule, and other relevant documents. The webpage increased the accessibility to knowledge and opportunities for people to leave their feedback on the rule. The webpage has been active since the 2015 request for comments was published in the State Register and will remain so until the end of the rulemaking project.

7. Direct communication with interested parties. The board established a WCA rulemaking email address, which it posted on the rulemaking webpage and shared at every rulemaking presentation, meeting, and communication. The board used this address to distribute rulemaking information and notices, both formal and informal, and to receive responses to them. It served as a standing channel through which interested parties could submit general inquiries, questions, and comments regarding the rulemaking at any time, whether or not a formal comment period was open. The board reviewed and responded to these communications throughout the rule development process. In addition, the board maintained an email list of individuals and organizations interested in WCA rulemaking who wishedto receive notice of rule proceedings and other rulemaking information, and it used that list to inform them of WCA rulemaking events and progress.
8. Tribal consultation and coordination. The agency shared information and sought feedback from Tribal governments utilizing multiple mechanisms. Those efforts are described in detail in Section 4, below, and listed in Exhibit 4.
9. Review by the board's Wetland Conservation Committee. The board's Wetland Conservation Committee consists of members representing the DNR, the MDA, counties, townships, watershed districts, and citizens. Committee members met on multiple occasions for updates on the rulemaking process and progress, to review and provide feedback on draft rule language, including each of three preliminary draft rules, and to make a recommendation to the full board for approval of the Notice of Intent to Adopt the rules. Meetings were open to the public with the agendas published in advance and were recorded and posted on the rulemaking webpage (https://bwsr.state.mn.us/wca-rulemaking).
10. Mitigation Newsletter. The USACE, in partnership with the board, publishes the Mitigation Newsletter to inform wetland bank owners and developers, natural resource consultants, state and federal agencies, and others of wetland banking and related regulatory topics. The board published informational updates on WCA rulemaking in the biannual Mitigation Newsletter in spring of 2023, fall of 2024, and spring of 2026. The updates included the scope and specific topics of rulemaking as they relate to mitigation/replacement, the availability of preliminary rule drafts, and a link to the board's rulemaking webpage and the electronic mail distribution list solicitation.

Tribal Consultation and Coordination

During the development of the proposed rules, the board invited government-to-government consultation with each Minnesota Tribal Nation, consistent with Minn. Stat. § 10.65 and agency policy. Between March of 2024 and November of 2025, the board consulted with the Fond du Lac Band of Lake Superior Chippewa, Grand Portage Band of Lake Superior Chippewa, Leech Lake Band of Ojibwe, Mille Lacs Band of Ojibwe, Prairie Island Indian Community, Red Lake Band of Chippewa, Shakopee Mdewakanton Sioux Community, and the White Earth Nation. Consultations were held in-person and virtually, at the discretion of each Tribal Nation. The consultations included discussions of federal, Tribal, and state wetland regulations, and preliminary drafts of the proposed rule.

In addition to formal consultation, and throughout the rule development process, the board regularly communicated and engaged with staff and representatives of federally recognized Tribal Nations, Tribal consortiums, and other Tribal organizations. This coordination occurred through numerous scheduled opportunities and took multiple forms, totaling approximately 45 informal engagements. These included written and email updates distributed to each Tribal Nation and the 1854 Treaty Authority; periodic agency reports to the Minnesota Indian Affairs Council; presentations to and discussions with the Minnesota Tribal Environmental Committee (MNTEC); virtual, in-person, and hybrid coordination meetings; listening sessions; and information posted on the board's website. The board remains available to meet directly with individuals, entities, and organizations according to the preferences of each Tribal Nation, consortium, or organization. Additional details of the board's Tribal consultation and coordination activities may be viewed in Exhibit 4.

Statutory Authority

The board has authority to develop rules governing wetland conservation under Minn. Stat. § 103G.2242, subdivision 1(a), which states: "T*he 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.*" The board also has authority to develop rules governing wetland conservation under Minn. Stat. § 103G.2241, subdivision 11(d), which states: "The board shall develop rules that address the application and implementation of exemptions and that provide for estimates and reporting of exempt wetland impacts, including those in section 103G.2241, subdivisions 2, 6, and 9."

In addition, there are references to the board's rulemaking authority incorporated into specific statutory provisions. Examples of such references include:

- Minn. Stat. § 103G.2242, subdivision 12, paragraphs (c) and (d):

"(c) Notwithstanding section 103G.222, subdivision 1, paragraph (i), the following actions, and others established in rule, that are consistent with criteria in rules adopted by the board in conjunction with the commissioners of natural resources and agriculture, are eligible for replacement credit as determined by the local government unit or the board, including enrollment in a statewide wetlands bank:"

"(d) Notwithstanding section 103G.222, subdivision 1, paragraphs (f) and (g), the board may establish by rule different replacement ratios for restoration projects with exceptional natural resource value."

- Minn. Stat. § 103G.222, subdivision 3(c):

"(c) Notwithstanding paragraph (a), clauses (1) and (2), the priority order for replacement by wetland banking begins at paragraph (a), clause (3), according to rules adopted under section 103G.2242, subdivision 1."

Finally, rulemaking is not occurring under new rulemaking authority. The current rulemaking amends the rule that was already compliant with the timeframes in Minn. Stat. § 14.125, and thus, the 18-month time limit does not apply.

Reasonableness of the Amendments

General Reasonableness

The proposed rules are the culmination of a process that lasted ten years and reflect an ongoing and robust dialogue with a wide range of stakeholders, the general public, Tribal governments, and other governmental entities. The board provided numerous opportunities for these individuals and entities to provide feedback and has carefully considered all feedback received from each.

The proposed amendments predominately conform the rule to statute changes that occurred after the adoption of the current rule and to other existing provisions of statute that the rule is not otherwise in conformance with. They also satisfy a statutory directive to develop rules. It is reasonable to propose amendments that conform the rule to statutes enacted by the Minnesota Legislature and to implement their legislative directive.

Many amendments to the rule are proposed to improve the efficiency, effectiveness and/or outcomes of the rule by updating outdated rule provisions and clarifying certain requirements and procedures. It is reasonable to amend rules for these reasons because they make it easier for regulated parties to comply with the rule and easier for LGUs to implement it. It is also reasonable to amend rules to keep them current and accurate and to improve the outcomes of the rule when such amendments impose no additional regulatory burden on the public.

Finally, the proposed amendments correct numerous errors, improve the rule's structure, eliminate redundant and/or superfluous language, improve the accuracy of terminology, improve word choice and arrangement, and so on. It is reasonable to propose amendments to correct these deficiencies because they make it easier to interpret, implement, and comply with the rule, and improve consistency in implementation of the rule.

For the foregoing reasons and for the specific reasons stated below, the proposed rules are reasonable.

Specific Reasonableness

Proposed change to Minnesota Rules:

The following nonsubstantive terminological amendments occur repeatedly throughout the rule and are described here collectively rather than addressed individually within each subpart where they appear.

The term "site" is replaced with "wetland" in the phrase "replacement site," changing it to "replacement wetland." The amendment is necessary because "replacement site" is not a defined term in this rule, while "replacement wetland" is a defined term that is consistent with the existing intent of the rule. For the same reason, the term “bank credits” is replaced with “banking credits”, and “bank” is replaced with “banking” where appropriate. It is reasonable to amend the rule to replace undefined terminology with defined terms that are used consistently throughout the rule and to make the rule’s terminology more concise, thereby providing greater clarity and certainty to the regulated community and members of the public.

The word "types" is deleted from "habitat types." The amendment is necessary to eliminate a conflict with the definition of “type” in Minn. R., part 8420.0111, subpart 75. Further, every habitat is inherently of a type, making the additional word unnecessary in this context. It is reasonable to remove conflicting language from the rule without altering its intent, thereby improving clarity for the regulated community and members of the public.

The word "wetlands" is added to "replacement," changing it to "replacement wetlands." The amendment is necessary because "replacement" alone does not specify what is being replaced, while "replacement wetlands" is a defined term used throughout the rule. It is reasonable to amend the rule to ensure consistent use of defined terms, thereby providing greater clarity to the regulated community and members of the public.

Purpose and Scope (8420.0100 - 8420.0117):

8420.0100 PURPOSE

Subpart 1. Purpose. The list of existing laws is proposed for removal. The amendment is necessary because an incomplete list of laws could be interpreted as definitive, creating conflicts with applicable statutes not included, and could mislead those who rely on the rule. It is reasonable to remove an incomplete list that has the potential to be misinterpreted in a manner that creates unintended conflicts with applicable law.

The sentence preceding the itemized list is revised to remove unnecessary prescriptive language. The amendment is necessary because the existing text directs that the chapter "shall be interpreted to implement" the purpose of the act, which creates an unimplementable standard that has the potential to conflict with actual standards established elsewhere in the rule, and is redundant because any rule's provisions are inherently interpreted to carry out its stated purpose. The revised text simply states, "The purpose of the act is to," making it a straightforward declarative statement of purpose rather than an unnecessary directive. The stated purposes remain unchanged. It is reasonable to propose the elimination of redundant, unnecessary prescriptive language from the rule.

8420.0105 SCOPE

Subpart 1. Scope; generally. The proposed amendments are necessary to conform the rule to amendments to Minn. Stat. § 103G.222, subdivision 1, which eliminated Wetlands of the United States (Circular 39) wetland type as a relevant factor for determining when excavation is regulated under this chapter.

As a result, the term “types," which was specific to that classification system, no longer has a basis in this subpart. It is reasonable to conform the rule to statutes enacted by the Minnesota Legislature.

Subpart 2. Applicability. The existing language references the “regulations” of federal agencies, including the United States Department of Agriculture, which administers the Wetland Conservation Provisions (“Swampbuster”) of the Food Security Act of 1985, as amended. However, those provisions are not administered and implemented purely through regulations, but also through various policies adopted by the agencies of the USDA and are a set of conditions that must be met to maintain eligibility for farm program participation. The addition of “and requirements” to paragraph (F) is proposed to more accurately reflect this. This proposed amendment is reasonable because it imposes no additional requirement and makes the rule more accurate.

The deletion of paragraph (I) is proposed as the cited statutory provisions, as well as provisions that are not cited, apply regardless of inclusion in the WCA rules and are sufficiently addressed in the sequencing section of the rule. It is reasonable to strike redundant language without changing the intent of the rule.

8420.0111. DEFINITIONS.

The amendments to this part fall into several recurring categories. Each category is addressed collectively here, with individual definitions that require additional explanation beyond the applicable general rationale being addressed in the corresponding subpart below.

Several amendments add new defined terms to this part. Such amendments are necessary because the terms are used throughout the rule but are currently undefined, creating ambiguity in implementation. It is reasonable to define terms that are used repeatedly throughout the rule and that are foundational to its implementation, as consistent definitions provide clarity and certainty for the regulated community, state and local governments, and members of the public.

Several amendments relocate definitions from other parts of this chapter to this part. Such amendments are necessary because definitions are most appropriately located in the definitions part of the rule, and their location elsewhere creates structural inconsistency and makes it more difficult for the regulated community to locate applicable definitions. It is reasonable to relocate definitions to the definitions part of the rule to improve accessibility and structural consistency.

Multiple amendments conform existing definitions to statutory amendments enacted since the adoption of the current rule. Such amendments are necessary to resolve conflicts between the rule and statute and to implement the Legislature's intent. It is reasonable to conform definitions to statute.

Several amendments strike terms and their definitions from this part. Such amendments are necessary because the stricken terms are no longer used in the rule, are adequately defined in documents incorporated by reference, or their definitions contain substantive provisions that are more appropriately located in other parts of the rule. It is reasonable to strike definitions that are no longer applicable, that are redundant with incorporated documents, or that are more appropriately addressed elsewhere in the rule.

Finally, multiple clerical amendments are made to correct cross-references and re-letter subparts as needed to maintain the structural integrity of this part following other proposed amendments. It is reasonable to make clerical amendments that are necessitated by other proposed amendments without altering the intent of the rule.

Subpart 3. Account holder. The term “legal partnership” is added to the definition of “account holder.” The amendment is necessary because the omission of legal partnerships from the definition creates ambiguity as to whether they may hold wetland bank accounts, despite the fact that they may and do function as account holders in practice. It is reasonable to ensure that the definition encompasses all entities capable of holding accounts under the rule, thereby preventing unintended exclusions and providing greater certainty to those who participate in the wetland banking program.

Subpart 8. Application. The last sentence of this subpart is stricken. The proposed amendment is necessary because the subject sentence prescribes a specific action to the board. It is not appropriate to include substantive, prescriptive provisions in the definition of a term. This amendment does not affect the intent of the rule, as the requirements for the provision and use of forms is already established in other parts of this rule. It is reasonable to propose an amendment that improves the clarity of the rule by locating prescriptive text in the appropriate part(s) of the rule.

Subpart 10a. Bank Service Area or Wetland Bank Service Area. This is a new subpart. The defined terms, though used throughout the current rule and statute, have been defined in neither. The proposed language establishes a definition based on the use of the term under current rule and statute, and that is consistent with the Federal Mitigation Rule at 33 CFR § 332.2. It is reasonable to define terms based on their existing use in rule and statute, as doing so codifies established practice without altering current implementation.

Subpart 11. Banking Credits. The phrase "certified and" is stricken. The amendment is necessary to remove redundant language. Minn. R., part 8420.0725 requires that credits must be certified by the LGU in order to be deposited; therefore, if they have been deposited, they have already been certified. A definition should not be used to restate a requirement that is established in another part of the rule. It is reasonable to improve the clarity of the rule by removing redundant, unnecessary language.

The rule proposes to add the word "state" to this definition, to make the terminology consistent with the definition of "wetland bank" in subpart 67 of this part and to differentiate between an individual wetland bank. It is reasonable to propose an amendment to improve the consistency of terminology used in the rule.

Subpart 13a. Calcareous fen. This is a new subpart. The definition is relocated here from Minn. R., part 8420.0935, subpart 2. This amendment is reasonable because the definition is more appropriately located in the definitions part as the term is used in multiple locations in the rule, not just in part 8420.0935.

Subpart 16a. Credit or replacement credit. This is a new subpart. The defined terms, though used throughout the current rule and statute, have been defined in neither. The proposed language establishes a definition based on the use of the term under current rule and statute. It is reasonable to define the terms based on their existing use in rule and statute, as doing so reflects current practice and legislative intent without altering the substantive requirements governing the generation or use of replacement credits.

Subpart 20. Determination or determine. The terms "conclusion," "the applicable governmental," and "or their designee" are added to the definition. The amendments are necessary to clarify that determinations are not limited to "technical finding[s]" and that such determinations are made by governmental units other than the "local government unit." It is reasonable to ensure that the defined scope of "determination" reflects the full range of governmental entities and decision types it encompasses in practice, thereby ensuring consistent implementation across all applicable contexts.

Subpart 23a. Electronic transmission. The definition is revised to incorporate the new statutory definition of "electronic transmission" and the statute's authorization of its use. It is reasonable to conform the rule to amendments to Minn. Stat. § 103G.005, subdivision 9(d) and Minn. Stat. § 103G.2242, subdivision 6.

Subpart 24. Eligible. The proposed amendment strikes the term "eligible" and its definition from this part. The amendment is necessary because the term is used throughout the draft rule in accordance with its conventional meaning (having the right to do or obtain something, or satisfying the appropriate conditions), not in the context of the definition provided. Additionally, the existing definition articulates a general rule provision regarding a local government's decision-making on an application rather than defining the term itself. Where this general provision is applicable, the corresponding sections of the rule (e.g., part 8420.0526 - actions eligible for credit) already address the ability of a local government unit to set applicable parameters, such as the amount of credit allocated for a proposed action eligible for credit. It is reasonable to strike the term and its definition to avoid confusion between its conventional usage throughout the rule and the narrower, procedural meaning conveyed by the definition as written.

Subpart 28. Greater than 80 percent area. The amendment conforms the rule to amendments to Minn. Stat. § 103G.005, subdivision 10(b), which eliminate conflicts between presettlement areas and bank service areas by bringing them into alignment. It is reasonable to conform the rule to statutes enacted by the Minnesota Legislature.

Subpart 30. Hydric Soils. The proposed amendment strikes the term “hydric soils” and its definition from this subpart. The amendment is necessary because, aside from this definition, the term appears only once in the rule and has been deleted from that subpart (Minn. R., part 8420.0330, subpart 3) in part because the term as used is no longer applicable. Soil survey map units are now assigned hydric soil ratings rather than being simply classified as hydric or not. While the term does appear in the definition of “wetland,” it is relevant only to the process of delineating wetlands in accordance with the United States Army Corps of Engineers Wetlands Delineation Manual (USACE ‘87 Manual), which is incorporated by reference under part 8420.0112. The applicable definition of hydric soils and its use in the context of wetland identification and delineation is contained within that incorporated document. It is reasonable to strike terms and definitions from the rule where they are defined in the documents incorporated by reference in which they are used, in order to avoid redundancy and provide greater clarity to the regulated community and members of the public.

Subpart 32. Impact. The amendment conforms the rule to Minn. Stat. § 103G.222, subdivision 1, which removed Circular 39 wetland type as a relevant factor for determining when excavation within a wetland is considered an impact. Previously, excavation was considered an impact if it occurred in semi-permanently or permanently flooded areas of type 3, 4 or 5 wetlands. Now, it is considered an impact if it occurs in the semi-permanently or permanently flooded areas of wetlands, regardless of their Circular 39 type. It is reasonable to conform the rule to statutes enacted by the Minnesota Legislature.

Subpart 35a. In-lieu fee program. The proposed amendments conform the rule to amendments to Minn. Stat. § 103G.005, subdivision 10(g), which defines “in-lieu fee program.” It is reasonable to conform the rule to statutes enacted by the Minnesota Legislature.

Subpart 36. Landowner. The term "banked wetland" is deleted from this definition. The amendment is necessary because "banked wetland" is not a defined term in this rule, and its use is unnecessary, as "replacement wetland" is a defined term that encompasses both project-specific replacement wetlands and wetlands for which credits have been deposited in the state wetland bank. It is reasonable to eliminate undefined terminology in favor of defined terms that are used consistently throughout the rule, thereby improving clarity for the regulated community and members of the public.

Subpart 37. Less than 50 percent area. The proposed amendments conform the rule to amendments to Minn. Stat. § 103G.005, subdivision 10(h), which eliminate conflicts between presettlement areas and bank service areas by bringing them into alignment.

Subpart 38. Local government unit. The proposed addition to Item B is a missing reference found in Minn. Stat. § 103G.005, subdivision 10e. The omission was discovered after the previous WCA rulemaking. The addition of item D is consistent with the addition of a like provision to Minn. Stat. § 103G.005, subdivision 10i(4).

Subpart 39. Local water plan. The local water planning processes contained in Minn Stat., Ch. 103B have been amended, most notably through the addition of the Comprehensive Watershed Management Planning Program (CWMPP), also referred to as “One Watershed One Plan”, under Minn. Stat. § 103B.801. Under Minn. Stat. § 103B.801, subdivision 2(1), a stated purpose of the CWMPP is to “align local water planning purposes and procedures under this chapter and chapters 103C and 103D on watershed boundaries to create a systematic, watershed-wide, science-based approach to watershed management.” The rule is amended to incorporate all applicable local water plans covered under the CWMPP process in the definition of “local water plan”, including those developed under Minn. Stat., Ch.

103D. While plans developed under Minn Stat., Ch. 103C may be incorporated into the CWMPP, it is not included in this definition as the content of those plans is not applicable to the definition as used in the WCA rule.

Subpart 40. Major Watershed. The proposed deletion is clerical in nature. The location of the referenced item has changed as a result of other proposed revisions.

Subpart 42. Minor watershed. The proposed deletion is clerical in nature. The location of the referenced item has changed as a result of other proposed revisions.

Subpart 44. Native vegetation. The definition is proposed for modification to remove an obsolete reference to the Minnesota Plant Database.

Subpart 46. Nonwetland. The proposed amendments are necessary to conform the rule to amendments to Minn. Stat. § 103G.005, subdivision 17b, which added deepwater habitats that are not public waters to the definition of a wetland. As a result, the definition of "nonwetland" in rule, which only applied to areas that did not meet the criteria for classification as a wetland using the USACE '87 Manual, is incorrect. The proposed rule amendment now defines "nonwetland" as being any area that does not meet the revised statutory definition of a "wetland" under Minn. R., part 8420.0111, subpart 72.

Subpart 50a. Performance Standards. The proposed amendment defines the term "performance standards." A formal definition is necessary because the term is used multiple times throughout the rule and is central to determining replacement credit allocations for both project-specific replacement and banking. The proposed definition is consistent with the definition established in the Federal Mitigation Rule for the same term. It is reasonable to define terms that are central to rule implementation and that align with established federal standards and common practice, thereby providing clarity and consistency for the regulated community and members of the public.

Subpart 51. Permanently and semipermanently flooded area of a type 3, 4, or 5 wetland. The references to Circular 39 "type 3, 4, or 5 wetland" are removed. The amendment is necessary to conform the rule to statutory amendments to Minn. Stat. § 103G.222, subdivision 1 and Minn. Stat. § 103G.2241, subdivision 9, related to the use of "permanently and semipermanently flooded areas." Secondly, a more specific definition is proposed that is based on the water regime description in the Classification of Wetlands and Deepwater Habitats of the United States, USFWS, August 2013 (Cowardin), a system that is referenced in Minn. Stat. § 103G.2242, subdivision 2(b). The more specific definition improves clarity and consistency with the requirements of statute, thereby promoting more accurate and uniform interpretation by the regulated community and LGUs. Finally, the term "area of a wetland" is changed to "wetland area" to make the terminology of this subpart consistent with Minn. R., part 8420.0115, which defines "wetland area", and with the use of the term in multiple other parts of the rule. It is reasonable to conform the rule to statutes enacted by the Minnesota Legislature and to propose a definition that increases the clarity of the rule and consistency in its implementation by LGUs. It is also reasonable to propose an amendment to improve the uniformity of terminology used in the rule.

Subpart 52. Plant community. The definition is amended to reference the state's Minnesota Native Plant Community classification system. The plant community classification method prescribed in the current rule fails to meet the needs and requirements for plant community designations contained in the WCA rule because it does not include nonwetland communities which are relevant to upland buffer establishment for wetland replacement, was not developed using a data-based approach, is not regionalized to account for different ecological sections in the state, and does not recognize communities that are considered "Rare Natural Communities" which are relevant to wetland replacement plans under Minn. R. part 8420.0515, subpart 3. The replacement of the existing classification system is reasonable because the proposed classification system meets the requirements for plant community designations.

Subpart 54. Project. The stricken sentence is relocated to Minn. R., part 8420.0420, subpart 1C. The amendment is necessary because the stricken sentence establishes a restriction associated with the application of exemptions and is not relevant to defining the term “project.” A substantive rule requirement should not be established in the definition of a term. It is reasonable to propose an amendment to relocate a substantive requirement to the appropriate part of the rule.

Subpart 55. Project-specific. “In-lieu fee” is excluded as a type of “project-specific” replacement. However, amendments to Minn. Stat. § 103G.2242, subdivision 1(a) added in “in-lieu fee” as a type of replacement. As with the existing exclusion of wetland banking for replacement, it is reasonable to add the exclusion for in-lieu fee replacement to clarify that in-lieu fee and project-specific are separate and distinct types of replacement.

Subpart 59a. Rare natural community. The proposed amendment defines the term “rare natural community.” The amendment is necessary because the term is referenced in several areas of the rule but is currently undefined. The proposed definition was developed through consultation with DNR and is based on DNR's Conservation Status Ranks for native plant communities in Minnesota, which follows the methodology used by the conservation organization NatureServe and its member natural heritage programs in North America. It is reasonable to define terms used throughout the rule, and to ground them in established, widely recognized methodologies and standards, thereby providing clarity and consistency for the regulated community and members of the public.

Subpart 61. Responsible party. The definition is amended to clarify that a “legal partnership” may be a responsible party. Legal partnerships are an entity subject to regulation under Minn. R., Ch. 8420. It is necessary and reasonable to ensure that the definition of responsible party encompasses all entities subject to regulation under WCA, thereby preventing unintended exclusions and providing greater certainty to the regulated community and members of the public.

Subpart 63. Rule. The rule proposes to clarify that the use of “rule” in this chapter also includes state administrative rules. It is necessary and reasonable to clarify the meaning of a term used throughout the rule to ensure consistent interpretation and application across all contexts in which it appears, thereby providing greater certainty to the regulated community and members of the public.

Subpart 72. Wetlands, a wetland, the wetland, or wetland area. The definition is revised to remove the phrase “contiguous wetland types, except those connected solely by riverine wetlands” in item B. The amendment is necessary because the deleted text is ambiguous, confusing, inconsistent with the definition of “wetlands” under Minn. Stat. § 103G.005, subdivision 19, and inconsistent with the requirement to use the USACE ‘87 Manual to identify wetland boundaries under Minn. Stat. § 103G.2242, subdivision 2(b). Whether wetlands are contiguous or are connected to one another by riverine wetlands is irrelevant under the statutory definition and the USACE ‘87 Manual. It is reasonable to remove extraneous language to improve the clarity of the rule and to prevent conflicts between the rule and statute.

Item C is amended to conform the rule to amendments to Minn. Stat. § 103G.005, subdivision 19(b), which differentiates between the authority to regulate public waters wetlands and the authority under WCA to allow replacement credit for the restoration of a drained public waters wetland. Accordingly, the proposed amendment is necessary to clarify that, for purposes of regulation under this chapter, the definition of wetlands excludes wetlands that are also classified as public waters. It is reasonable to clarify a definition when such clarification will not alter the current application of the term and when the clarification conforms the definition to statute.

New Item D is revised to conform the rule to amendments to Minn. Stat. § 103G.005, subdivision 19(c), which incorporates certain deepwater aquatic habitats into the definition of wetlands and adopts the definition of "deepwater aquatic habitats" that is established in the United States Army Corps of Engineers' (USACE) wetland delineation manual. It is reasonable to conform the rule to statutes enacted by the Minnesota Legislature.

The proposed rule strikes the existing item D in its entirety. This amendment is necessary because the existing text requires that wetland boundaries and type be determined and prescribes the method(s) for doing so. However, these requirements are already prescribed in Minn. R. part 8420.0405, making the language of this Item redundant. Additionally, substantive requirements should not be established within the definition of a term. It is reasonable to amend the rule to eliminate redundant language and ensure that substantive requirements are located where they are most applicable, thereby improving the clarity of the rule.

Subpart 73. Wetlands in a cultivated field. The term "before January 1, 1991" is stricken from the definition and is replaced with "most recent."

It is necessary and reasonable to strike "before January 1, 1991" because the corresponding language, related solely to the agricultural exemption, was stricken from Minn. Stat. § 103G.2241 in 2024.

It is necessary and reasonable to replace the stricken term with "most recent" to ensure that the definition's period of review, "six of ten," is not left without a point of reference, and to ensure that such point of reference establishes a reasonable standard for review based on the availability of imagery. Imagery covering a 10-year period prior to 1991 is not readily available, whereas imagery spanning a period of ten years immediately preceding the date of a current or future review is readily available and easily accessible in digital form. Further, this standard is reasonable because it is consistent with joint BWSR-USACE guidance relating to crediting for the restoration of partially drained agricultural wetlands as well as proposed rule language in Minn. R. part 8420.0526, subpart 4.

Subpart 75. Wetland type or type. The proposed amendments to this subpart make several interconnected changes:

First, the reference to Wetlands of the United States (Circular 39) as the basis for determining wetland type is stricken, along with the Circular 39 type descriptions (items A through H, types 1–8). This amendment is necessary because amendments to Minn. Stat. § 103G.222, subdivision 1, and Minn. Stat. § 103G.2241, subds. 1, 2, and 9 made Circular 39 irrelevant to WCA implementation by eliminating its only purposes thereunder: as a component of eligibility for certain exemptions, and in determining whether excavation is regulated as an impact. As a result, Circular 39 wetland types are now only applicable to the identification of public waters wetlands by DNR under Minn. Stat. § 103G.005, subdivision 15a, and its reference in this rule would be without purpose.

Second, amendments to Minn. Stat. § 103G.005, subdivision 17b added "A Hydrogeomorphic Classification for Wetlands" (HGM) as one of two classification systems that may be used to define wetland type. Amendments to Minn. Stat. § 103G.2242, subdivision 2(b) also added HGM as one of three classification systems that may be used for determining wetland type. The current rule prescribes only the use of Circular 39, with "Classification of Wetlands and Deepwater Habitats of the United States" (Cowardin) used as a separate, parallel typing system to characterize components of a wetland. The proposed amendment to the definition of "wetland type or type" bases the definition solely on HGM, while maintaining the use of Cowardin to characterize components of a wetland. The use of HGM as the classification system for determining wetland type is necessary to improve the efficiency and effectiveness of the rule by utilizing the authority provided by statutory amendments that occurred since the current rule was adopted, particularly in regard to wetland replacement.

The use of Circular 39 for determining wetland type is a source of inefficiency in program implementation and is inconsistent with established science on wetland functional surrogates because it is primarily based on plant community types. Specific deficiencies associated with the current classification system include:

- Plant communities are poor wetland functional surrogates;
- Functions related to hydrology or landscape position may not be adequately accounted for by characterizing the wetland community;
- Plant communities only take into account current wetland conditions and are not reflective of historical wetland conditions and functions; and
- Using plant community types to track wetland impacts and replacement credits substantially increases complexity and inconsistency in the regulatory program, with little to no positive effect on replacement outcomes. For example, plant community development for restored wetlands is difficult to predict with any precision, resulting in plant communities that differ from the restoration plan due to an inaccurate prediction rather than a problem with the restored wetland. In addition, plant community mapping is not precise and there are typically several plant communities within each wetland, resulting in many different wetland credit and impact types for any one replacement or banking plan without any meaningful difference in function.

In contrast, HGM is based on the "first-principle" physical factors of landscape position, water source, and hydrodynamics, making it a scientifically sound and administratively stable functional surrogate, unlike Circular 39's reliance on inherently variable, unpredictable, and shifting plant communities. The shift to HGM will provide an improved functional surrogate for the in-kind provision in Minn. R. 8420.0522, subpart 3, and will allow for the development of a more accurate functional assessment method under Minn. R. 8420.0522, subpart 1. A more detailed justification for using HGM to define wetland type is included in Exhibit 5.

The phrase "classified according to" is replaced with "category of wetland based on." The amendment is necessary for two reasons: it avoids the circular construction of using "type" to define "type," and it more accurately reflects that HGM provides a systematic framework for classifying wetlands. The term “category” is consistent with the HGM framework.

Third, the word "parallel" is removed from the description of Cowardin. The amendment is necessary because HGM and Cowardin are not parallel systems, rather, they characterize different components of a wetland. The new language clarifies that Cowardin is used to characterize components of a wetland "including permanently and semi-permanently flooded wetland areas," linking it to its specific functions in the rule's definitions of excavation as an impact under Minn. R., part 8420.111, subpart 32, and the de minimis exemption under Minn. R., part 8420.0420, subpart 8.

Finally, "items A and B" is stricken from the incorporation-by-reference citation, and "Both documents" is retained, which is necessary to complete the structural cleanup that follows from replacing Circular 39 with HGM.

The amendments are reasonable because they align the rule with current statutory authority by replacing an obsolete classification reference with the hydrogeomorphic framework now authorized by statute, clarify the distinct roles of the remaining classification systems, and eliminate a circular definitional structure.

8420.0112. INCORPORATION BY REFERENCE.

Multiple amendments were completed to this subpart. The amendments are necessary to conform items to related statutory provisions, delete obsolete references, update information related to source documents, and complete necessary clerical edits. These amendments are reasonable because they ensure consistency with statutory amendments that have occurred since the current WCA rule was adopted, eliminate obsolete references, update information related to existing source documents, and maintain the structural continuity of this subpart by completing clerical edits made necessary by changes to the lettering of multiple list items. The necessity and reasonableness of amendments that are not of a nature described immediately above are discussed under each applicable item, below.

The terms “supplements” and “replacements” are proposed because it is reasonable to propose terminology that more fully encompasses the various processes and document types that are commonly used to modify a source document. It also improves clarity and readability by stating the document types once rather than repeating similar language in each incorporated item.

The phrase “as approved” is deleted and replaced with “unless specified otherwise” because it is reasonable to eliminate the burdensome procedural requirement for the board to approve every specific update to an incorporated document. Under the proposed amendment, the board would only take action if it determined that an update to a document should not be incorporated.

The added sentence describing the location of source documents replaces the closing paragraph of this part, which contained obsolete information and was removed, as described below. It is reasonable to update obsolete references and provide the location of source documents to the public.

Item A. The deletion of the reference to the Wetlands of the United States publication and its replacement with A Hydrogeomorphic Classification for Wetlands, United States Army Corps of Engineers (August 1993) is consistent with amendments to Minn. R. part 8420.0111, subpart 75, Minn. Stat. § 103G.005, subdivision 17b, and Minn. Stat. § 103G.2242, subdivision 2(b).

Item B. The phrase “and supplementary guidance” iis added. The amendment is necessary and reasonable because multiple instances of supplementary guidance have been added to the source documents since the current rule was adopted. "Supplementary guidance” is the term used by the USACE to refer to Regional Supplements, Regulatory Guidance Letters (RGLs), and memoranda that officially augment or clarify the USACE ‘87 Manual to ensure the methodology aligns with current regulatory standards and established field practices.

Item C. The revision to the source of the incorporated document is reasonable because the source of the document has changed.

Items D and E are deleted because both are obsolete, and neither is referenced in WCA statutes or the WCA rule.

Item F is re-lettered as item D due to the deletion of preceding list items. The replacement of the U.S. Fish and Wildlife Service’s National Wetland Inventory (NWI) with the Minnesota Wetland Inventory database published by the Minnesota DNR is reasonable because the DNR’s inventory is more current and accurate due to the use of improved methods and data sources.

Item G is re-lettered as item E due to the deletion of preceding list items.

Item H is re-lettered as item F due to the deletion of preceding list items. The name and date of the source document are revised to incorporate changes that have occurred since the current rule was adopted.

Item I is deleted because the source document is obsolete and is not referenced in WCA or the WCA rule.

Item J is deleted because the source document is obsolete, and its content is inconsistent with current understanding and practices related to wetland wildlife habitat management.

Item K is deleted because the source document is obsolete and is not referenced in WCA or the WCA rule.

Item L is deleted because the source document is obsolete, and its intended purpose is now met through the incorporation of new item G.

Item M is deleted because the source document is obsolete, and its intended purpose is now met through the incorporation of new item H.

Item N is deleted because the source document is obsolete, and its intended purpose is now met through the incorporation of new item G.

Item O is deleted because the source document is no longer referenced in WCA or the WCA rule.

Item P is deleted because it was removed from Minn. R., part 8420.0111, subpart 52 and is not referenced elsewhere in the WCA statute or WCA rule.

New Item G is added to replace and fulfill the intended purpose of Item N because the Item N source document is obsolete.

New Item H is added to replace and fulfill the intended purpose of Item M because the Item M source document is obsolete.

New Item I is added to replace and fulfill the intended purpose of Item L because the Item L source document is obsolete.

Item Q is re-lettered as item J due to the deletion of preceding list items. New item J is revised to make its format consistent with the other items in this part.

New Item K is added because amendments to Minn. R., part 8420.0111, subpart 52, require the use of the specified source document.

The deleted paragraph at the end of this part is obsolete and was replaced by the amendments to the opening paragraph of this part.

8420.0117 PRESETTLEMENT WETLAND ACRES AND AREAS.

Because they are interdependent, the background information and the specific reasonableness for subparts 1, 2 and 3, which follow, are described immediately below. The specific revisions to those subparts are described under each respective subpart.

Amendments to Minn. Stat. § 103G.005, subds. 10b and 10h require that, for purposes of wetland replacement, greater than 80 percent areas and less than 50 percent areas be established based on bank service areas that are classified by the percentage of presettlement wetlands remaining (presettlement area). Prior to the statutory amendment, presettlement areas were delineated based on county boundaries for all purposes. Additional amendments to subparts 1 and 2 are necessary to clarify that, with the addition of the new subpart 3, they are now only applicable to Minn. R., part 8420.0420, subpart 8. It is reasonable to conform the rule to statutes enacted by the Minnesota Legislature, and to clarify the applicability of other affected subparts.

Throughout subpart 2, the rule is amended to clarify that the basis for reclassification is the percentage of presettlement wetland acres remaining, not the percentage of presettlement wetlands remaining. This amendment is consistent with current practice and the intent of the rule and is not a substantive change. It is reasonable to amend the rule for clarity and to prevent misinterpretation, while keeping the original intent.

Subpart 1. County classification. The proposed modification to the applicability of this subpart, from “this chapter” to “part 8420.0420, subpart 8” (de minimis exemption), conforms this subpart to the proposed amendments to subpart 3 by specifying that the classification of counties and watersheds based on their respective presettlement area is now only applicable to the de minimis exemption. It is reasonable to amend a subpart to accommodate changes made to another subpart, and to thereby provide greater clarity and certainty to LGUs, the regulated community and members of the public.

The map heading is amended to include the term “Presettlement” so that the map heading reads “Presettlement Wetland Areas.” The amendment is necessary because the current map heading, “Wetlands Areas”, does not accurately describe the map’s content. Additionally, “wetland area” is a distinct term defined and used elsewhere in the rule, and that does not apply to the map contained in this subpart. It is reasonable to propose an amendment that improves the clarity of the rule.

Subpart 2. County or watershed reclassification. The proposed modifications to this subpart specify that a local government unit’s request for the reclassification of counties and watersheds based on presettlement area applies only to counties and major watersheds, not bank service areas. The amendment is necessary because of the addition of subpart 3, which added provisions for the classification of bank service areas by presettlement area. This provision is consistent with Minn. Stat. § 103G.222 paragraphs (o) and (p), which allow local governments to only request that the board reclassify the presettlement designation of counties and major watersheds. It is reasonable to propose an amendment to accommodate amendments to other parts of the rule and maintain consistency with statute.

Subpart 3. Bank Service Area Classification. The addition of subpart 3 conforms the rule to amendments to Minn. Stat. § 103G.005, subds. 10(b) and 10(h), which define greater than 80 percent areas and less than 50 percent areas as of bank service areas where 80 percent or more or 50 percent or less, respectively, of the presettlement wetland acreage is intact for purposes of wetland replacement. To accommodate this amendment, it is necessary to establish an administrative process for classifying wetland bank service areas as greater than 80 and less than 50 percent areas. This process provides transparency for notifying the public when classifications are made and includes a requirement to make the classifications publicly available on the board’s website. It is reasonable to establish an administrative process for the implementation of statutes enacted by the Minnesota Legislature.

LOCAL GOVERNMENT UNIT DUTIES AND PROCEDURES

8420.0200 DETERMINING LOCAL GOVERNMENT UNIT; DUTIES

Throughout this subpart, the term “site” is replaced with “wetland,” and the term “for” is replaced with “over” when addressing jurisdiction. These amendments are necessary to improve the terminological precision of this subpart. For example, “replacement wetland” is defined in Minn. R., part 8420.0111, subpart 60, while “replacement site” is undefined and vague. It is reasonable to propose amendments that improve the clarity of the rule without altering its intent.

Subpart 1. Determining local government unit.

A specific reference to Minn. Stat. § 368.01 is added to Item B for consistency with Minn. Stat. § 103G.005, subdivision 10i(2) and corresponding amendments to the definition of local government unit at Minn. R., part 8420.0111, subpart 38. The previous omission of the statutory reference from the rule resulted in an inconsistency with statute regarding which towns were eligible to serve as local government units. It is reasonable to correct omissions to eliminate conflicts between the statute and rule, and to fulfill statutory intent.

“Board” is removed from the second sentence of Item B as the rules being referenced are those of the watershed management organization, not the board as defined in Minn. R., part 8420.0111, subpart 13. It is reasonable to clarify the rule by removing a reference correct the attribution of the referenced rule to the incorrect entity.

Item D was amended to clarify that DNR is the local government unit for banking projects implemented solely for the replacement of impacted wetlands under a permit to mine, consistent with amendments to Minn. Stat. § 103G.005, subdivision 10i(4). It is reasonable to conform the rule to statutes enacted by the Minnesota Legislature.

Additionally, this Part of the rule designates local government units, not approving authorities. Striking the language related to approving authorities avoids confusion concerning the responsibilities of DNR under their authority for approving projects and prevents “local government unit” and “approving authority” from being incorrectly understood to be synonymous. The deleted language is also unnecessary, as DNR’s referenced authority for activities associated with projects requiring permits to mine and for projects affecting calcareous fens is addressed in statute as well as Minn. R., part 8420.0930 and Minn. R., part 8420.0935, respectively. It is reasonable to remove inaccurate rule language and clarify the use of terms.

Item F: The addition of “...or an application involves…” to Item F clarifies that the board may coordinate the review of any application type, e.g. including wetland delineations, when the application spans multiple local government units, whereas the current rule language may be incorrectly interpreted as limiting such coordination to applications for activities that impact wetlands. It is reasonable to propose amendments that improve the clarity of the rule and more accurately describe the role of local government units and the board.

Item J: the phrase “the guidelines in” is removed because the list items are not guidelines but are the criteria that the board is required to apply to determine which entity is the local government unit responsible for making decisions. It is reasonable to correct rule language that incorrectly suggests that the application of certain criteria or procedures is discretionary.

Subpart 2. Local government unit duties. The term “minimum” is added to clarify that standards established by the board are, specifically, minimum standards. It is necessary and reasonable to propose an amendment that improves the clarity of terminology used in the rule. The proposed replacement of “must” with “may” reflects statutory amendments to Minn. Stat. § 103G.2242, subds. 2a and 9 that occurred since the adoption of the current WCA rule; namely, removing the requirement for a local appeal process by local government units. It is reasonable to conform the rule to statutes enacted by the Minnesota Legislature.

8420.0240 TECHNICAL EVALUATION PANEL PROCEDURES

The references in item B to resources that provide the definition and procedures for the determination of wetland boundary and type, in which the “technical evaluation panel must be knowledgeable and trained in” are removed and replaced with the requirement that they be knowledgeable and trained in “the identification of wetland boundaries and type.” The amendment is necessary because the requirements for identifying wetland boundary and type are already specified in parts 8420.0405 and 8420.0111, subpart 75 of this rule. Listing them in this subpart is redundant. It is reasonable to propose an amendment that removes redundant rule language.

The addition of Item F conforms the WCA rule to the amendment of Minn. Stat. § 103G.2242, subdivision 2(b), which requires technical evaluation panel members to disclose certain financial interests and/or management responsibilities related to wetland banks. It is reasonable to conform the rule to statutes enacted by the Minnesota Legislature.

8420.0255 LOCAL GOVERNMENT UNIT APPLICATION AND DECISION PROCEDURES.

The term “Notice” is added to the heading of this part to more accurately reflect its contents. It is reasonable to title parts of the rule such that their content is indicated accurately.

Subpart 1. General. The use of electronic transmission for sending notices and other documents is authorized, consistent with amendments to Minn. Stat. § 103G.2373. It is reasonable to conform the rule to statutes enacted by the Minnesota Legislature.

The exception of the banking plan application process from the timeline requirements of Minn. Stat. § 15.99, and the application of the decision timelines contained in Minn. R., part 8420.0705 to that process conforms the rule to amendments to Minn. Stat. § 103G.2242, subdivision 2a(c), which directs the board to establish timelines for banking plan applications notwithstanding the timelines of Minn. Stat. § 15.99. It is reasonable to conform the rule to statutes enacted by the Minnesota Legislature.

Subpart 2. Determination of complete application. “That” was replaced with “whether” to clarify that a local government unit is not compelled to make only an affirmative determination of whether an application is complete. It is reasonable to correct lexical errors that corrupt the intent of the rule.

Subpart 3. Notice of application.

Item A is revised to include the leading official of any Tribal governing body listed in Minn. Stat. §10.65, subdivision 2, as one who must receive notice of application when project activities occur within their reservation boundaries. This amendment is necessary to ensure that tribes are notified of regulated impacts to wetland resources that could affect Tribal lands or interests. It is reasonable to propose amendments to improve communication and coordination between governmental bodies that have a shared interest in a resource.

The proposed amendments to Item A, subitems 2 and 3, establish criteria for the requirement to issue public notice when there are changes to the wetland replacement under approved replacement plans. The amendments clarify the applicability of the notice requirement for changes to project-specific replacement wetlands and replacement via wetland banking credits. Specifically, item A, subitem 2 is revised to apply the requirement to issue public notice for revisions to a replacement plan when certain criteria are met only to project-specific replacement, not all replacement actions. Those existing criteria, which include changes to the replacement wetland type, relocating replacement to a wetland that is more than 500 feet from the location of the previously approved replacement wetland, and changes to the action that is eligible for replacement credit, are generally not applicable to the use of wetland banking credits under the rules. Correspondingly, new subitem 3 is added to prescribe a reasonable threshold for issuing public notice for revisions to an approved replacement plan that prescribes the use of wetland bank credits by requiring that such notice be issued when it is proposed that wetland bank credits be withdrawn from a bank that is of a lower siting priority than the bank specified in the approved replacement plan.

These amendments to subitems 2 and 3 are necessary to accommodate amendments to the rule that occurred in 2009, which encouraged and resulted in widespread adoption of the use of wetland banking credits for replacement purposes. Over 95 percent of wetland replacement now occurs through wetland banking. However, when those amendments occurred, this subpart was not amended to accommodate them and still assumes that a specific replacement area would be used, thereby maintaining thresholds for issuing public notice for revisions to a replacement plan that are not applicable to wetland replacement using banking credits. It is reasonable to amend the rule to accommodate prior amendments to the rule, and to thereby provide greater clarity and certainty to the regulated community and members of the public.

The term "wetland" is added simply to clarify that "type" means "wetland type." It is reasonable to clarify terminology to ensure consistent interpretation and application of the rule across local government units and members of the regulated community.

The remaining revisions to this subpart are necessary to improve its clarity. It is reasonable to propose nonsubstantive revisions that improve the clarity of the rule without altering its intent.

Subpart 4. Decision. The structure of this subpart is converted from a narrative format to a more concise list-based format for ease of interpretation, increased clarity, and consistency with current guidance on rule formatting. It is reasonable to improve the structure and readability of the rule to make it easier to understand.

The period of validity for decisions was revised from three to five years to conform the rule to amendments to Minn. Stat. § 103G.2242, subdivision 2a(d). It is reasonable to conform the rule to statutes enacted by the Minnesota Legislature.

Subpart 5. Notice of Decision. “Mailed” is revised to “sent” to accommodate the addition of “electronic transmission” in Minn. Stat. § 103G.005, subdivision 9d and its use in 103G.2242. “In a format” was changed to “on a form” for consistency with current practice and with terminology used elsewhere in the rule. In addition, “business” is proposed for deletion to conform the WCA rule to Minn, Stat. § 103G.2242, **subdivision** 7. It is reasonable to conform the rule to statutes enacted by the Minnesota Legislature and to improve consistency within the rule.

Subpart 6. Decisions and notice for replacement via banking. “Designated” is proposed for addition to clarify that the banking administrator function will be fulfilled by whichever position is designated to do so by the agency, and because the Board does not have a position titled “banking administrator.” It is reasonable to clarify which roles will perform what functions, and to avoid the use of specific job titles in rule, as such titles may change.

APPLICATION PROCEDURES

8420.0305 GENERAL APPLICATION REQUIREMENTS

The order of terminology in Item C is proposed for revision to make it consistent with other parts of the rule. It is reasonable to improve consistency in terminology throughout the rule in a manner that does not alter the intent or effect of the rule.

8420.0310 WETLAND BOUNDARY OR TYPE APPLICATIONS

The requirement that the landowner submit the "proof" necessary to make the wetland boundary or type decision is stricken. The amendment is necessary because this requirement is redundant with this part's requirement that the landowner's application include information according to the wetland delineation report submittal guidelines provided by the board and introduces a potentially arbitrary standard. It is reasonable to remove arbitrary, redundant language from the rule without altering its intent, thereby improving clarity for the regulated community and members of the public.

Additional line/stylistic edits are made to this subpart to reduce redundancy and improve its clarity. It is reasonable to propose nonsubstantive revisions that improve the clarity of the rule without altering its intent.

8420.0315 NO-LOSS APPLICATIONS

The revision to the citation in item A is proposed because the existing citation is incorrect. It is reasonable to correct inaccurate citations.

The proposed deletion of “proof” and replacement with “information” in item B improves the clarity of this provision. More specifically, the term “proof” is overly stringent and may be implemented in a way that imposes an arbitrary, unattainable standard on regulated entities. It is reasonable to propose rule language that clarifies the standard for regulated entities to meet the documentation requirements for no-loss applications.

8420.0320 EXEMPTION APPLICATIONS

The proposed revision of “8420.0915” to “8420.0900” corrects the citation. It is reasonable to correct erroneous citations.

The proposed deletion of “proof” and replacement with “information” in item B is necessary to improve the clarity of this provision. More specifically, the term “proof” is overly stringent and may be implemented in a way that imposes an arbitrary, unattainable standard on regulated entities. It is reasonable to propose rule language that clarifies the standard for regulated entities to meet the documentation requirements for exemption applications.

8420.0330 REPLACEMENT PLAN APPLICATIONS.

Subpart 3. Application contents. The rule is revised to clarify that the applicant is responsible for submitting, on a form provided by the board, the information necessary to demonstrate that the proposed project satisfies the requirements and standards of parts 8420.0500 to 8420.0528 and, for project-specific replacement plans, part 8420.0810. The amendment is necessary to establish a clear and direct link between the application requirement and the standards that the application must demonstrate compliance with, which the existing language does not provide. It is reasonable to propose an amendment that improves the clarity of the rule by providing regulated parties with a clear understanding of what the application must demonstrate and provides local government units with a clear basis for evaluating it.

Except as indicated below, the rule also proposes to remove the unnecessarily detailed replacement plan application requirements of subpart 3 and replace them with minimum application requirements established by the board. The amendments are necessary because current application requirements are so specific as to be inflexible, resulting in instances of local government units and/or the board being unable to obtain information that is needed but not explicitly required, and in other instances, requiring information from regulated parties that is not needed. Some of the requirements are also outdated due to technological improvements. It is reasonable to allow the board to establish such requirements as they enable local government units to obtain information that is critical to the review of replacement plan applications while removing outdated requirements and arbitrary regulatory barriers for regulated parties.

Further, the amendments improve the ability to coordinate with the USACE for the development of joint application forms. Joint application forms are used by landowners who seek concurrent approval from both the state and the USACE. Authorizing the board to establish replacement plan application requirements enables them to maintain consistency with the application requirements of USACE as the availability and quality of information and technology evolves, continuing to provide the landowner generally uniform application requirements. It is reasonable to update rule language to improve consistency with federal regulations and to assist regulated parties in meeting regulatory requirements.

In addition to the revisions described above, item B(11)(a) is removed because it is redundant with existing provisions at Minn. R., part 8420.0522, subpart 8, and item B(11)(c) is removed because it is redundant with existing provisions at Minn. R., part 8420.0526, subpart 1D. It is reasonable to remove redundant provisions of the rule.

Item B(11)(e) is proposed for elimination as the source of funding used to achieve replacement is not relevant to whether the replacement satisfies the requirements of the rule, and Minn. Stat. § 103G.2242 does not impose a limitation on the particular source of funds a regulated party may use, so long as the replacement is paid for by the individual or organization performing it. It is reasonable to propose an amendment to eliminate an irrelevant requirement that places an undue burden on regulated parties.

Item B(11)(f) is stricken. The amendment is necessary for two reasons. First, monitoring is required under parts 8420.0800 to 8420.0820 regardless of whether the applicant acknowledges it in a signed statement, making the provision redundant. Second, the requirements for monitoring and the circumstances under which monitoring responsibilities may be transferred to the local government unit are fully addressed in part 8420.0810, including subpart 2, which is now directly cited earlier in this subpart, making the subitem's separate reference to those parts duplicative. It is reasonable to remove a redundant acknowledgment requirement that is already addressed by substantive provisions elsewhere in the rule and by the citation added to this subpart.

Item B(11)(b) is relocated to Minn. R., part 8420.0522, Subpart 10 A(1), item B(11)(d) is relocated to Minn. R., part 8420.0522, subpart 10 A(2), item B(12) is relocated to Minn. R., part 8420.0522, subpart 10(B), and item B(14) is relocated to Minn. R., part 8420.0522, subpart 10(A)(3) because these items are limitations applicable to all methods of wetland replacement, they are not application requirements, and are more appropriately located in the Part that establishes wetland replacement standards. It is reasonable to move mislocated rule provisions to the appropriate part of the rule for clarity and consistency.

BOUNDARY OR TYPE, NO-LOSS, AND EXEMPTION STANDARDS

8420.0405 BOUNDARY OR TYPE.

Subpart 1. Wetland boundary. The proposed amendment strikes the reference to “subsequent updates and supplements, and guidance provided by the board” in the requirement to use the United States Army Corps of Engineers Wetland Delineation Manual, replacing it with a clarification that the manual is incorporated by reference under the appropriate subpart. The amendment is necessary because the Incorporation by Reference subpart already encompasses “updates, addenda, supplements, replacements, and derivations” for all incorporated documents, making the stricken language redundant and creating the potential for inconsistency between rule provisions. It is reasonable to amend the rule to eliminate redundant language and consolidate related requirements in their most appropriate location, thereby reducing the potential for conflicting interpretations and providing greater clarity and certainty to the regulated community and members of the public.

Subpart 2. Wetland type. The list of documents prescribed for use in the identification of wetland type and the associated table are stricken and replaced with a requirement to identify wetlands according to Minn. R., part 8420.0111, subpart 75. The amendment is necessary because the prescribed subpart establishes the definition of “wetland type” and includes the classification systems used to identify it, making the stricken language redundant and creating the potential for inconsistency in the rule’s requirements. It is reasonable to amend the rule to eliminate redundant language and consolidate related requirements in their most appropriate location, thereby reducing the potential for conflicting interpretations and providing greater clarity and certainty to the regulated community and members of the public.

8420.0410 NO-LOSS AND EXEMPTION CONDITIONS

The references in Item C are revised because the location of the referenced provisions has changed as a result of proposed amendments to Minn. R., part 8420.0112, Incorporation by Reference. It is reasonable to update references to provisions whose location or identifier has changed.

8420.0415 NO-LOSS CRITERIA.

The proposed amendment to Item B deletes the phrase 'blockage of culverts' from the list of sediment or debris that may be removed under this no-loss provision. The amendment is necessary because blockage of culverts is not an example of debris as the other listed items are, and its inclusion is therefore inconsistent with the structure of the list. Additionally, sediment and debris removal is allowed under the no-loss criteria regardless of whether such material is blocking a culvert. It is reasonable to amend the rule to ensure that examples provided within a list are consistent in kind, thereby improving clarity and reducing potential confusion for the regulated community and members of the public.

The term “permitted” is replaced with “allowed” and the terms “installed” and “roadway” are deleted. The amendment is necessary because the term “permitted" is otherwise used in the draft rule exclusively in reference to mining permits, creating potential confusion in this context and inconsistency with how allowable actions are referred to throughout the rule. The term “installed” is unnecessary because a culvert would by definition need to be installed to be relevant to the action of unblocking it. The modifier “roadway" is unnecessarily restrictive, as blocked culverts can exist in a variety of situations beyond roadways, such as under railroads or berms, and the amended language is inclusive of those situations. It is reasonable to amend the rule to improve terminological consistency and remove unnecessarily restrictive language, thereby providing greater clarity and broader applicability to the regulated community and members of the public.

The phrase “is not permitted unless it can be shown by aerial photographs that the proposed activity will not drain or fill” is deleted and replaced with “must not impact,” and the phrase “was there” is replaced with “existed.” The amendment is necessary because the current language arbitrarily limits the type of evidence that may be used to demonstrate compliance with this provision to aerial photographs alone, a restriction that is not supported by statute or other rule procedures. The term “permitted” is replaced for the same reasons of consistency described above. The phrase “drain or fill” is replaced with “impact,” a term that is defined in the rule and serves as the foundational basis for wetland regulation throughout the rule, making it more comprehensive and appropriate in this context. The phrase “was there” is replaced with “existed” to improve the precision of the language. It is reasonable to amend the rule to eliminate arbitrary evidentiary restrictions and align regulatory language with defined terms used throughout the rule, thereby establishing a clearer standard and providing greater certainty to the regulated community and members of the public.

The term “different type” is stricken from Item C because of the amendments to Minn. R., part 8420.0111, subpart 75, that now base wetland type on HGM class. As a result, it is not possible for the wetland type to change as a result of water level manipulations, because HGM classes are based primarily on landscape position and water source, neither of which can be affected by water level manipulations. In addition, type was being used as a surrogate for wetland function, which current science has since proven is an erroneous use of wetland type. Thus, as a practical matter, the limitation based on water level manipulations resulting in a change to wetland type is ineffective. It is reasonable to strike a rule that has been made ineffective by.

The stricken term is replaced with "degraded wetland." The term "degraded wetland" is defined in Minn. R., part 8420.0111, subpart 19, and applies to activities that result in a decrease in wetland function and value due to human activities. This amendment is necessary to ensure that a comparable limitation still exists for this no-loss provision, and to base that limitation on changes to wetland function. Requiring that the water level manipulation not degrade the wetland is consistent with the general purpose of the no-loss provisions, which is to allow activities that generally do not result in a loss of wetland function and value. It is reasonable to replace a provision that was indirectly made ineffective by other amendments to the rule with an equivalent provision that imposes no greater regulatory burden on regulated parties.

The proposed amendment to item D restructures it into a list format and adds the phrase “conducted for the...” to subitem 3. The amendment is necessary to clarify that Item D contains three distinct no-loss actions, and to bring the formatting of this item into conformance with current rule formatting requirements. Additional nonsubstantive terminological revisions are made to improve clarity and accommodate the restructuring. It is reasonable to amend the rule to improve its structure and internal consistency without altering its intent, thereby providing greater clarity and certainty to the regulated community and members of the public.

The reference to guidance in subitem 2 is updated because the current references are no longer accurate, and the subitem is restructured to apply the referenced guide only to wetland restoration because the referenced guide is not applicable to fish and wildlife habitat restoration and improvement. It is reasonable to update obsolete references and correct the misapplication of referenced documents.

The term "and" is added to Item H after the semicolon at the end of Subitem 2 and the semicolon and "and" at the end of subitem 3 is replaced with a period. These amendments are necessary to correct the punctuation of the list following the deletion of subitem 4, described below. It is reasonable to amend the rule to ensure that its formatting and punctuation are consistent and accurate, thereby providing greater clarity to the regulated community and members of the public.

Subitem 4 is stricken in its entirety. The amendment is necessary because this condition is conflicting, not supported by statute, and not implementable as written. The no-loss provision applies to a temporary wetland impact, while the condition references the “original” project, which is inconsistent and undefined. The ten-year timeframe is arbitrary, and the phrase "for a particular site within a wetland" is undefined and unclear. Additionally, the condition allows a local government unit to permit "repairs to the original project," which directly conflicts with Subitems 1 and 2, which require restoration of the wetland to pre-project conditions. The condition further requires a local government unit to determine that repairs are "necessary and reasonable" without providing any basis for making that determination, creating the potential for arbitrary decision-making. It is reasonable to delete a condition that is internally inconsistent, conflicts with other provisions of the rule, and lacks statutory support, thereby providing greater clarity and certainty to the regulated community and members of the public.

8420.0420 EXEMPTION STANDARDS

Subpart 1. Scope. The last sentence of item A is deleted. This amendment is necessary because, with the exception of subpart 8 (de minimis), statutory amendments enacted in 2024 eliminated exemptions that are based on the amount of impacted wetland. The substantive requirement of the deleted sentence is now located in subpart 8, new item F, where it remains relevant, consistent with Minn. Stat. § 103G.2241, subdivision 9(f). It is reasonable to delete language that has been rendered obsolete by statute and to address it where it is applicable, thereby reducing redundancy and providing greater clarity to the regulated community and members of the public.

The existing sentence in Item C is deleted and replaced with "A project may not be split into components or phases for the purpose of gaining additional exemptions." The amendment is necessary for two reasons. First, the existing language prohibiting the combining of exemptions on a wetland impacted by a project is not supported by statute. Statute restricts only the combining of the de minimis exemption under Subpart 8 with other exemptions; it does not restrict the combining of other exemptions. Second, the 2024 statutory changes eliminated area-based exemptions other than de minimis, leaving only activity-based exemptions, such that only one exemption will apply to any given activity, rendering the existing language unnecessary. The replacement language is relocated from the definition of "project" in Minn. R., part 8420.0111, subpart 54, because it is a substantive restriction on the application of exemptions rather than a definitional provision and is more appropriately located here. It is reasonable to remove language that is unsupported by statute and to relocate substantive requirements to the part of the rule where they are most applicable, thereby providing greater clarity and certainty to the regulated community and members of the public.

The proposed deletion of “or drainage in subpart 3” removes a reference to Subpart 3 that is now obsolete. The phrase “...or drainage in subpart 3...” refers to the drainage exemption in subpart 3(C), which is deleted because of corresponding statutory amendments, as described in the relevant section of this document, below. It is reasonable to propose the removal of rule language that references provisions that have themselves been removed as a result of statutes enacted by the Minnesota Legislature.

The addition of the term “deed” simply clarifies that “restrictions” means “deed restrictions”, and it is clarified that “other criteria” means those that “...may affect the risk of conversion to non-agricultural use”, as the term “other criteria” was so broad as to be unclear. It is reasonable to clarify the meaning of terminology in a manner that does not alter the intent of the rule.

The term “In” is deleted and replaced with “When” to correct a word choice error. It is reasonable to correct word choice errors to improve the accuracy of the rule.

Subpart 2. Agricultural activities.

Multiple statutory amendments were made to the agricultural activities exemptions during the 2024 legislative session, through which some existing exemption provisions were removed, and new ones introduced. It is reasonable to conform the rule to statutes enacted by the Minnesota Legislature by:

- Striking the provisions contained in subpart 2(A) and 2(B), which were repealed from statute.
- Introducing new language in Subpart 2(A) that conforms the rule to statute by incorporating exemption provisions for impacts to wetlands on agricultural land labeled prior converted cropland (PC) and impacts to wetlands resulting from drainage maintenance activities authorized by the NRCS on areas labeled farmed wetland (FW), farmed-wetland pasture (FWP), and wetland (W).
- Incorporating the statutory requirement, as new subpart 2(A)(2)(a), that such wetlands be labeled on a valid final certified wetland determination issued by the NRCS in accordance with their implementing regulations.
- Incorporating the new statutory requirement, into the new subpart 2(A)(2)(d), that for purposes of verification of qualification for the exemption, landowners and/or operators provide certain supporting documentation to, and allow NRCS to share related information with, the LGU and the board. Additional clarification is added to this provision as described in the corresponding paragraph, below.
- Amending subpart 2(F) to incorporate the amendment to Minn. Stat. § 103G.2241, subdivision 1(5), which specifies that for impacts under that subdivision to be exempt from the requirement for a replacement plan, they must be conducted "in accordance with" a Section 404 permit issued by USACE, not simply be authorized under such permit.
- Amending subpart 2G to incorporate new statutory language from Minn. Stat. § 103G.2241, subdivision 1(6), related to the exemption of impacts resulting from agricultural activities that are conducted in accordance with a Memorandum of Agreement between the board and the NRCS.

Subpart 2(A): Minn. Stat. § 103G.2241, subdivision 11(d) directs the Board to develop rules that address the application and implementation of exemptions. Additional rule language is necessary to implement the new statutory provisions related to the exemption of impacts associated with certain agricultural activities and is proposed and is reasonable as follows:

- New Subpart 2(A)(1): The statutory exemption incorporated into Subpart 2(A), requires that associated impacts be "authorized" by NRCS. NRCS typically does not issue written authorization or confirmation of authorization of impacts or activities under their program, though it was common practice in the past. In any case, drainage maintenance activities whose impacts do not exceed the scope and effect of drainage manipulations that occurred before December 23, 1985, are not in violation of NRCS' Wetland Conservation (WC) provisions and are thus "authorized" in-fact. The rule proposes to clarify that, for purposes of this exemption, "authorized" means that NRCS has provided written confirmation that the specific activity is authorized under their implementing regulations, or, in the absence of such written confirmation, the resulting impact of the activity does not exceed that which is authorized under their regulations. It is reasonable to clarify that the term "authorized" has the meaning given to it in the implementing regulations and agency procedures under which such authorization occurs. Further, it is reasonable to propose language to ensure that a landowner's qualification for this exemption is not unnecessarily constrained by the interpretation of "...authorized by NRCS..." that would be made in most regulatory contexts; namely, that a specific, explicit authorization or written approval made by an employee of NRCS would be required.
- New Subpart 2(A)(2)(b): Following legislation that amended the agricultural exemption provisions, many questions were received from LGU, SWCD, and Board staff seeking clarification

as to how they should determine whether an area is labeled PC when a Certified Wetland Determination map and/or accompanying form are unclear, when the determination of PC appears contradictory to NRCS' definition of that label, or when NRCS has combined both the PC label and the non-qualifying Non-Wetland (NW) label on a single field (i.e. PC/NW).

- To resolve this lack of clarity, the rule proposes to include simple criteria to confirm whether an area is labeled PC and qualifies for the exemption. These criteria are drawn directly from the definition of PC contained in NRCS' implementing regulations located at 7 Code of Federal Regulations, Part 12. They clarify that the area must not have supported woody vegetation as of December 23, 1985, and that the area must have been used to produce an annually seeded crop at least once before that date. Though not verbatim, the only material difference between the proposed criteria and those included in NRCS' definition is the rule's use of "annually seeded crop" instead of NRCS' "agricultural commodity." The substitution results in no difference in the application of this exemption but conforms the criteria to terminology already used elsewhere in the rule and avoids the need to define an additional term ("agricultural commodity") that would only be used once throughout the entire rule. These amendments are reasonable because they ensure that the exemption is applied only to impacts on areas that are clearly labeled PC, or when labeling is unclear, are clearly intended to be labeled PC. Further, because areas labeled PC/NW contain areas of PC, it is reasonable to propose language to assist LGUs in differentiating between those areas to ensure that regulated entities are not denied the exemption simply by virtue of an area having been labeled PC/NW, and not simply PC.

- New Subpart 2(A)(2)(c): Clarifies that impacts to wetlands resulting from drainage maintenance activities that involve relocation of any portion of the drainage system do not qualify for this exemption unless they satisfy its requirements independently for each wetland being impacted. Because compliance with the WC Provisions is based on effect rather than on reproducing or restoring specific drainage system characteristics, wetland impacts resulting from relocating or reconfiguring a drainage system, or any portion of one, are exempt under those provisions so long as the resulting scope and effect do not exceed those of the drainage manipulations that occurred to any affected wetland before December 23, 1985. Impacts that exceed that scope and effect are not exempt. It is necessary and reasonable to clarify the applicability of the statutory exemption and make it easier for regulated parties to comply with the rule.
- New Subpart 2(A)(2)(d): While conforming the rule to the statutory requirement that landowners and/or operators provide certain documentation for verification of the exemption, and that they allow NRCS to share related information with the LGU and the board, as described above, the rule:
    - Clarifies that the statutory requirement to provide "...related information..." means "...any other information necessary to demonstrate qualification..." The statutory requirement to provide information "related" to the valid, final certified wetland determination is not clear in the requirement that such information be sufficient to make a conclusive determination of qualification for the exemption. The act of simply providing "related" information is insufficient to support qualification for the exemption; rather, the information must be sufficient to conclusively determine the scope and effect of the drainage maintenance activities or to determine that NRCS has otherwise provided confirmation that those activities are "authorized." Such evaluations often require consideration of information not directly related to the wetland determination itself, such as the specifications and anticipated effect of proposed

drainage maintenance activities; records of past drainage maintenance actions on and surrounding the labeled area; results of previous NRCS compliance investigations; specific, written confirmation of authorization from NRCS; and the potential presence, location and size of other wetlands in the area. Conversely, “related information” could be interpreted too broadly, where an LGU requires information that may be related, but is not necessary to demonstrate qualification for the exemption.
It is reasonable to require the submittal of information that is sufficient to demonstrate qualification for an exemption while clarifying the scope of the information required.

  - Includes the SWCD as an entity with which the regulated entity must allow NRCS to share the information described above. SWCDs commonly serve as WCA LGUs in agricultural areas. Additionally, any member of the TEP may request that a TEP review an application and make technical findings and recommendations on the applicability of the exemption in accordance with Minn. R., part 8420.0240 and Minn. Stat. § 103G.2242, subdivision 2. SWCDs are members of the TEP and are often co-located with NRCS. When LGUs consist of an entity other than the SWCD, they are often in a different physical location than NRCS. Thus, when the SWCD is not the LGU but is co-located with NRCS, the rule’s inclusion of the SWCD as described above enables freer and more efficient acquisition and exchange of information for TEP review. It is reasonable to propose language that creates a more efficient process for the acquisition and exchange of required information that is consistent with other provisions of rule and statute.

- New Subpart 2(A)(2)(e): The rule limits impacts under this Subpart to those that would be exempt under the related federal provisions that were in effect upon the date of enactment of the relevant provisions in state statute, that date being August 1, 2024. It is reasonable to propose a rule that prevents future amendments to the related federal provisions from altering, in unintended ways, the future application and outcomes of the associated exemption as intended by the legislature.

Subpart 2(C): This subpart is identified as subpart 2(B)(1) in the proposed rule. The term "certified" is replaced with "approved" in Item B. The amendment is necessary because "certified" implies a process of officially recognizing that something meets specific qualifications or standards, yet no such qualifications or standards exist for soil and water conservation projects, which are highly variable and specific to the locale in which they are implemented. The replacement term "approved" is consistent with Minn. Stat. § 103G.2241, subdivision 1(3), and ensures that such projects have been approved by the SWCD, which is the entity specifically charged with implementing soil and water conservation and is therefore the appropriate authority to make such a determination. It is reasonable to align rule language with the applicable statute and to ensure that terminology accurately reflects the nature of the action being described, thereby providing greater clarity to the regulated community and members of the public.

The reference to examples of soil and water conservation projects is stricken. The amendment is necessary because the stricken provision imposes no substantive requirement or standard. Because the SWCD is the entity specifically charged with implementing soil and water conservation, it is the appropriate authority to determine what constitutes such a project, and no enumeration of examples in the rule is needed to guide that determination. It is reasonable to remove language that imposes no substantive requirement or standard and that is unnecessary given the existing authority and expertise of the SWCD.

The term “technical staff” is removed because it is not a formal term used by all SWCDs and may result in confusion for SWCDs or others where SWCDs do not have staff that they refer to as “technical staff.” Further, because statute only references the SWCD, approval of a soil and water conservation project under this item is the responsibility of the SWCD, and the determination of which staff positions will approve such projects, or whether the projects must be approved by formal action of the SWCD board of supervisors, is at their discretion and under their authority. Specification of a specific position or class of position in rule is unnecessary and a potential conflict with statute. It is reasonable to propose language that improves the clarity of the rule by removing inaccurate and superfluous terminology and that is consistent with statute.

Subparts 2(C-G) are renumbered as a result of other changes to the structure and content of this subpart. It is reasonable to re-letter list items to maintain the structural continuity of a subpart.

Subpart 3. Drainage. The extensive amendments to this subpart conform the rule to recent amendments to Minn. Stat. § 103G.2241, subdivision 2, which eliminate the drainage exemptions contained therein, except for the drainage of wetlands that have existed for 25 years or less resulting from maintenance and repair of existing drainage systems. The statutory amendments also eliminate wetland type as a consideration for eligibility for the remaining exemption and make the exemption applicable to both public and private drainage systems. It is reasonable to conform the rule to statutes enacted by the Minnesota Legislature.

Subpart 4. Federal approvals. It is clarified that the term “rule” means “state administrative rule,” and edits to the sentence structure of this subpart are made to improve its clarity. It is reasonable to clarify the meaning of terms and improve the rule’s structure in a manner that does not affect the intent of the rule.

Subpart 6. Utilities. The revision to this Subpart conforms it to the existing provisions of, and amendments to, Minn. Stat. § 103G.2241, subdivision 6, which:

- Specifies that for impacts under that subdivision to be exempt from the requirement for a replacement plan, they must be authorized by, and conducted “in accordance with,” a Section 404 permit issued by USACE.
- Removes the provision allowing significant modifications or alterations to less than one-half acre of wetlands.
- Includes “utility-type service” as a type of utility upon which the listed actions may occur.
- Includes new placement, enhancement, realignment, or replacement as exempted activities.
- Eliminates local government unit ability to issue a seasonal or annual exemption based on the implementation of best management practices.

It is reasonable to conform the rule to statutes enacted by the Minnesota Legislature and to improve the structure of the rule to increase its clarity.

Subpart 8. De minimis. The revisions to this subpart conform the rule to amendments to Minn. Stat. § 103G.2241, subdivision 9, which eliminate thresholds based on wetland type (Circular 39) and thresholds specific to the 11-county metro area from the de minimis exemption, and bases thresholds on presettlement area, shoreland zone, shoreland building setback zone, and permanently/semi-permanently flooded water regimes. The amendments also reflect the statutory clarification that if a project's wetland impacts exceed the applicable de minimis threshold, all wetland impacts require replacement. The exemption restrictions related to the landowner's portion of the wetland and the cumulative area drained/filled since 1992 have been eliminated in statute and are reflected in the proposed rule. Additional restrictions have been added to statute and are incorporated into the proposed rule to prevent increasing de minimis amounts by dividing property.

It is reasonable to conform the rule to statutes enacted by the Minnesota Legislature.

Subpart 9. Wildlife habitat. The proposed rule removes the limitation on excavation within certain wetland types because it conflicts with Minn. Stat. § 103G.2241, subdivision 10, which contains no such limitation. It is reasonable to propose language that conforms the rule to statutes enacted by the Minnesota Legislature.

The word "area" is deleted from this subpart. The amendment is necessary because the term is redundant and in conflict with the definition of “wetland area.” A percentage of a wetland is by definition a measure of area, making the word "area" superfluous in this context. Minn. R., part 8420.0111, subpart 72B, defines “wetland area” as a portion of a wetland or the wetland, whereas the existing use of “wetland area” in this subpart refers to the entire area of the wetland. Retaining the term would therefore create ambiguity as to the portion of the wetland upon which the five percent limitation is imposed, creating the potential for arbitrary implementation. It is reasonable to remove redundant language and eliminate terminology that conflicts with a defined term used elsewhere in the rule, thereby providing greater clarity and certainty to the regulated community and members of the public.

Several amendments are made to Subitem 3. "Provide" is replaced with "improve" and "improvement" is deleted, replacing "provide wildlife habitat improvement" with "improve wildlife habitat" to improve clarity and conciseness through the use of active voice. Consistent with similar amendments throughout the rule that ensure clarity and consistency in the use of “certify” and related terms, "certified" is replaced with "determined" because "certified" implies a process of officially recognizing that something meets specific qualifications or standards, yet no such qualifications or standards exist for determining whether a project improves wildlife habitat. The reference to the technical evaluation panel is deleted because it conflicts with statute, which grants authority to make this determination solely to the soil and water conservation district. The reference to wildlife habitat guidance is deleted because the resource is obsolete. These amendments are necessary to align the rule with statute and to ensure that terminology accurately reflects the nature of the action being described. It is reasonable to amend the rule to resolve conflicts with statute, remove inapplicable terminology and an obsolete resource, and improve the clarity and conciseness of the rule language, thereby providing greater certainty to the regulated community and members of the public.

WETLAND REPLACEMENT

8420.0500 PURPOSE AND REQUIREMENT

Subpart 2. Requirement. The rule clarifies that, for project-specific replacement, the replacement plan must comply with Minn. R., part 8420.0810. This amendment is necessary because the added reference was missing, resulting in an incomplete list of provisions that prescribe the requirements for replacement plans. It is reasonable to ensure that references to applicable rule provisions are complete and accurate, so that those implementing and complying with the rule have a clear picture of all requirements that apply.

8420.0512 (proposed) ESTABLISHING BANK SERVICE AREAS

This new part establishes a process and criteria for the establishment of BSA. Currently, BSA boundaries are, in the absence of an objective process and/or criteria, arbitrarily determined by the board and delineated on a map at a scale that is insufficient for both delineating and/or interpreting such boundaries. The map is then published in the rule. Because BSAs are an important tool used within the rule to address the location of acceptable replacement wetland values consistent with Minn. Stat. § 103G.2242, subdivision 1(a) and the siting of replacement wetlands under Minn. Stat. § 103G.222, subdivision 3, the board must have the ability to adjust them when factors such as land use and the economic viability of wetland banks change over time. It is also necessary to establish concise, objective criteria on which to base BSA boundaries and designations. The criteria contained within this new part are equivalent to the criteria used to establish bank service areas under the Federal Mitigation Rule, ensuring consistency with implementation of Section 404 of the Clean Water Act (CWA) by the USACE. It is reasonable to amend the rule to establish objective criteria and a transparent process for establishing and maintaining an important element in carrying out the board's statutory directive.

8420.0515 SPECIAL CONSIDERATIONS.

Subpart 1. Scope. The term "site" is replaced with "wetland" in the phrase "replacement site," changing it to "replacement wetland." The amendment is necessary because "replacement site" is not a defined term in this rule, while "replacement wetland" is a defined term that is consistent with the existing intent of this subpart. It is reasonable to amend the rule to replace undefined terminology with defined terms that are used consistently throughout the rule, thereby providing greater clarity and certainty to the regulated community and members of the public.

Subpart 3. Rare natural communities. This subpart is deleted in its entirety and replaced with new Items A through E. The amendment is necessary to better align this provision with the board's statutory authority under Minn. Stat. § 103G.2242, subdivision 1, which authorizes the board to develop rules for the replacement of wetland value, and to address numerous problems that have been identified with the implementation of this subpart as it currently exists. The existing language contains provisions that exceed or are inconsistent with that statutory authority, including determinations by the commissioner regarding rare natural community status and criteria. The existing language also lacks clarity in several respects, including the extent of jurisdiction over rare natural communities relative to wetland boundaries (i.e. within vs. outside of the wetland boundary), the applicability of Minn. Stat. § 15.99 to decisions related to RNCs, and the appeal process for determinations by the commissioner, and others. The revised language refocuses the subpart on standards and requirements for replacement of public value lost as a result of wetland impacts that permanently adversely affect a rare natural community. The new Items A through E establish a standard for what constitutes a permanent adverse effect on a rare natural community, provide a basis for local government unit decision-making, clarify replacement options available to applicants, and establish a clear process for consultation with the commissioner. These revisions, combined with the new definition of "rare natural community" added to 8420.0111, subpart 59a, provide greater clarity for both applicants and local government units regarding their respective obligations, options, and procedures. It is reasonable to revise this subpart to align the rule with the board's statutory authority, establish clear and implementable standards for replacement decisions, and provide greater clarity and certainty to the regulated community and members of the public. See Exhibit 6 for additional background on relevant statutory authority, deficiencies in the existing language, and the improved outcomes of the proposed amendments.

Subpart 6. Groundwater sensitivity. The proposed deletion removes a reference to an obsolete resource. It is reasonable to remove references to resources that are no longer relevant.

Subpart 7. Sensitive surface waters. The term “listed” is changed to “designated” to conform it to the terminology used in the referenced rule. It is reasonable to use terminology consistent with the rule that is referenced.

Subpart 8. Education or research use. The proposed revision allows the local government unit to consider the significance of adverse effects of wetland impacts on the education and research uses of wetlands. The existing language focuses on whether the education and research uses will be maintained or adequately replaced, without any consideration of the significance of the effect of the wetland impact on those uses. Consideration of the significance of impacts is consistent with the approach prescribed in other parts of the rule. The amendments also provide greater clarity for LGUs regarding how to evaluate such uses within the context of a replacement plan. It is reasonable to propose amendments to increase clarity and consistency with related subparts of this part of the rule.

Subpart 9. Waste disposal sites. This subpart is repealed to remove the requirement that LGU staff evaluate hazardous wastes and contaminants. The existing provision does not prevent the LGU from approving a replacement plan if such wastes or contaminants are present, nor does it address any special consideration of wetland value. Rather, it simply directs the LGU to evaluate potential waste material in a disposal site, with no outcome on replacement plan approval. The MPCA has the expertise and is the relevant agency for this type of assessment, not the LGU. Other sections of the WCA rule require the applicant to disclose and follow all other local, state, and federal permits and approvals, which would include those related to hazardous wastes and contaminants. It is reasonable to propose amendments that remove unnecessary requirements.

Subpart 10. Consistency with other plans. The term “local water management plans” is revised to “local water plans”, and the term “watershed management plans” is stricken. The term “Local water plan” is defined in Minn. R., part 8420.0111, subpart 39, and includes “watershed management plans.” It is reasonable to propose changes that do not affect the intent of the rule but improve its clarity through the removal of superfluous terminology.

8420.0520 SEQUENCING.

Subpart 1. Requirement. The word "areas" is deleted from the phrase "replacement wetland areas" in Item E, leaving "replacement wetlands." The amendment is necessary because "areas" is superfluous and its’ inclusion can cause confusion due to the definition of “wetland area” under Minn. R. 8420.0111, subpart 72B. The term "replacement wetlands" is an accurate description, and the addition of "areas" adds no meaning to the phrase. It is reasonable to remove redundant language from the rule without altering its intent, thereby improving clarity for the regulated community and members of the public.

Subpart 7a. Sequencing flexibility. The proposed revision to paragraph A removes an unnecessary procedural limitation on the use of sequencing flexibility. Specifically, the requirement that an applicant request that an LGU exercise sequencing flexibility before that LGU can exercise such flexibility is stricken. The amendment is necessary to allow sequencing flexibility to be applied directly by the LGU absent the applicant’s request, subject to certain qualifying conditions being met. It is reasonable to propose an amendment that removes an unnecessary procedural burden and assists the LGU and the applicant in administration of and compliance with the rule, respectively.

The proposed revision to paragraph B shifts the mechanism for determination of public value from the use of “a functional assessment” to, more broadly, “an assessment of wetlands functions,” as the use of a specific functional assessment method is not always necessary when the relative public value of a wetland can be discerned by the LGU from readily observable characteristics of the wetland. It is reasonable to propose an amendment to provide flexibility for LGUs, the Technical Evaluation Panel, and applicants, in how to meet a substantive requirement for applying sequencing flexibility.

The requirement for the applicant to provide necessary information is stricken, as the LGU may often have sufficient information to exercise sequencing flexibility without requiring the applicant to provide it directly. The source of the information that is the basis for its exercise is irrelevant, and the requirement that it be provided directly by the applicant creates an unnecessary procedural hurdle. It is reasonable to propose an amendment that removes an unnecessary procedural burden and assists the LGU and the applicant in administration of and compliance with the rule, respectively.

Subpart 8. Wetlands on cultivated fields. The rule is revised to conform it to amendments to Minn. Stat. § 103G.222, subdivision 1(d), which removed the requirement for a deed restriction on wetlands impacted for agricultural use and replaced at 1:1 without regards to sequencing, except when the LGU determines the wetland is at risk of conversion from agricultural use to another use within 10 years. The amendments clarified that, when the LGU determines the wetland is at risk of conversion from agricultural use to another use within 10 years, it "may" require that the deed restriction be recorded. It is reasonable to conform the rule to statutes enacted by the Minnesota Legislature.

8420.0522 REPLACEMENT STANDARDS

Subpart 1. General Requirement. Carbon sequestration is added to the list of functions upon which the public value of a wetland is based on. The addition is necessary to conform the rule to an amendment to Minn. Stat. § 103B.3355(a), which added "carbon sequestration" to the list of wetland functions upon which the public values of wetlands must be determined. Other minor revisions to this subpart are clerical only. It is reasonable to conform the rule to statutes enacted by the Minnesota Legislature.

Subpart 2. Determining impacts of partial drainage. This subpart is rephrased to improve clarity. The amendment is necessary for several reasons. The opening description of how drainage impacts are determined when wetland hydrology is completely removed is unnecessary, as it is inferred from the definition of an impact and represents the default condition; this subpart is specific to an alternative impact determination for partial drainage, and is revised to reflect that limited scope. The existing requirement that the impact determination be acceptable to the technical evaluation panel is deleted because it is arbitrary and conflicts with statute, which makes such decisions the responsibility of the LGU. The stricken requirement is replaced with a requirement that the local government unit consult with the TEP, consistent with similar amendments proposed elsewhere in the rule and the technical advisory role of the panel. The replacement language also provides an explicit basis for the local government unit to determine when a percentage greater than 50 percent is warranted, whereas the existing language provided no such basis, creating the potential for arbitrary decisions. It is reasonable to reword this subpart to improve clarity, eliminate arbitrary requirements, resolve potential conflicts with statute, and provide a clearer standard for local government unit decision-making, thereby providing greater certainty to the regulated community and members of the public.

Subpart 3. In-kind wetland replacement.

This subpart is amended to distinguish between the meaning of "in-kind replacement" and the indicator of in-kind replacement. In-kind replacement means replacing a wetland with a wetland of similar function, while an indicator of similar function is a wetland of the same type. Wetland type is redefined in Minn. R., part 8420.0111, subpart 75, consistent with a change to statute that allows type to be defined in terms of hydrogeomorphic class. Hydrogeomorphic classes are based on hydrologic conditions and landscape position consistent with one of the indicators of in-kind replacement specified in the existing rule. Therefore, the proposed amendment more simply and directly specifies the indicator of in-kind replacement as impact and replacement wetlands of the same wetland type. Additionally, the second indicator of in-kind replacement contained in the existing rule (same plant community) is proposed for removal as it is a poor surrogate for wetland function. The contemporary scientific understanding of wetland functions is that the primary drivers of wetland functions are hydrologic and geomorphic conditions that tend to result in a suite of similar functions for wetlands that share these characteristics. These hydrologic and geomorphic characteristics as reflected by hydrogeomorphic class are relatively consistent over time and more closely aligned with specific functional attributes, whereas plant communities occur across a wide spectrum of wetland hydrologic sources and landscape positions. Furthermore, the removal of plant community and the complete shift to hydrogeomorphic class as an indicator of in-kind replacement is consistent with wetland functional assessment guidance and procedures issued by federal agencies involved in wetland regulation, including EPA and the USACE. A more detailed justification for the use of HGM for determining wetland type is included in Exhibit 5. It is reasonable to update the rule to remove outdated concepts and reconcile a part of the rule with other parts that were changed as a result of statutes enacted by the Minnesota Legislature.

Subpart 4. Replacement ratios. Proposed item A, subitem 3 eliminates the replacement ratio penalty for bank owners, including local governments, for the use of their own credits for a project that crosses a BSA boundary but is within the same city or county. The existing penalty disincentivizes the establishment of single-user banks in areas in which an LGU has more than one BSA within their jurisdiction (e.g. some counties can be split by up to four BSAs). It is reasonable to add rule language that removes barriers to the establishment of wetland mitigation banks from which credits would be used by regulated parties to meet the requirements of the rule.

The proposed revisions to the minimum replacement ratio table conform the rule to statute by eliminating "50-80 percent area" from the "location of impact" column. Minn. Stat. § 103G.005, subds. 10b and 10h were amended such that 50 to 80 percent areas are no longer considered in wetland replacement. These subdivisions now specify that, for purposes of wetland replacement, greater than 80 percent areas and less than 50 percent areas are bank service areas that meet the criteria contained in the definitions. Due to these amendments, the definition of 50 to 80 percent area in subdivision 10h is no longer relevant for purposes of wetland replacement. It is reasonable to conform the rule to statutes enacted by the Minnesota Legislature.

A colon was added to the 1:1 ratio to correct the inadvertent use of a period in a previous rulemaking. It is reasonable to correct typographic errors in the rule.

Multiple revisions are made to item C to conform it to changes to the definition of "in-kind replacement" in Minn. R., part 8420.0522, subpart 3. It is reasonable to amend a subpart to accommodate changes made to another subpart, and to thereby ensure consistency across different subparts of the rule.

The remaining language is revised to allow the TEP determination under this Item to be based on the review of a plan or criteria developed or approved by the board, instead of "a local plan approved by the board." The amendment is necessary to broaden the type of information that may be reviewed while maintaining the board's oversight role. For example, the amendment will allow the use of plans or criteria developed by the board that identify high priority areas for wetland replacement under Minn. Stat. § 103B.3355(e) or compensation planning frameworks developed to meet the requirements of an in-lieu fee program developed under Minn. Stat. § 103G.2242, subdivision 1. The concluding sentence of this item is stricken because it is not prescriptive. It is reasonable to propose a rule amendment that makes it easier to implement the rule, without changing the intent of the rule, and to remove superfluous language.

Item E is amended to make the land deed restriction optional, in conformance with statutory amendments that have occurred since the current rule was adopted. It is reasonable to conform the rule to statutes enacted by the Minnesota Legislature.

The amendment to item F clarifies that the use of "rule" in this item specifically refers to state administrative rules. The amendment is necessary because, without this clarification, the term "rule" as used in this item could be interpreted to include watershed management organization rules, which are included within the definition of “rule” under Minn. R. part 8420.0111, subpart 63, creating potential ambiguity in its application. It is reasonable to provide specific differentiation of a term that is defined to include two different types of rules, thereby providing greater clarity and certainty to the regulated community and members of the public.

The addition of item G, in concert with revisions to subpart 7f of this part, which are proposed to “grandfather” existing banks affected by BSA changes, allows existing wetland banks to continue to sell credits in the BSA that was in place when the bank was approved without penalizing credit purchasers through increased replacement ratios resulting from replacement that occurs outside of the new BSA. The amendment is necessary to protect the interests and investments of wetland bank owners who established their bank under the replacement ratios and siting requirements in place prior to the related amendments to the statute and rule, by allowing them to sell and/or use credits without any additional restrictions or replacement ratio increases that may result from the statutory and rule changes related to siting and replacement ratios. It is reasonable to propose an amendment to accommodate other amendments to statute and rule, and in so doing, to maintain for bank owners the conditions that applied to credit sales when their bank was approved.

Subpart 5. Ecological suitability and sustainability. In item A, the sentence establishing a general preference for restoration over creation is deleted because it is not prescriptive. The preference hierarchy for replacement actions is reflected in the credit allocations in Minn. R., part 8420.0526 (Actions Eligible for Credit), which generally allocates higher credit amounts reflective of the stated hierarchy in the deleted sentence. It is reasonable to propose the deletion of non-prescriptive “preferences” that are otherwise reflected in another part of the rule.

The term “replacement site” in item B is replaced with “replacement wetland” to clarify that the requirement applies to the area of the site that is wetland, not the site in general. The phrase “habitat types” is replaced with “habitats” to eliminate confusion with other uses of the term “type” in the rule, which refers specifically to wetland type, not habitat type. It is reasonable to propose amendments that improve the clarity of the rule without altering its intent.

The content of item D is converted to list format to improve its clarity. The word "wetlands" is added after "replacement" in the opening sentence to clarify that the sentence refers to “replacement wetlands” as defined in Minn. R. part 8420.0111, subpart 60, rather than “replacement” in general which is undefined. The phrase "of important species" is added in subitem 2 to specify that the habitat requirements the local government unit must consider are those of important species. "Current development trends" is added as a new consideration in subitem 5 because land development trends are an important factor in the design of replacement wetlands, as changes in the watershed have the potential to degrade the wetland in the future. Subitem 7 is reworded for clarity because the phrase "providing a suite of functions" is inconsistent with the structure of the lead-in sentence and the other considerations listed. It is reasonable to propose amendments that clarify existing language, correct internal inconsistencies, and add considerations that make the rule more effective without altering its intent.

Subpart 6. Required upland buffer. The term "upland" is stricken throughout this subpart. The amendment is necessary for two reasons. First, a strict interpretation of the existing language could be interpreted as an upland-only requirement, preventing otherwise suitable wetlands from generating replacement credits solely due to the absence of adjacent upland areas. Second, there are instances where non-upland areas could serve as a protective buffer in the absence of sufficient upland. Broadening the buffer criteria to include non-upland areas also makes the rule more consistent with the Federal Mitigation Rule's broader definition of "buffer." It is reasonable to remove barriers to replacement wetland establishment and to align the rule more closely with federal regulations for wetland replacement and wetland bank establishment, thereby making it easier for regulated parties and banking plan applicants to comply with the rule.

Subpart 7. Siting of replacement. Multiple nonsubstantive revisions are made to the terminology of this subpart to improve its clarity. They alter neither the intent nor outcome of the rule. These revisions are identical to those described in the preceding text of this SONAR. It is reasonable to propose amendments that improve the clarity of the rule without altering its intent.

Item A is amended to conform it to Minn. Stat. § 103G.222, subdivision 3, which prohibits impacted wetlands that are located outside of a “greater than 80 percent area” from being replaced in a “greater than 80% area,” refers to “impacted” wetlands rather than “affected” wetlands, replaces “county” with “wetland bank service area,” and replaces the corresponding requirements contained in sub-items (4) and (5) of the current rule with “another bank service area.” It is necessary and reasonable to conform the rule to statutes enacted by the Minnesota Legislature.

Except as otherwise described below, the item B is amended to conform it to Minn. Stat. § 103G.222, subdivision 3(b), which specifies that the priority order for the siting of replacement by wetland banking begins at the BSA, according to rules adopted by the board. It is reasonable to conform the rule to statutes enacted by the Minnesota Legislature.

The introduced text pauses the implementation of the revised siting priority order when using wetland bank credits for replacement in the seven-county metropolitan area. The amendment is necessary because it is typically more costly to generate credits within the seven-county metropolitan area due to higher land prices, and the shift in the siting priority under Minn. Stat. § 103G.222, subdivision 3(b), described above, could make banks in the seven-county metropolitan area less competitive than banks within the same BSA but outside of the seven-county metropolitan area. The pause will allow banks within the seven-county metropolitan area more time to sell their existing credits with reduced competition, similar to the market conditions that existed prior to enactment of the statute change in 2015. It is reasonable to propose an amendment that mitigates potential unintended financial impacts on certain wetland banks resulting from statutory amendments.

The remainder of item B, the entirety of item C, and the entirety of item D are stricken to conform the rule to amendments to Minn. Stat. § 103G.222, from which the equivalent provisions were also stricken. It is reasonable to conform the rule to statutes enacted by the Minnesota Legislature.

Now lettered as item C, the opening language of item E is revised to improve its clarity. The second sentence of item (2) is deleted because the factor in item (1) and the first sentence of item (2) are only relevant to project-specific replacement and not to the use of banking credits, which now make up over 95% of all replacement. These factors (ecological suitability and sustainability, capability of being done) are already addressed in the process for the establishment and approval of wetland banking credits, leaving cost as the sole applicable factor in most uses of banking credits. Therefore, it is necessary to delete this sentence as it disallows the use of the sole factor to be used by applicants when seeking replacement opportunities further down the siting priority order. It is reasonable to propose an amendment that makes it easier to comply with the rule.

Item F is relabeled as “Item D” due to other amendments to this subpart.

New item E is proposed to conform the WCA rule to amendments to Minn. Stat. § 103G.222, subdivision 3(h), which allows an LGU to exercise flexibility in their determination of compliance with the priority order of siting when approving a replacement plan that has adequately completed an environmental impact statement review that identified a replacement wetland site or sites. It is reasonable to conform the rule to statutes enacted by the Minnesota Legislature.

The proposed addition of item F, coupled with subpart 4G of this part, allows existing banks to continue to sell credits in the BSA that was in place when their bank was approved, in addition to the new BSA. The amendment is necessary because existing bank owners who have invested financially in banks with a known market of credit consumers may be negatively affected by a BSA change that substantially alters that market. The grandfathering provision mitigates this potential negative effect. It is reasonable to propose an amendment that prevents negative economic consequences resulting from other amendments to the rule.

The maps and list of major watersheds are proposed for deletion because they are subject to change over time, are of a scale that is insufficient to be useful, and the information is now readily available online. It is reasonable to propose an amendment to remove the duplication of external informational resources that are subject to change from the rule.

The re-lettering of paragraphs in the subpart accommodates changes to the structure of the subpart resulting from the proposed amendments described above.

Subpart 8. Timing of replacement. Item B is amended by adding in-lieu fee replacement credits to item B, subitem 1 and replacing "certified" with "verified" in subitem 2. The word "wetlands" is added after "replacement" to clarify that the sentence refers to “replacement wetlands” as defined in Minn. R., part 8420.0111, subpart 60, rather than “replacement” in general which is undefined.

The addition of in-lieu fee replacement credits to subitem 1 is necessary to establish that the use of such credits constitutes replacement that occurs in advance of impacts, as authorized by amendments to Minn. Stat. § 103G.2242, subdivision 1(a), which grant the board authority to adopt rules for in-lieu fee wetland replacement programs. Because existing replacement standards distinguish between in-advance and concurrent replacement, it is necessary to specify which category applies to in-lieu fee credits. Specifying in-lieu fee credits as in-advance replacement is appropriate because the purpose and advantage of an in-lieu fee program is to provide greater certainty of successful replacement than concurrent replacement by delivering replacement through an established process administered by a qualified sponsor. This greater certainty is consistent with the rationale for treating in-advance replacement more favorably, as in-advance replacement reduces the risk of unsuccessful replacement. In addition, when the applicant purchases in-lieu fee credits, the replacement obligations of the applicant are transferred to the in-lieu fee program sponsor. When that credit purchase occurs prior to the wetland impact, the replacement is considered in-advance.

The term "certified" is replaced with "verified" in Subitem 2 for consistency with related amendments to parts 8420.0705, 8420.0725, 8420.0735, and 8420.0800 that clarify the use of such terms. Construction certification is a formal process performed by an engineer confirming that the constructed project meets design standards. The LGU's role in this context is not to certify construction but to verify that it has been completed as depicted in the engineer-certified construction plans, making "verified" the more accurate term.

It is reasonable to amend this subpart to implement the board's authority to establish in-lieu fee replacement programs, to accurately characterize the LGU's role in construction review, and to ensure consistent use of terminology throughout the rule, thereby providing greater clarity and certainty to the regulated community and members of the public.

Subpart 9. Financial assurance. The citation in item C is corrected from part 8420.0910 to part 8420.0905, the correct appeals part. The term "certification" is replaced with "determination" in item D, consistent with amendments proposed throughout the rule that distinguish the local government unit's role in determining whether replacement requirements have been adequately met from the formal certification of construction performed by a licensed engineer under part 8420.0800. It is reasonable to correct an inaccurate citation and to use terminology that accurately reflects the local government unit's role in replacement review, consistent with related amendments throughout the rule.

New Subpart 10. Replacement site limitations. This new subpart is proposed to improve the clarity of the rule by relocating replacement site limitations from Minn. R., part 8420.0330, subpart 3 (Replacement Plan Application Contents) to the replacement standards section of the WCA rule as they are substantive rule requirements, not application contents. It is reasonable to propose amendments that improve the clarity of the rule by modernizing its structure, without altering the intent of the rule.

8420.0526 ACTIONS ELIGIBLE FOR CREDIT.

Subpart 1. Scope. The proposed amendments to Item B require that a reduction in wetland credit allocation be based on a LGU determination that the replacement wetland does not meet performance standards. The amendments are necessary because the existing language could allow for arbitrary credit allocations by the LGU. It is reasonable to prescribe objective standards for determining the success/outcomes of restoration actions.

The phrases "or conversion" and "from one wetland type to another" are deleted from Item D. The amendment is necessary because converting a wetland from one type to another is no longer applicable to the allocation of credit following the change in the definition of wetland type, which is now based on hydrogeomorphic setting, a characteristic that would not change as a result of the actions listed in this item. Additionally, the substantive restriction of this provision is the modification of nondegraded wetlands, not the result of that modification, and the deleted language obscures that intent. It is reasonable to remove language that is no longer applicable and that creates potential confusion, thereby providing greater clarity to the regulated community and members of the public.

Item D is further revised to authorize maintenance of an existing drainage system without disqualifying the affected wetlands from being restored for replacement credit. A strict interpretation of the existing rule would prohibit restoration of a wetland for replacement credit for a period of ten years following impacts associated with any exemption, including drainage maintenance. This interpretation is excessively strict and results in a substantial percentage of restoration opportunities being prohibited simply because routine maintenance has occurred; an impact that is particularly prevalent in agricultural areas of the state where minor maintenance of drain tile and ditches occurs on a regular basis. It is reasonable to clarify the applicability of a provision that unnecessarily limits wetland restoration opportunities without a corresponding benefit to the purposes of the rule.

Subpart 2. Upland buffer areas.

The term "upland" is removed from the title of this subpart. The amendment is necessary to create consistency between the heading and the content of the subpart, as item A is revised to allow non-upland buffer areas to be eligible for replacement credit, making an upland-only heading inaccurate. It is reasonable to amend a subpart heading to accurately reflect the content of the subpart.

The proposed revisions to Item A eliminate the ability to generate replacement credit from the establishment of nonnative buffer, allow credit for preserving buffers around existing wetlands, and remove the upland-only requirement for buffer eligibility, consistent with the amendment to part 8420.0522, subpart 6, which broadens buffer criteria to include non-upland areas. The elimination of the nonnative buffer credit is necessary because authorizing replacement credit for nonnative buffer is inconsistent with other parts of the rule that require and incentivize the establishment of native vegetation in replacement wetlands and buffers. The amendment to allow the generation of credits for preserving buffers around existing wetlands is necessary to improve the function and sustainability of both the replacement wetlands and the wetlands to which the buffer is extended, in part by establishing and maintaining habitat connections. The removal of the upland-only requirement is necessary to create consistency with the amended subpart 6. Additional nonsubstantive amendments were made to the structure and wording of this item to improve its clarity. It is reasonable to propose amendments that increase consistency throughout the rule and improve the clarity of the rule.

The proposed revisions to Item B provide flexibility to increase the buffer area under circumstances already identified in other provisions of the WCA rule or associated with the establishment of easement boundaries. The amendments are necessary to ensure that the replacement wetland is self-sustaining and to enable the board to effectively enforce conservation easement provisions on the wetland bank. The amendments also improve consistency with the Federal Mitigation Rule, which requires that credit be allocated to any areas that the applicant is required to protect as a condition for approval of the replacement or banking application. Under the current rule, buffer established beyond the maximum allowable amount is not eligible for replacement credit, which serves as a disincentive to establish buffers in those areas thus undermining the long-term sustainability of replacement wetlands in situations where site conditions necessitate a larger buffer area than the rule currently allows credit to be allocated. The current rule language is inconsistent with the Federal Mitigation Rule and could lead to differing credit amounts between the federal and state programs within the same replacement wetland.

Amending the WCA rule to resolve this inconsistency will improve replacement wetland sustainability, simplify replacement credit generation and tracking, and make it easier for credit sellers to broadly market credits to satisfy the replacement requirements of both programs. It is reasonable to update the rule to improve replacement wetland outcomes, increase consistency with federal regulations, and simplify processes for those complying with both programs.

Item C: The criteria allowing an increase in wetland buffer credit beyond the standard amount have been revised. The amendment is necessary because existing criteria are vague and have been inconsistently applied statewide. As a result, it is difficult for LGUs and TEPs to determine when the criteria are met. The rule also clarifies that a buffer credit increase must be based on a “recommendation” from the TEP, not a “find[ing]” by the TEP. The amendment is necessary because a requirement for a "finding" to gain eligibility could be misinterpreted as requiring a formal decision by the TEP, which is not a decision-making body. It is reasonable to improve the consistency and clarity of the rule without altering its substantive intent.

In addition to improving the clarity and precision of the rule, the criteria for receipt of an increased buffer credit amount are revised to create an incentive to restore or preserve rare and important plant communities and plant communities that provide critical habitat for rare species. The amendment is necessary to encourage replacement of these important communities and species, which are identified as special considerations under Minn. R., part 8420.0515. It is reasonable to provide incentives that result in improved wetland replacement outcomes without altering the intent of the rule or creating additional regulatory burdens for regulated parties.

Subpart 3. Restoration of completely drained or filled wetland areas. The subject text is proposed for relocation to Minn. R., part 8420.0528, subpart 2, Item D, where it will be included with other vegetative replacement design criteria. The referenced item contains vegetation-based design requirements that are applicable to all replacement wetlands. It is reasonable to propose amendments that relocate provisions to a more applicable subpart that clarifies their applicability.

Subpart 4. Restoration of partially drained or filled wetland areas.

The proposed revisions simplify wetland credit determinations for restoring degraded wetlands in agricultural fields by eliminating, in many instances, the need to distinguish between wetland areas that have been completely drained and those that have only been partially drained. In highly altered agricultural landscapes, making this distinction is difficult, inexact, and poorly correlated with differences in functional gain. The proposed language is necessary to base credit eligibility on the extent of degradation and the functional gain realized from restoration, which more accurately reflects actual replacement outcomes and improves the eligibility of marginal cropland. The proposed language is also consistent with the Joint BWSR-USACE guidance for Determining Wetland Mitigation Credit Potential for Hydrologic Restorations on Cultivated Fields in Minnesota, issued in 2019. It is reasonable to align the rule with established joint federal and state procedures and to improve replacement outcomes by basing credit eligibility on functional gain rather than distinctions that are difficult to make accurately in the field.

Subpart 6. Protection of wetlands previously restored via conservation easements. The term “easements” is stricken from the subpart heading and replaced with “programs.” The amendment is necessary as not all conservation programs require an easement on restored wetlands. It is reasonable to revise a subpart heading to more accurately indicate the content and applicability of the subpart.

Subpart 9. Preservation of wetlands owned by the state or a local unit of government. The proposed revisions conform the rule to amendments to Minn. Stat. § 103G.2251, which:

- expand the 12.5% credit eligibility for the preservation of wetland areas and adjacent buffer owned by state or local governments and protected by a permanent conservation easement to any wetland areas and adjacent buffer protected by a permanent conservation easement, not just those owned by state or local governments; and
- prohibits wetland areas located on private lands and that have been restored using public conservation funds from being used to generate replacement credits.

It is reasonable to conform the rule to statutes enacted by the Minnesota Legislature.

8420.0528 REPLACEMENT WETLAND CONSTRUCTION STANDARDS

Subpart 2. Design requirements. The proposed language related to "actions to restore the native plant community" is relocated to item D from part 8420.0526, subpart 3, with minor revisions to improve clarity and fit within this item. The phrase "involving wetland restoration or creation" is added to clarify that the vegetation establishment and management plan requirement applies only to replacement and banking plans that involve wetland restoration or creation, and not to preservation projects, for which a vegetation establishment and management plan is not applicable. Currently, the rule requires the establishment of native plant communities for different restoration actions, but those requirements are described inconsistently across the subparts of part 8420.0526. Relocating the requirement to the replacement wetland construction standards creates a consistent standard applied across all restoration and creation actions eligible to generate replacement credit and places it in a more logical location within the rule. The amendments are necessary to increase consistency across the rule, clarify the scope of the vegetation plan requirement, and eliminate ambiguity regarding its applicability to preservation projects. It is reasonable to propose amendments that increase consistency, improve clarity, and resolve ambiguity without altering the substantive intent of the rule.

The term ”Types 3, 4, and 5” is deleted from Item E and replaced with “permanently and semipermanently flooded wetland areas” in Item E to remove the Circular 39 types and to clarify that this item’s requirement for varying water depths applies to areas with surface water for a substantive portion of the growing season. The amendment is necessary to incorporate terminology that is defined and used in other parts of the rule, while eliminating the use of the Circular 39 typing system, which is no longer used in the WCA rule as described previously in this SONAR. Elimination of the reference to Circular 39 types from this item does not alter the intent of the design criteria, which is to require a variety of water depths in flooded areas of wetlands. It is reasonable to replace obsolete terminology and improve the consistency of the rule without altering its intent.

The “preference” for 10:1 and 15:1 sideslopes in Item F is stricken as a preference is neither prescriptive nor enforceable. Further, the stated preference may not be compatible with the creation of wetlands on some landscape settings and/or may fail to achieve the desired functional characteristics. It is reasonable to strike a non-prescriptive, unenforceable rule provision.

The proposed amendments to Item H improve the accuracy of the terminology used in this item. Dams and dikes are more accurately characterized as types of water control structures than as “impoundment features,” as they are often integrated with culverts and overflow structures that are intended to control and/or manipulate water levels in a wetland. “Registered professional engineer” is stricken and replaced with the proposed term because engineers in Minnesota are licensed to practice engineering, not registered. It is reasonable to propose amendments to improve the clarity of the rule without altering its intent.

Subpart 3. Design considerations. The phrase “when necessary” is stricken from item B to improve the clarity of the rule by eliminating superfluous language, as each listed item for expanding buffers already describes instances where it must be considered as required by the opening text of this subpart. It is reasonable to remove language that is redundant with the existing structure of the rule and that has the potential to create confusion regarding when the listed considerations apply.

The term "hydrologic bounce" is replaced with "water level fluctuations" in item C. The amendment is necessary because "water level fluctuations" is more widely understood than the technical term "hydrologic bounce," making the provision more accessible to those who must apply it. It is reasonable to replace technical jargon with more commonly understood terminology without altering the intent of the provision, thereby improving the usability of the rule for the regulated community and members of the public.

The rule proposes to strike the reference to the guidance document located at Minn. R., part 8420.0112, item N as the document is obsolete and incorporation of it has been removed from that part. Because the document is obsolete and because there are no specific, standardized hydrologic bounce criteria that are applicable to all wetlands, the criteria are replaced with a more generally applicable requirement related to maintaining the wetland’s function, value, and sustainability. It is reasonable to remove obsolete references and criteria and replace them with criteria related to the intended goal of replacement wetlands and the intent of the rule.

8420.0544 REPLACEMENT FOR PUBLIC TRANSPORTATION PROJECTS.

The proposed amendments to Item B conform the rule to amendments to Minn. Stat. § 103G.222, subdivision 3 which eliminated the replacement siting provisions contained in this item, while maintaining the exception from the siting provisions in 8420.0522, subpart 7 for public transportation projects utilizing credits from wetland banks submitted prior to April 1, 1996. It is reasonable to propose amendments to conform the rule to statutes enacted by the Minnesota Legislature.

The term "bank administrator" is replaced with "designated banking administrator" in Item D(2). The replacement clarifies that the banking administrator function is fulfilled by whichever position is designated to do so by the agency. The revision is necessary because the Board does not have a position titled "banking administrator" and the use of specific job titles should be avoided in rule. It is reasonable to propose revisions to terminology to improve the clarity of the rule without altering its intent.

Item I is amended to conform the rule to amendments to Minn. Stat. § 103G.222, subdivision 1(m), which specifies the type of public transportation projects for which the board must provide replacement wetlands. It is reasonable to propose an amendment to conform the rule to statutes enacted by the Minnesota Legislature.

8420.0700 PURPOSE OF WETLAND BANKING

The references to other specific parts of the rule are deleted and replaced with the phrase "this chapter." The amendments are necessary because the operation of wetland banks must comply not only with the stricken parts, but with all applicable requirements of "this chapter." The stricken provisions represent only a portion of the provisions in the rule that govern bank operation. It is reasonable to propose an amendment that clarifies which provisions the board must ensure that bank operation complies with.

8420.0705 ESTABLISHING WETLAND BANK SITE

The heading is revised to correct a grammatical error and to clarify that this part addresses establishment of a wetland bank, not just the site. It is reasonable to correct grammatical errors and clarify the scope of the provisions covered under this part of the rule.

Subpart 1. Eligibility for wetland banking. The reference to standards contained in other specific parts of the rule is stricken and replaced with "requirements of this chapter." The stricken provisions represent only a portion of the requirements for the deposit of wetland credits. The revision is necessary to clarify that wetland credits must comply with all applicable requirements of "this chapter" and is not limited to only the previously referenced parts. It is reasonable to correct rule text that incorrectly states which parts of the rule that apply to a certain action.

The phrase "and certified by the local government unit prior to deposit" is deleted from this subpart. The amendment is necessary because this requirement is already established in 8420.0725, making the language redundant. Additionally, the deleted language creates confusion by conflating two distinct processes that occur at different times: eligibility, which is established through approval of the wetland banking plan; and certification, which is the process of determining whether replacement actions have successfully met performance standards. Removing this language more clearly establishes the eligibility requirement as the operative standard of this subpart. It is reasonable to remove redundant language and eliminate potential confusion between distinct regulatory processes, thereby providing greater clarity and certainty to the regulated community and members of the public.

The last sentence of subpart 1 is deleted. The amendment is necessary because the requirement that replacement actions receive prior LGU approval before being eligible for deposit in the wetland bank is already clearly established in the two immediately preceding sentences, making this sentence redundant. It is reasonable to remove redundant language from the rule without altering its intent, thereby improving clarity for the regulated community and members of the public.

Subpart 2. Local government unit and board authority. Item A is amended by replacing "certification" with "verification" in the reference to the LGU's construction review responsibility. Construction certification is a formal process performed by an engineer confirming that construction meets specific standards and requirements. The local government unit's role in this context is not to certify construction but to verify that it has been completed as depicted in the engineer-certified construction plans, making "verification" the more accurate term. This change is consistent with related amendments to parts 8420.0705, 8420.0725, 8420.0735, and 8420.0800. It is reasonable to use terminology that accurately reflects the LGU's role in construction review and to ensure consistent use of that terminology throughout the rule.

Item B is amended to correct an error in the current rule and to clarify the board's authority regarding easements associated with approved banking plans. The current rule incorrectly states that the board may reject or modify a deposit application if any part of the banking plan is missing, incorrect, or inconsistent with this chapter. This is an error because credit deposits are requested only after a banking plan has been approved, and a banking plan cannot be approved if it contains missing or incorrect components. Those issues are addressed during the bank plan approval process whereby the technical evaluation panel provides recommendations on bank plan approvals and can appeal erroneous LGU decisions. The amended language corrects this error by clarifying that the basis for rejection or modification of a credit deposit is its inconsistency with the approved banking plan. Language is also added to clarify the board's authority to refuse to accept a conservation easement when it determines that the banking plan is inconsistent with this chapter, consistent with the board's authority under Minn. Stat. § 103G.2242, subdivision 1 to establish and administer a wetland banking program.

It is reasonable to correct an error in the rule, clarify the board's authority regarding easements, and ensure that the basis for a deposit rejection is accurately stated, thereby providing greater clarity and certainty to the regulated community and members of the public.

Existing Subpart 3. Application procedures (now "Prospectus requirements and procedures") -and- new Subpart 3a. Banking plan application and decision procedures.

The heading of this subpart is revised to "Prospectus requirements and procedures." It is necessary and reasonable to amend a heading to more accurately indicate the content of a subpart.

Amendments to Minn. Stat. § 103G.2242, subdivision 2a(c), direct the board to establish timelines for wetland bank project review and comment apart from Minn. Stat. § 15.99, subdivision 2. Over 95 percent of the wetland replacement in Minnesota is achieved through the use of wetland banks. The establishment of wetland banks typically involves significant landscape and drainage alterations, construction of engineered structures, secondary effects to adjacent properties, and easement acquisition, requiring a more detailed and lengthier review than other WCA applications, which necessitates a more comprehensive and detailed review process. Wetland bank establishment also includes substantial coordination between the applicant and regulatory agencies in an iterative process to develop final banking plan. The proposed rule reorganizes the core requirements of bank plan applications and eliminates the requirement to send the application to the USACE, as not all applicants wish to obtain their approval and USACE approval is not required by statute or rule.

The proposed rule establishes a process for reviewing and approving wetland banks that emulates the process and timelines prescribed by the Federal Mitigation Rule, which includes three mandatory phases in the bank approval process, plus an optional phase at the beginning. Because the final phases of the federal process involve the drafting and finalization of a banking instrument, which is not applicable to the WCA program, an exact duplication of the federal phases and timelines is not possible. However, the two proposed mandatory WCA bank plan application phases are consistent with the corresponding application phases in the Federal Mitigation Rule (see Exhibit 7). The review, comment, decision, and noticing time periods are similar to those used for other types of decisions in this rule and statute, and the overall time period for the completion of each phase nearly matches that which is prescribed in the Federal Mitigation Rule. This process has been largely used unofficially in recent years by applicants and LGUs, albeit through multiple administrative decision extensions by the LGU.

The prospectus phase is required under the proposed language, consistent with federal process. The review timeline for the prospectus phase also matches the federal process. The prospectus phase does not involve an LGU decision but instead compels the TEP to develop findings and recommendations regarding project feasibility, prior to development of the full bank plan application.

The second phase is the review of the full bank plan application, which follows the same basic public notice provisions as other WCA decisions except that the review and decision timelines are increased to closely match the last two phases of federal process. The TEP is afforded additional time after the comment period ends to allow for consideration of any other comments received as they develop their findings and recommendations.

A process is established for revisions to bank plan applications, which occurs commonly as the plans are refined over time. This process is intended to provide certainty, predictability, and to minimize the need for the LGU to continually extend timelines while applicants are revising their plans.

A final provision is proposed to require the board to act on the banking plan application when the LGU fails to make a decision within the required timelines. This provision provides a reasonable alternative to a “default approval,” regardless of the application’s compliance with rule requirements, when the LGU misses the decision deadline.

It is reasonable to establish timelines for wetland bank application review and comment because the state has the general statutory authority and legislative directive to do so. It is reasonable to align that process and those timelines as closely as possible to that of the Federal Mitigation Rule as implemented by the USACE district with responsibility for its implementation within the state.

Subpart 5. Conservation easement.

The proposed amendments to Item A eliminate multiple prescriptive requirements related to conservation easement acquisition. In association with the board’s authority to establish and administer a wetland banking program, the standards and requirements for easement acquisition are subject to change over time due to changes in policy, legal considerations, and other factors that affect the board’s ability to obtain and hold a real estate interest in perpetuity for a wetland bank site. The elimination of the prescriptive requirements is necessary because they prevent necessary changes from being made. Further, such prescriptive requirements do not allow for flexibility to be exercised by the board in the easement acquisition process when necessitated by the circumstances of a particular wetland bank and associated easement. The proposed amendments also eliminate the provision stating that the easement does not confer a right of access to the public. Because the easement does not and has never granted public access, this statement is unnecessary. Additionally, the easement specifications and requirements are made available to applicants who can decide if they are willing to confer an easement to the board to establish a bank. The granting of an easement and establishment of a wetland bank are voluntary actions taken by applicants, not regulatory compliance requirements. It is reasonable to propose amendments that remove unnecessary procedural hurdles from the rule and make it easier for the regulatory agency to adapt policies and procedures related to internal processes over time, consistent with the intent of the rule.

The proposed amendment to Item B specifies that an easement is not required on certain lands (federal, state, land held in trust by the federal government for Tribal nations) when acquisition of a conservation easement is not feasible and adequate access to, and long-term protection of, the bank site otherwise exists. The amendment is necessary to increase the LGU’s flexibility to approve wetland banks under certain property ownership that meet all other requirements of rule, and the establishment of an easement is not feasible but adequate long-term protection and access otherwise exists. It is reasonable to propose an amendment to improve the flexibility of the rule without altering its intent.

Subpart 6. Time limits for construction.

The term "certification" is replaced with "verification", and a sentence is added to allow the LGU to extend the time limits under this subpart in consultation with the TEP.

The replacement of "certification" with "verification" is necessary to accurately reflect the LGU's role in construction review, as that role is to verify that construction has been completed as depicted in the engineer-certified construction plans rather than to certify that it meets specific standards through a formal process. This change is consistent with related amendments to parts 8420.0705, 8420.0725, 8420.0735, and 8420.0800.

The sentence allowing for extensions is necessary to provide flexibility when delays in the initiation or completion of bank construction activities are encountered due to weather, regulatory approvals, or other unforeseen circumstances, which the current rule does not address.

It is reasonable to replace terminology that more accurately reflects the LGU's role in construction review, consistent with related amendments throughout the rule, and to allow extensions of construction timelines to accommodate unforeseen circumstances, thereby providing greater flexibility to wetland bank project sponsors while ensuring that the requirements of this chapter are ultimately met.

8420.0725 CERTIFICATION AND DEPOSIT OF CREDITS

The phrase “in which they are located” in item A is stricken. The amendment is necessary because DNR is the designated LGU for a wetland bank in which credits are used solely for replacing impacts under a permit to mine per Minn. Stat. § 103G.005, subdivision 10i(4), and as a statewide agency they are not located in a particular area. It is reasonable to propose an amendment to correct inaccurate rule language.

The second sentence of this item is amended to improve the clarity of the rule concerning the process of requesting certification of and deposit of credits. Additionally, the amendment establishes a requirement that the request be made on a form provided by the board and that the request be based on the approved credit release schedule and performance standards. As the administrator of the wetland bank, the board must track all credit deposits and withdrawals for all wetland banks, necessitating a standardized form for efficient processing. Requiring the credit deposit request to be based on the credit release schedule and performance standards of the bank provides criteria on which the LGU must base its certification decision. The current rule language lacks this important tie back to the standards and criteria contained in the approved bank plan. It is reasonable to amend the rule to establish clear standards and to establish a standard form for the submittal of requests by applicants and review by the LGU.

The third sentence is amended to require that wetland bank credit certifications identify the number of credits eligible for deposit by the area of the bank from which the credits were generated, and it eliminates the requirement that the credits be identified by type and buffer. The amendment is necessary because the rule imposes an identification requirement but contains no corresponding provision that requires the use of that information. Replacement using wetland banking credits does not require identification of credits by type and buffer. It is reasonable to amend a part of the rule to eliminate nonsubstantive requirements that have no connection to any other rule provision or outcome.

The phrase requiring that "sufficient time has passed for the wetland to become established, especially vegetation and hydrology" is replaced with a requirement that the applicable performance standards contained in the approved banking plan have been met. The amendment is necessary because performance standards, established under parts 8420.0111, subpart 50a and 8420.0705, subpart 3a(B), are the mechanism by which it is determined whether the wetland has become established for a specific bank, including vegetation and hydrology. The language describing the area to be certified is replaced with a requirement that a land survey or comparable method of field measurement be used to define the extent of the area on which the credit certification is requested. The requirement that the person making the measurement verify in writing as to the method and accuracy is replaced with a requirement that the credit release request identify the method and accuracy of the measurement. It is necessary and reasonable to amend the rule to eliminate incorrect and unnecessary language, and to replace ambiguous language with references to established standards and requirements, thereby providing greater clarity and certainty to the regulated community and members of the public.

Item B of the existing rule is stricken, and the remaining items are re-lettered accordingly. The amendment is necessary because item A was amended to address the request for certification and deposit of credits on a form provided by the board. The specific list of information to include in a request for credit certification and deposit is outdated, incomplete, and unnecessary as the information requirements are contained within the form provided by the board under item A. Additionally, some of the listed items are repetitive of requirements for the establishment of a wetland bank previously stated in this part and/or obtained by the board and provided by the applicant through other required processes, such conservation easement acquisition. It is reasonable to remove repetitive, outdated, and unnecessary prescriptive requirements from the rule to increase the flexibility and efficiency of the rule.

Item C is relabeled item B due to the proposed deletion of existing item B. The additional revisions to this item are necessary to make it consistent with proposed amendments to parts 8420.0800 and 8420.0705 and correct an inaccurate reference to part 8420.0820, subpart 2. It is reasonable to amend a subpart to accommodate changes to another subpart and to correct an inaccurate reference, thereby providing greater clarity and certainty to LGUs, regulated parties, and members of the public.

The last sentence of item D is deleted, and the item is now identified as item C due to the deletion of item B. The amendment is necessary because the deleted language addressed a scenario in which an approved banking plan does not contain a credit release schedule and associated performance standards. This scenario is no longer possible under the new language in part 8420.0705, subpart 3a(B), which requires the submittal and approval of a credit release schedule and performance standards as a condition of banking plan approval. It is reasonable to remove language that addresses a scenario that can no longer occur under the rule, thereby improving clarity for the regulated community and members of the public.

Item E is relabeled as item D due to the deletion of item B. This item is amended so that the applicant, instead of the LGU, is responsible for sending approved credit deposits to the board. The amendment is necessary because requiring the LGU to send the credit deposit form while the applicant separately submits any required fee is inefficient and creates unnecessary administrative duplication. Because the credit deposit is required only if requested by the applicant and approved by the LGU, the applicant is best positioned to control the timing of submission and payment of fees and has the incentive to submit it in a timely manner. It is reasonable to propose amendments that increase the efficiency of the rule and appropriately place control over the timing of a voluntary, applicant-initiated process in the hands of the applicant.

Item F is now identified as item E due to the deletion of item B. The term "areas" is replaced with "wetlands" in this item. The amendment is necessary because "replacement wetlands" is a defined term in this rule that accurately describes what is being referenced, while "replacement areas" is not a defined term and is less precise. It is reasonable to replace undefined terminology with the defined term used consistently throughout the rule, thereby providing greater clarity and certainty to the regulated community and members of the public.

Additional amendments were completed to this part that are not specifically identified under each item above, and that consist of nonsubstantive, terminological revisions that are necessary to improve clarity of the rule. For example, in item E, the term “enter” is revised to “record”, and “wetland bank” is revised to “wetland bank account.” It is reasonable to improve the clarity of the rule by making its terminology more accurate and precise, without altering its intent.

8420.0735 MONITORING AND CORRECTIVE ACTIONS

Subpart 1. Monitoring. In item B, the requirement for the board to conduct periodic inspections of deposited wetlands to ensure they meet easement conditions is stricken and replaced with the assignment of responsibility to the board for assessment of wetland bank sites to ensure that they continue to provide important functions and values in a manner consistent with the approved bank plan. The amendment is necessary because the current language is inaccurate. Enforcement of easement conditions is a method, not a goal, used by the board to ensure that a wetland bank site continues to provide important wetland functions and values. The board may use additional methods to ensure the continuation of important wetland functions at a bank site, such as freezing unused credits, pursuing legal avenues to enforce the easement conditions, or using stewardship funds under Minn. Stat. § 103B.103 for repairs. Additionally, an easement is not required for all wetland banks (e.g. state lands); therefore, enforcement of easement conditions is only applicable to those bank sites for which an easement is required. Finally, the amendments allow for the use of methods other than physical inspection by the board for easement oversight, such as the use of technology. Each bank site is unique in terms of location and risk (e.g. whether structures are present or not, adjacency to incompatible or intensive land uses, etc.), and the proposed language allows for a more tailored approach to long-term monitoring of bank sites. The proposed amendments are necessary to correct inaccurate language, clarify the goal of long-term monitoring by the board, and provide flexibility in monitoring techniques, consistent with the purpose of replacement wetlands. It is reasonable to propose amendments that correct inaccurate language and improve the clarity and efficiency of the rule.

Subpart 2. Maintenance responsibilities. The term “banked” is changed to “replacement,” as “replacement wetland” is the more accurate term, and its use is consistent with other provisions of the rule, including its definition in part 8420.0111, subpart 60. It is reasonable to propose the use of more accurate, consistent, and defined terminology.

Subpart 3. Corrective actions. The term “banking administrator” is replaced with “designated banking administrator” in item A. The replacement clarifies that the banking administrator function will be fulfilled by whichever position is designated to do so by the agency. The revision is necessary because the Board does not have a position titled “banking administrator” and the use of specific job titles should be avoided in rule. It is reasonable to propose revisions to terminology to improve the clarity of the rule without altering its intent.

8420.0745 WITHDRAWALS AND TRANSFERS

Subpart 1. General. The term “regulatory” is replaced with “governmental.” This amendment is necessary because some non-regulatory agencies, such as the NRCS, also approve the use of wetland banking credits. It is reasonable to propose the use of terminology that is more accurate while not altering the intent of the rule.

Additional proposed revisions to this part are clerical in nature and improve the readability and clarity of the rule without altering its intent.

Subpart 2. Withdrawals. The first sentence has been amended to include all parties eligible to withdraw banking credits, rather than just replacement plan applicants. The amendment is necessary because the current language incorrectly suggests that credit withdrawals are only performed by replacement plan applicants, whereas other persons may also withdraw credits. For instance, persons seeking an exemption under Minn. R., part 8420.0420, subpart 2(F) (formerly G) may purchase credits to qualify for that exemption without applying for a replacement plan. It is reasonable to propose an amendment to correct errors in the current rule.

The second sentence is stricken because it duplicates the board’s existing obligation under Minn. R., part 8420.0755, subpart 1 to maintain and share information on wetland bank accounts. It is reasonable to propose an amendment to make the rule more concise by eliminating redundant language.

The third sentence, which requires a completed credit withdrawal form to be submitted with a replacement plan application, is stricken. The amendment is necessary to mitigate unnecessary procedural and financial risk for both buyers and sellers of credits. Currently, the potential exists for a signed withdrawal form to be submitted for processing without the credit seller receiving their agreed-upon fee/price, or, for the replacement plan to be denied after the applicant has already submitted the withdrawal form for processing and paid for the credits. Under Minn. R., part 8420.0330, the board will require an acknowledgement from both the credit user and seller, typically in the form of a purchase agreement, noting that the credit withdrawal is contingent upon plan approval. Since the outcome of a replacement plan is uncertain until approved, submitting the fully executed withdrawal form only after approval and purchase finalization is more efficient and reduces risk for both the buyer and seller. It is reasonable to amend the rule to reduce financial risk for the public and to make it easier for buyers and sellers of credits to comply with the rule.

The part is also amended so that the applicant, instead of the LGU, is responsible for sending the credit withdrawal form to the board. Because the credit withdrawal may require a fee, it is inefficient for the LGU to submit the form and the applicant to separately submit the fee. It is the applicant’s responsibility to make the withdrawal to satisfy the conditions of an approved replacement plan. Replacement plans are sometimes approved but not subsequently executed. The amendment is necessary to assign responsibility for making the withdrawal to the applicant, and to allow them to control if and when an approved replacement plan is implemented. It is reasonable to amend the rule to increase efficiency and to allow an applicant to control the timing of a process that affects them.

Subpart 3. Transfers and Subpart 4. Reporting credit transactions. The term “bank administrator” is replaced with “designated banking administrator” in item A. The replacement language clarifies that the banking administrator function will be fulfilled by whichever position is designated to do so by the agency. The revision is necessary because the board does not have a position titled “bank administrator” and the use of specific job titles should be avoided in rule. It is reasonable to propose revisions to terminology to improve the clarity of the rule without altering its intent.

8420.0755 BANK ACCOUNT ADMINISTRATION

Revisions to the heading of this part are proposed so that the heading more accurately reflects the content of this part upon incorporation of the additional amendments proposed below. It is reasonable to amend a part heading to more accurately indicate the content of that part.

Subpart 1. Account information. The proposed rule replaces the detailed list of information that the board must maintain for each wetland bank site with a more relevant requirement to maintain ownership and credit transaction records for each account. The amendment is necessary because the current requirements overlap with data obtained under other rule provisions. Specifically, LGUs provide detailed information to the board through application and decision notices, and applicants submit additional information during the board’s acquisition of conservation easements and bank sites. It is reasonable to propose amendments that eliminate redundant requirements and streamline the rule by utilizing information already captured through other processes.

Item B is stricken and replaced with the requirement that the board make account contact information and credit balances publicly available upon the account owner’s request. The amendment is necessary because item B consists of remnant language that originated prior to the transition to the internet as the primary mechanism for sharing and accessing information, and it requires direct inquiries and responses for the sharing of relevant information. Further, the list of data in existing item B is overly specific and outdated. The board now uses its website to share account contact information and credit balances, and the only information relevant to potential purchases of credits are the bank’s contact information and credit balances. The addition of “if requested by the account owner” is necessary because not all wetland bank accounts have credits available for sale to the prospective purchasers (e.g. single user accounts) and, thus, do not wish to have their contact information made available to the public.

It is reasonable to remove outdated and overly prescriptive requirements from the rule and align the rule with current agency practices and communication technology.

Subpart 2. Administrative fees. The proposed rule incorporates amendments to Minn. Stat. § 103G.2242, subdivision 14, which expanded and modified the board’s authority for the collection of fees associated with wetland banking, and the establishment of Minn. Stat. § 103B.103, which requires the board to seek a financial contribution for each wetland banking easement it acquires. The fees listed in items A through C, also derived directly from statute, are stricken as they are incomplete and it is unnecessary to restate a statutory provision within rule that the board has no authority to modify. All of the relevant statutory fees are currently being implemented in accordance with a fee policy adopted by the board. It is reasonable to eliminate unnecessary language from the rule, reduce confusion related to how fees are assessed, and accommodate any future statutory changes to fee authorities without making the corresponding rule provisions obsolete.

Subpart 3. Audit. The term "part" is not correct and is stricken and replaced with "chapter." Compliance requirements are contained in this chapter, not part. It is reasonable to amend the rule to correct inaccurate terminology.

8420.0800 REPLACEMENT WETLAND CONSTRUCTION CERTIFICATION

The term "certification" is stricken and replaced with "verification" in the heading of this part to more accurately indicate this part's contents. It is reasonable to revise a part heading to more accurately indicate the content of that part.

Subpart 1. Purpose. The subpart heading is revised to "General Requirement" to more accurately indicate the content of the subpart. It is reasonable to revise a subpart heading to more accurately indicate the content of that subpart.

The concluding sentence of this subpart is relocated to the beginning of this subpart to improve the clarity of this subpart. It is reasonable to propose an amendment that improves the clarity of the rule without altering its intent.

The language requiring the LGU to "certify" the initial construction of replacement wetlands prior to initiation of monitoring has been stricken and replaced with the requirement for the LGU to "determine" that the construction specifications of replacement wetlands have been met prior to the initiation of monitoring. This amendment is necessary because the term "certification" is misleading, inaccurate, and inconsistent with the intent of this subpart. A requirement for "certification" of construction by an individual licensed to practice engineering in Minnesota exists in subpart 3 of this part. In contrast, the intent of this subpart is for the LGU to "determine" that construction specifications have been met prior to the initiation of monitoring, which involves verifying the construction certification provided by the licensed engineer. Such a determination is not a formal "certification" and applying that term both to the responsibilities of the LGU under this subpart and the licensed engineer under subpart 3 is confusing and misleading. Corresponding amendments to this subpart and elsewhere in the rule provide for the consistent usage of the correct terminology for the different actions taken by the LGU and the licensed engineer. It is reasonable to propose amendments that correct confusing and misleading language that could otherwise be construed in a manner that alters the intent of the rule.

Subpart 2. Construction as-built documentation. The proposed addition of "or banking" clarifies that as-built information to document compliance with replacement plans also applies to wetland banks. It is reasonable to propose an amendment that clarifies the scope of activities to which a requirement applies.

The addition of the term "construction specifications" to this subpart and the revisions to Item F are proposed to improve the accuracy and clarity of terminology used in this subpart. The term "water control structures," as opposed to the current "impoundment features," more accurately describes the types of structures used in the restoration and creation of replacement wetlands. Engineers developing construction plans are more accurately referred to as "individuals licensed to practice engineering in Minnesota" than "licensed professional engineer." It is reasonable to propose amendments that improve the accuracy and clarity of the rule without altering its intent.

Subpart 3. Construction inspection and certification. The term "certification" is stricken and replaced with "verification" in the heading of this subpart and in the text to more accurately indicate its content and provide for the accurate and consistent use of terminology as described under subpart 1 above. It is reasonable to revise a subpart heading to more accurately indicate the content of that subpart.

The proposed addition of “or banking” clarifies that construction inspection and verification requirements apply to wetland banks. It is necessary and reasonable to propose an amendment that clarifies the scope of activities to which requirements apply.

The object of the LGU’s authority to inspect the replacement wetland at any time is changed from the replacement wetland’s “long-term viability” to its “condition.” The amendment is necessary because term “long-term viability” is vague and unrelated to other rule requirements, while “condition” is more accurate and inclusive. The “condition” is then compared with the specifications of the approved plan to determine compliance. It is reasonable to propose amendments to improve the accuracy and clarity of terminology.

The remaining amendments to this subpart improve the clarity of its terminology and conform it to the proposed amendments to subpart 1. It is reasonable to propose amendments that improve the clarity of the rule and ensure consistency across its provisions without altering its intent.

8420.0810 REPLACEMENT WETLAND MONITORING

Subpart 1. Purpose. The phrase “and associated performance standards” is added to improve the clarity of the rule, as performance standards are specific, measurable criteria for determining when the goals of the replacement wetland are met and are a requirement for banking plan approval under the new part 8420.0705, subpart 3a. It is reasonable to propose an amendment that improves the clarity of the rule without altering its intent.

Subpart 2. Responsibilities. A sentence is added to item B to make explicit the LGU's role in determining compliance with monitoring requirements, providing necessary context for the provision that follows which addresses the circumstance in which a different LGU may assume that responsibility. It is reasonable to include this language to ensure that item B is complete and self-contained, thereby providing greater clarity and certainty to the regulated community and members of the public.

Subpart 2a. Monitoring plan. New subpart 2a is added to this part. The amendment is necessary because, while the current rule references monitoring and monitoring report requirements in subparts 3 and 4 of this part, part 8420.0735, and elsewhere, it does not clearly establish the requirement for a monitoring plan or specify its required contents. The new subpart limits the monitoring plan requirement to restoration and creation actions because credit actions such as preservation do not involve changes that require monitoring. A monitoring plan is necessary because the generation of replacement credit from restoration and creation depends on the achievement of performance standards, which can only be documented through monitoring. The required contents of the monitoring plan — including a description of proposed monitoring methods, the frequency and timing of monitoring during the growing season, and the content and submittal dates of monitoring reports — must be specified on a site-specific basis because the scope, timing, and type of monitoring varies depending on the nature and scope of the project and its associated performance standards. It is reasonable to add rule provisions that establish a clear monitoring plan requirement and specify its contents, thereby facilitating implementation of other parts of the rule and providing greater clarity and certainty to the regulated community and members of the public.

Subpart 3. Duration of Monitoring. Subpart 3 is retitled and its contents reorganized and revised. The heading is amended to more accurately reflect the contents of the subpart. Current items B and C are now identified as items C and D, and new item B is added.

Item A is amended to improve clarity regarding the timing and duration of monitoring. The existing language allowing monitoring to begin at the discretion of the LGU is deleted, as this discretion is arbitrary. The revised language clarifies that monitoring is required only for restoration and creation activities, as monitoring is typically not necessary for preservation, and establishes that the monitoring period must be sufficient to determine whether performance standards have been met.

New Item B is added to address monitoring period extensions for wetland banking projects. The current rule does not recognize or provide a process for such extensions, yet some wetland banks require additional time to fully achieve performance standards. Banking differs from project-specific replacement in this regard because wetland impacts have not yet occurred and credits are allocated only as performance standards are met, whereas for project-specific replacement the impacts have typically already occurred concurrent with replacement wetland construction. Accordingly, item C, which places a limit on monitoring extensions and allows the LGU to specify corrective actions, is revised to apply only to project-specific replacement and not wetland banking.

These amendments are necessary to improve clarity regarding monitoring timing and duration, eliminate arbitrary discretion, address a gap in the current rule regarding monitoring extensions for wetland banking, and ensure that monitoring requirements are appropriately tailored to the differences between project-specific replacement and wetland banking. It is reasonable to clarify and reorganize these provisions to provide a more complete and accurate framework for monitoring requirements, thereby providing greater clarity and certainty to the regulated community and members of the public.

Subpart 4. Monitoring reports. Subpart 4 is amended by revising item A and deleting item B. The amendments are necessary to clarify monitoring report requirements and to link those requirements to approved performance standards and monitoring plans, replacing the current rule's uniform and prescriptive approach with one that allows flexibility in the timing and content of reports commensurate with the specific nature and scope of each project. This flexibility is necessary because wetland credit allocations are based on the achievement of performance standards, and monitoring reports must be able to effectively document and justify credit deposits on a site-specific basis.

Item A is revised to clarify the purpose of monitoring reports as documenting progress toward and achievement of performance standards, to require inclusion of preconstruction data in the first annual monitoring report, and to link the timing of report submittal to the approved monitoring plan rather than an arbitrary date determined by the LGU. Reports must now be submitted prior to any credit deposit request. The provision allowing biannual reporting after the third full growing season is replaced with a more flexible provision allowing the LGU to determine that an alternative schedule is sufficient for long-term monitoring of the site.

Item B is deleted because the detailed list of required report contents it prescribed is replaced by the site-specific monitoring plan contained in the approved banking plan. The purpose language previously in item B is addressed by other amendments to this part.

It is reasonable to replace prescriptive and uniform monitoring report requirements with a framework that links reporting requirements to approved performance standards and monitoring plans, thereby providing greater site-specific applicability and flexibility, clarity, and certainty to wetland banking plan applicants, the regulated community, and members of the public.

8420.0820 LOCAL GOVERNMENT UNIT MONITORING RESPONSIBILITIES.

Subpart 1. Monitoring oversight. In item B, the term "order" is replaced with "require" in subitems 1 and 2. The existing provisions in subitems 3 and 4 are deleted and consolidated into a new subitem 3, which directs the local government unit to pursue enforcement actions according to part 8420.0900, with the remaining subitems renumbered accordingly. The phrase "replace the lost wetland function and value" in renumbered subitem 5 is replaced with "satisfy the replacement requirements of this chapter."

The replacement of "order" with "require" is necessary because "order" implies the issuance of a formal legal order, which overstates the local government unit's authority in this context; "require" more accurately describes that authority. The deletion of existing subitems 3 and 4 is necessary because both actions are encompassed by the new subitem 3 directing the local government unit to pursue enforcement actions under part 8420.0900, making separate enumeration redundant. The replacement of "replace the lost wetland function and value" is necessary because that phrase is vague; "satisfy the replacement requirements of this chapter" is more precise and identifies the established mechanism by which lost wetland function and value is addressed under the rule.

In item C, the word "annual" is deleted in two places. The amendment is necessary because monitoring reports associated with project-specific replacement plans are not necessarily submitted on an annual basis under part 8420.0810, subpart 4, making the term inaccurate.

It is reasonable to propose amendments that improve the accuracy and clarity of the rule without altering its substantive intent.

Subpart 2. Certification of successful replacement and completion of monitoring. This Subpart is retitled and revised to clarify the roles and responsibilities of the LGU and TEP in determining replacement success, and to eliminate references to "certification" in this context. The amendment is necessary because the current language leaves the determination of replacement success to be initiated by the applicant through a request for a field review, whereas it is the LGU and TEP who are responsible for making that determination. The revisions also eliminate references to "certification," which is potentially confusing as certification is a distinct process assigned to the engineer under 8420.0800, Subpart 3. It is reasonable to clarify roles and responsibilities in determining replacement success and to eliminate terminology that could be confused with a separate process, thereby providing greater clarity and certainty to banking plan applicants, the regulated community, and members of the public.

8420.0830 COMPREHENSIVE WETLAND PROTECTION AND MANAGEMENT PLANS

Subpart 4. Flexibility options under local plan. Item D is stricken because the exemptions to which it applies were stricken by statutory amendments enacted in 2024. It is reasonable to propose amendments that conform the rule to statutes enacted by the Minnesota Legislature.

8420.0835 HIGH PRIORITY REGIONS AND AREAS

Item D is deleted and Item E is re-lettered as Item D because the reference to part 8420.0840 is no longer relevant due to the deletion of that part, as described below. It is reasonable to conform the rule to amendments to other parts of this rule.

8420.0840 WETLAND PRESERVATION AREAS

The entirety of this part is stricken. The amendment is necessary because statutory amendments enacted in 2011 eliminated the reimbursement mechanism for the establishment of wetland preservation areas under Minn. Stat. § 103F.612, removing the funding mechanism that made the procedures in this part operable and rendering them irrelevant in practice. The procedures for establishing wetland preservation areas remain codified in Minn. Stat. §§ 103G.612 through 103G.616 and need not be restated in rule. It is reasonable to eliminate rule language that implements a program that, as a practical matter, will not be used following the Legislature's elimination of the reimbursement mechanism that provided the financial incentive for participation.

8420.0900 ENFORCEMENT PROCEDURES

The entire part 8420.0900 has been reorganized, and language amended, to clarify enforcement roles and procedures as the previous language was organized poorly and difficult to follow. Amendments were also proposed to conform the rule to statutory amendments that have occurred since the current rule was adopted. These proposed amendments to the rule contain few substantive changes beyond those related to statute and, other than modernizing the structure of the rule, clarifying roles and responsibilities, and improving the clarity of its provisions, do not materially affect the current enforcement process.

Subpart 1. Enforcement authorities. This subpart is amended to revise its title and restructure its content. The first sentence is revised for grammatical accuracy. The second sentence, establishing the requirement that an enforcement order be served in person or by certified mail, is relocated from subpart 3, item B of the current rule to this subpart, where it more appropriately applies to all enforcement orders rather than only those addressed in the context from which it was relocated. Two sentences are added to establish upfront clarity regarding the respective roles of the LGU and the SWCD in the enforcement process. The amendment is necessary to improve the organization and clarity of enforcement roles and responsibilities and to ensure that procedural requirements are located where they are most applicable. It is reasonable to reorganize and clarify the rule to provide a clearer framework for enforcement at the outset of this part, thereby providing greater clarity and certainty to the agencies involved with WCA enforcement, the regulated community, and members of the public.

Subpart 2. Cease and desist orders. This subpart is amended by simplifying item A and deleting item B in its entirety. Item A is amended to replace the existing detailed description of circumstances under which a cease-and-desist order may be issued with a single standard requiring probable cause that an activity is not in compliance with this chapter, and the word "only" is added to reinforce that this is the operative threshold. Item B, which described circumstances under which a cease-and-desist order must not be issued, is deleted as unnecessary as item A now specifies that a cease-and-desist order may be issued only when the enforcement authority has probable cause to believe that an activity is not in compliance with this chapter. The amendment is necessary because the existing language attempts to enumerate all circumstances under which a cease-and-desist order may and may not be issued, creating language that is overly complex, incomplete, and difficult to apply. The simplified standard in item A is sufficient to govern the issuance of cease-and-desist orders, and the deletion of item B eliminates the need to describe all scenarios in which one cannot be issued. It is reasonable to simplify enforcement standards to make them clearer and more broadly applicable, without altering the underlying intent of the provision, thereby providing greater clarity and certainty to the regulated community and members of the public.

Former item C is renumbered as item B, and its first sentence is deleted and its second sentence revised for clarity. The deleted sentence, which required the enforcement authority to advise the landowner regarding the application for a replacement plan, exemption, or no-loss, is addressed in subpart 4, item B of the revised rule, where it is applied as required content of the order rather than a separate advisement requirement. The remaining sentence is revised to improve clarity regarding the requirement to submit copies of the order to the SWCD the LGU, and the commissioner. It is reasonable to relocate procedural requirements to the part of the rule where they are most applicable and to consolidate related requirements, thereby providing greater clarity and certainty to the regulated community and members of the public.

New Item C is added to subpart 2. The first sentence clarifies the role and responsibility of the LGU upon receipt of a cease-and-desist order; specifically, that the LGU must promptly determine whether the order should remain in place and whether a restoration or replacement order is needed under subpart 3. The second sentence requires the LGU to notify the lead official of the applicable Tribal governing body when a cease-and-desist order is issued for an activity occurring within the exterior reservation boundary of a federally recognized Indian Tribe. These additions are necessary to provide clear direction to LGUs regarding their responsibilities upon receipt of a cease-and-desist order and to ensure that Tribal governments are informed of enforcement actions within their reservation boundaries. It is reasonable to add language that clarifies LGU responsibilities and improves coordination with Tribal governments on enforcement actions, thereby providing greater clarity and certainty to agencies involved in WCA enforcement, the regulated community, and members of the public.

Item D is deleted. The amendment is necessary because the deleted language is now addressed in the new subpart 5a, item A, which is a more logical and intuitive location, making it redundant in this location. It is reasonable to remove redundant language from the rule without altering its intent, thereby improving clarity for the regulated community and members of the public.

Former item E is renumbered as item D and revised for clarity. The amendment is necessary to clarify that this item applies to a LGU determination made under item C of this subpart. The notification requirement is also revised to remove the enforcement authority and landowner as recipients of notice from the LGU. Removing the enforcement authority from this notice requirement is necessary because the responsibility and authority to determine eligibility lies with the LGU, the responsibility and authority to develop the restoration plan lies with the SWCD, and the enforcement authority’s responsibilities under the rule begin after both have been completed. Removing the landowner from this notice requirement is necessary because the landowner is notified of the application decision separately and will be notified when the rescission order is served, making prior notification redundant and potentially confusing. The revised notification requirement clarifies that the enforcement authority is responsible for notifying those required to receive a copy of the order under item B when the order has been rescinded, as the authority to rescind the order lies with the enforcement authority. It is reasonable to revise this item to improve its clarity and applicability and to ensure that notification requirements accurately reflect the roles and responsibilities of the entities involved in WCA enforcement, thereby providing greater clarity and certainty to those agencies, the regulated community, and members of the public.

Item F is deleted. The amendment is necessary because the deleted language is now addressed in the new item E of this subpart, making it redundant in this location. It is reasonable to remove redundant language from the rule without altering its intent, thereby improving clarity for the regulated community and members of the public.

Item G is deleted. The amendment is necessary because the deleted language is relocated to the new subpart 5a, item C of the revised rule, where it is more appropriately located within the overall structure of the enforcement provisions. It is reasonable to relocate this language to improve the organization of the rule without altering its intent, thereby providing greater clarity and certainty to the agencies involved in WCA enforcement, the regulated community, and members of the public.

Subpart 3. Restoration and replacement orders.

Item A is amended and its sub-items revised. "Must" is replaced with "may" to reflect current practice, as a restoration or replacement order may not always be necessary. For example, a landowner may voluntarily complete a simple restoration prior to the development of an order. Additional language is added to item A to clarify the trigger for issuance of a restoration or replacement order and to provide consistency with subpart 2, item A. Following the issuance of a cease and desist order, the timeframe for the issuance of a restoration or replacement order, which allows the landowner time to apply for a replacement plan, exemption, or no-loss after the cease and desist order has been issued but before the restoration or replacement order is issued, is changed from three weeks to 30 days to provide a clearer and more reasonable timeframe for the development of a replacement plan, consistent with other commonly used timeframes in the rule. Sub-items 2 and 3 are deleted as the circumstances they describe are now covered in item A of this subpart, as the related activities constitute violations of this chapter. It is reasonable to amend this subpart to reflect current practice, improve clarity and consistency with other provisions of the rule, and consolidate related requirements, thereby providing greater clarity and certainty to the agencies involved in WCA enforcement, the regulated community, and members of the public.

Item B is amended to replace the requirement that the SWCD prepare a restoration plan in consultation with the LGU and the enforcement authority with a requirement to prepare the plan in consultation with the TEP. The amendment is necessary to clarify roles and responsibilities consistent with statute and to ensure that staff with the relevant technical expertise are consulted in developing restoration plans, which are site-specific and often complex. The reference to the enforcement authority is deleted because the development of the restoration plan is purely a technical function, which is the role of the SWCD with assistance from the TEP. It is reasonable to amend the rule to ensure that restoration planning involves those with the most appropriate technical expertise and to clarify the respective roles of the entities involved in the enforcement process, thereby providing greater clarity and certainty to the agencies involved in WCA enforcement, the regulated community, and members of the public.

Sub-items 1 through 4 are added to item B to enumerate the required contents of a restoration plan. The amendment is necessary to improve the clarity and consistency of content requirements of restoration plans developed by SWCD staff. Sub-item 1 requires identification of the specific actions and standards necessary to restore the wetland, providing clear benchmarks for determining restoration success. Sub-item 2 requires identification of restoration methods and approaches, improving the consistency and specificity of restoration plans and providing landowners with clear direction to improve the likelihood that restoration actions will be sustainable. Sub-items 3 and 4 address the deadlines to be included in the restoration plan, clarifying that it is the SWCD's role to determine these dates as part of developing the plan. However, the requirement to consult with the TEP under item B will ensure that the LGU is consulted in the establishment of those deadlines. The 30-day minimum timeframe in sub-item 3 is relocated from subpart 4, Item D of the current rule. Sub-item 4 identifies factors the SWCD may consider when specifying the date for restoration completion, including the complexity of the restoration, seasonal constraints, and the availability of required resources. It is reasonable to enumerate restoration plan contents to improve clarity and consistency in the development of restoration plans, thereby providing greater certainty to SWCD staff, landowners, and the regulated community and members of the public.

A sentence is added to new item C to resolve a potential conflict of interest in the development of some restoration plans. The amendment is necessary to provide a mechanism for addressing potential conflicts of interest, such as a relationship between the SWCD staff person and the landowner, by allowing the SWCD to request that another member of the TEP develop the plan. Development of the plan is limited to other members of the TEP to ensure the plan is prepared by staff with the necessary technical expertise, and to utilize technical staff that are already being consulted under item B. It is reasonable to add language that provides a clear process for addressing conflicts of interest in the development of restoration plans, thereby protecting the integrity of the enforcement process and providing greater certainty to the regulated community and members of the public.

New item D specifies that the determination of whether restoration is possible or prudent must be made by the SWCD in consultation with the TEP. The amendment is necessary for consistency with

Minn. Stat. § 103G.2372, subdivision 1(b), which gives the SWCD the authority to make that determination. The requirement to consult with the TEP is consistent with the technical advisory role of the TEP under Minn. Stat. § 103G.2242, subdivision 2 and elsewhere in statute and rule. It is reasonable to amend the rule to align the assignment of responsibilities with the applicable statute, thereby providing greater clarity and certainty to the agencies involved in WCA enforcement, the regulated community, and members of the public.

Item E is added to this subpart. The first sentence is added to improve clarity by establishing that the replacement order must specify the replacement actions to be completed. The second sentence, allowing the order to provide more than one replacement option and to require a combination of restoration and replacement, is relocated from subpart 5, item A of the current rule. The amendment is necessary to provide clear direction regarding the required contents of a replacement order and to consolidate related provisions in a more appropriate location. It is reasonable to add language that clarifies the required contents of a replacement order and to relocate related provisions to improve the overall organization of the enforcement subpart, thereby providing greater clarity and certainty to the agencies involved in WCA enforcement, the regulated community, and members of the public.

New item F strikes the requirement that the order be served in person or by certified mail. The amendment is necessary because this requirement is now addressed in subpart 1 of this part, making it redundant in this location. It is reasonable to remove redundant language from the rule without altering its intent, thereby improving clarity for the agencies involved in WCA enforcement, the regulated community, and members of the public.

Items G, H, and I are added to this subpart. Item G is relocated from subpart 4, item E of the current rule and revised to improve clarity regarding the obligations of the landowner or responsible party when a complete application is not submitted within the time period specified in the order. Item H is new language added to provide clarity regarding when a restoration or replacement order has been satisfied, as this was not addressed in the current rule. Item I is relocated from subpart 4, item F of the current rule and revised to improve clarity regarding the conditions that may be attached to a certificate of satisfactory restoration or replacement and the actions that must be taken when the landowner has failed to meet the conditions. These amendments are necessary to consolidate related enforcement requirements, address a gap in the current rule regarding completion of restoration or replacement orders, and improve the clarity of the applicable standards. It is reasonable to reorganize, clarify, and supplement these provisions to provide a completer and more accessible framework for the enforcement process, thereby providing greater clarity and certainty to the agencies involved in WCA enforcement, the regulated community, and members of the public.

Subpart 4. Contents of order. This subpart is retitled and its contents reorganized and revised. New items A and B are added, existing items B, C, E, and F are deleted, existing Item D is revised and renumbered as Item C, and a revised item D is retained.

Item A, requiring that each order state that any violation is a misdemeanor, is relocated from subpart 5, item B of this part. New item B, requiring that each cease-and-desist order advise the landowner or responsible party of their ability to submit an application and the potential consequences of denial, is relocated from subpart 2, item C of this part and revised to clarify that this advisement must be included as content of the order itself rather than provided separately by the enforcement authority.

Item C is revised to improve its clarity. The requirement that the restoration order incorporate the soil and water conservation district plan is added for consistency with subpart 3, item B of the current rule (item F of the revised rule), and the list structure of the date requirements is simplified. The last sentence, specifying that the landowner or responsible party must restore the wetland as ordered if approval of a replacement plan, exemption, or no-loss is not obtained, is relocated from subpart 5, item A of this part and revised for accuracy and completeness. Item D is revised by deleting its last sentence, which established a 30-day minimum timeframe for submittal of a complete application, as this requirement is now addressed in subpart 3, item B, sub-item 3 of this part.

Former item B is deleted as it is now addressed in subpart 5a, item E of this part. Former item C is deleted as it is now addressed in subpart 5a, item B of this part. Former item E is deleted because it is unnecessary and because its allowance for the LGU and the enforcement authority to decide whether an application may be submitted or not based purely on their mutual agreement creates the potential for arbitrary decisions. Former item F is deleted as it is now addressed in subpart 3, item I of this part.

These amendments are necessary to consolidate required order contents in a single subpart, improve clarity regarding what each type of order must contain, eliminate provisions that create the potential for arbitrary decisions, and relocate provisions to more appropriate locations within the revised rule structure. It is reasonable to reorganize and clarify the required contents of enforcement orders to provide a more complete and accessible framework for the enforcement process, thereby providing greater clarity and certainty to the agencies involved in WCA enforcement, the regulated community, and members of the public.

Subpart 5. Enforcement authority orders. This subpart is repealed, replaced with new subpart 5a, which is titled “Applications submitted in response to enforcement orders,” and its contents are relocated as follows: Current item A is deleted as its first sentence is now addressed in subpart 3, items D and E of this part, and its second and last sentences are now addressed in subpart 4, item C of this part. Current Item B is deleted as it is relocated to subpart 4, item A of this part. Current item C is deleted as it is relocated to subpart 7, item B of this part.

New subpart 5a, item A consolidates several provisions from the current rule. Its first sentence clarifies that any application submitted in response to an enforcement order must comply with this chapter. Its second sentence is relocated from subpart 2, item D of this part and revised to clarify that it applies to applications submitted in response to any enforcement order by removal of the reference to being “triggered by a cease-and-desist order.” The relocated language strikes “and the standards and application procedures applicable to the type of application” as it is not applicable to decision procedures and is more appropriately addressed in the first sentence of subpart 5a, item A, pertaining to applications. The new subpart’s last sentence addresses notice of the application and decision to the enforcement authority, which was previously addressed in subpart 2, item F of the current rule in the context of applications submitted in response to cease and desist orders only.

New subpart 5a, item B is relocated from subpart 4, item C of the current rule and revised to clarify that it is the role of the enforcement authority to rescind the order and that any required replacement must be completed prior to rescission. New subpart 5a, item C is relocated from subpart 2, item G of the current rule and revised to clarify that it applies to all enforcement orders issued to LGUs, not only cease and desist orders, and to all application types, not just to an exemption or no-loss. New subpart 5a, item D is relocated from subpart 2, Item F of this part and revised to clarify what is to be communicated to the SWCD, with the reference to notifying the enforcement authority and the landowner removed as the decision notification requirement is addressed in new Item A. New subpart 5a, item E is relocated from subpart 4, item B of this part.

These amendments are necessary to consolidate related enforcement provisions in more appropriate locations within the revised rule structure, to clarify the applicability of certain provisions to all enforcement orders rather than only specific order types, and to eliminate redundancy. It is reasonable to reorganize and clarify these provisions to provide a more complete and accessible framework for the enforcement process, thereby providing greater clarity and certainty to the agencies involved in WCA enforcement, the regulated community, and members of the public.

Subpart 7. Misdemeanor. This subpart is amended by renumbering the existing language as item A and adding new item B. Item B is relocated from subpart 5, item C of this part and revised to replace the reference to the TEP with SWCD staff, consistent with Minn. Stat. § 103G.2372, subdivision 1(b), which clarifies that it is the role of the SWCD to determine whether restoration or replacement is required. The amendment is necessary to relocate this provision to a more appropriate location within the revised rule structure and to clarify roles and responsibilities consistent with statute. It is reasonable to relocate and clarify this provision to improve the overall organization of the enforcement subpart and to align the rule with the applicable statute, thereby providing greater clarity and certainty to the agencies involved in WCA enforcement, the regulated community, and members of the public.

Subpart 8. Deed restriction. This is a new subpart. Item A is added to improve transparency regarding the authority to record restoration or replacement orders as deed restrictions on property, consistent with Minn. Stat. § 103G.2372, subdivision 1(b). Item B is added to provide clarity and transparency regarding the circumstances under which a deed restriction recorded under item A must be removed, consistent with Minn. Stat. § 103G.2372, subdivision 1(b) and subdivision 1(d), the latter of which was added to statute in 2017. These amendments are necessary to reflect existing statutory authority in the rule and to provide clear guidance regarding the recording and removal of deed restrictions associated with enforcement orders. It is reasonable to add language that improves transparency and provides clear criteria for the recording and removal of deed restrictions consistent with statute, thereby providing greater clarity and certainty to the agencies involved in WCA enforcement, the regulated community, and members of the public.

8420.0905 APPEALS

Except as described otherwise below, the proposed amendments to this part conform the WCA rule to statutory amendments that have occurred since the current rule was adopted and provide additional minor clarification for multiple provisions.

Subpart 1. Appeal of replacement and restoration orders to the board. The time period for director review of and decision issuance for an appeal of a replacement or restoration order is increased to sixty days, in conformance with Minn. Stat. § 103G.2242, subdivision 9a. It is reasonable to conform the rule to statutes enacted by the Minnesota Legislature.

Subpart 2. Appeal of local government unit staff decisions. Item A is amended to conform the rule to amendments to Minn. Stat. § 103G.2242, subdivision 2a, which eliminated the requirement for an LGU to rule on an appeal of a staff decision, making a local appeals process optional for the LGU. Item D is added to this subpart to clarify that a decision on a local appeal must be noticed consistent with all other LGU decisions. All additional revisions to this subpart, including to the subpart heading, consist of line and copy edits intended to improve the clarity and readability of the subpart. It is reasonable to propose amendments to the rule that improve its clarity and readability without altering its intent.

Subpart 3. Appeal of local government unit decisions to the board. This subpart is amended to clarify that it applies to decisions made on local appeals, to delete the requirement that LGUs establish a local appeals process, to extend the subpart's applicability to decisions made by public road authorities, and to replace "sufficient grounds" with "significant merit" as the standard a petition must meet. Additional minor revisions align the subpart with the statutory amendments addressed in subpart 2 of this part and incorporate nonsubstantive edits that improve the clarity and readability of this subpart.

The clarification that this subpart applies to local appeal decisions is necessary because the existing language did not make this explicit, creating potential ambiguity regarding the scope of the board's appeal jurisdiction. The deletion of the requirement for local appeals is necessary to conform the rule to amendments to Minn. Stat. § 103G.2242, subdivision 2a, which made establishment of a local appeals process optional for LGUs. The addition of decisions made by public road authorities is necessary to conform the rule to Minn. Stat. § 103G.222, subdivision 1(m), which subjects such decisions to the board's appeal jurisdiction. The replacement of "sufficient grounds" with "significant merit" is necessary to conform the rule to amendments to Minn. Stat. § 103G.2242, subdivision 9b(1), which establishes "significant merit" as the applicable standard.

It is reasonable to conform the rule to statutes enacted by the Minnesota Legislature and to improve the clarity and readability of the subpart without altering its intent.

Subpart 4. Board appeal procedures.

The exceptions provided in Item A are converted from narrative to list form to improve clarity and to conform to current rulemaking guidance. It is reasonable to propose changes that modernize the structure of the rule and conform it to current rulemaking guidance without altering the intent of the rule.

The criteria proposed for addition to item A as sub-items (4) and (5) conform the rule to Minn. Stat. § 103G.2242, subdivision 9(b). It is reasonable to conform the rule to statutes enacted by the Minnesota Legislature.

The examples of "fundamental information" in item F are removed because they reflect the types of information available at the time of enactment and could be misinterpreted as being exhaustive, leading to appeals being reviewed without consideration of additional types of fundamental information that have since become available. It is reasonable to remove language that could be interpreted in a manner inconsistent with the intent of the rule.

The ability to remand an appealed matter when a verbatim transcript does not exist is removed from item F. The amendment is necessary because verbatim transcripts rarely exist and no rule requires that one be developed, yet their absence under the current language can trigger protracted procedural disputes unrelated to the merits of the appeal. The regulated party's right to appeal is unaffected, as item F already allows remand to receive additional evidence when the record is otherwise incomplete or deficient. It is reasonable to remove a procedural requirement that is triggered by the absence of a document that is neither required nor regularly produced.

The phrase “of a local appeal” is added to the sentence in item F that describes the conditions under which the board may remand a matter or receive additional evidence. The amendment is necessary to clarify what type of proceeding is being referenced in the applicable condition. It is reasonable to propose an amendment to improve the clarity of the rule without altering its intent.

Subpart 5. Appeal of board decisions. The phrase “taken to” is stricken and replaced with “filed with” to improve the accuracy of terminology used in this subpart. It is reasonable to propose revisions to improve the specificity and accuracy of the terminology used in the rule, without altering the rule’s intent.

ACTIVITIES UNDER DEPARTMENT OF NATURAL RESOURCES AUTHORITY

8420.0930 MINING.

Subpart 1, item B is added to require the commissioner to provide notice of an application for wetland replacement under a permit to mine to the counties in which the impact and replacement wetland are proposed. Subpart 4, item B is amended to allow “surplus” wetland credits generated under a project-specific replacement plan to be allocated by the commissioner to offset future mining-related wetland impacts under permits to mine held by the permittee or related entities. These amendments are necessary to conform the rule to amendments to Minn. Stat. § 103G.222, subdivision 1(a).

Subpart 1, item C is added because it is necessary to consolidate existing requirements contained in subpart 2, item B and subpart 3 item A in a more appropriate and intuitive location.

The references to replacement standards in subpart 2, item B and subpart 3, item A are deleted because they are redundant with the standards now consolidated in subpart 1, Item C of the revised rule. The term "local government unit" is replaced with "commissioner" throughout this part because the commissioner generally does not act as an LGU as defined in this chapter when regulating wetland impacts under the permit-to-mine program.

It is reasonable to amend this part to conform the rule to statute, consolidate redundant provisions, and ensure that responsibilities are accurately assigned, thereby providing greater clarity and certainty to the regulated community and members of the public.

8420.0935 STANDARDS AND CRITERIA FOR IDENTIFICATION, PROTECTION AND MANAGEMENT OF CALCAREOUS FENS.

The heading of this part is amended to more accurately reflect its contents. It is reasonable to amend a subpart heading to accurately reflect the content of the subpart.

Subpart 1. Purpose. The deleted text prohibiting certain impacts to calcareous fens and the applicability of exemptions and sequencing to actions affecting calcareous fens are stricken, with a substantial portion of the stricken text being relocated, in substance, to subpart 4 of this part. This amendment is necessary because prescriptive text is not appropriate for inclusion in a subpart that simply states the purpose of the part, some of the deleted content is redundant with provisions contained in subpart 4, and the relocation of the remainder to subpart 4 makes its applicability clearer. It is reasonable to propose amendments that eliminate redundant rule language and relocate rule language to the most applicable part or subpart of the rule.

Subpart 2. Identifying calcareous fens. The definition for calcareous fens is stricken from this subpart and relocated to Minn. R., part 8420.0111, subpart 13a, as it is appropriate for definitions to be located at part 8420.0111, which contains the definitions for this chapter. It is reasonable to propose an amendment to relocate rule language to the appropriate part of this Chapter.

Subpart 4. Management plans. The rule proposes to relocate to this subpart two provisions from subpart 1, to clarify its applicability, as described and justified, above. The proposed language addressing water appropriations is added to conform the rule to amendments to Minn. Stat. § 103G.223 (b), which authorize the commissioner to allow water appropriations that result in temporary reductions in groundwater resources on a seasonal basis under an approved calcareous fen management plan. It is reasonable to conform the rule to statutes enacted by the Minnesota Legislature.

The phrase “Impacts and” is added to the title of this subpart to more accurately indicate its contents. It is reasonable to amend the title of a subpart to improve its accuracy.

Subpart 5. Restoration. The term “Upgrade” is changed to “improve” to more clearly and accurately describe the goal of a typical management plan for a previously damaged calcareous fen. “Upgrade” can imply replacing something with a newer or better version. The term “improve” means making something better in general, without necessarily replacing it. It is reasonable to improve the accuracy of terminology used in the rule without altering its intent.

The sentence added at the conclusion of this subpart clarifies the existence and extent of DNR’s existing statutory enforcement authority for unauthorized impacts to calcareous fens. It is reasonable to conform the rule to statutes enacted by the Minnesota Legislature.

Subpart 6. Appeals. The language proposed in the first sentence of item B establishes a definitive timeline for the appeal of a DNR calcareous fen designation, replacing the existing language allowing appeal "at any time" with a requirement that a hearing be requested within 30 days after the commissioner publishes the designation in the State Register. The publication of the designation in the State Register serves as the notification mechanism and simultaneously triggers the 30-day appeal period. This amendment is necessary because the existing rule language does not establish a timeline for appeal or a mechanism for public notification of a designation, both of which are required for appeals and public notification under other parts of the rule. It is reasonable to establish a notification and appeal timeline for calcareous fen designations that is consistent with those established for other determinations under the rule, thereby providing greater clarity and certainty to landowners regarding their rights and the procedures available to them.

Regulatory Analysis

Minn. Stat. § 14.131 (a) requires the agency to provide the following information to the extent it may be ascertained through reasonable effort. The paragraphs below state the statutory requirements followed by the information the agency is required to provide. Some responses will provide specific detail for a specific amendment being proposed. However, for most of the questions, the Board's response can be general and will apply across all of the components of this rulemaking, regardless of the specific amendment being proposed.

Classes Affected

A description of the classes of persons who probably will be affected by the proposed rule, including classes that will bear the costs of the proposed rule and classes that will benefit from the proposed rule.

The classes of persons who will probably be affected by the proposed rules include landowners of property containing wetlands (the regulated community), local governments and state agencies who have responsibility for implementation of the rule, and members of the general public. The proposed rules are amendments to an existing, comprehensive set of rules for administration and implementation of the WCA that are expected to make implementation of the existing rule more efficient and effective and are therefore not expected to increase costs for any of those classes. Furthermore, and without diminishing the board’s claim of no increased costs for affected classes, the proposed amendments primarily reflect legislative changes that are already in effect regardless of the rules, and any unanticipated increase in costs would predominantly stem from those changes, not the rules themselves. The proposed rules that are not a result of legislative changes do not expand jurisdiction, impose new regulatory requirements, or modify existing ones in a manner that makes compliance with the rule more costly.

The regulated community is likely to benefit from the proposed rules because they align the Board's rules with statutory provisions, define previously undefined terms, provide increased clarity and certainty, increase the efficiency of regulatory processes, and make it easier for the regulated community to ensure they comply with Minn. Stat. § 103G and other relevant statutory provisions. LGUs and state agencies with responsibility for administration and implementation of the rule are likely to benefit from the proposed rules by being able to more efficiently and effectively perform their duties. The general public is likely to benefit from the proposed rules because they will experience the environmental benefits of the regulated community's improved compliance with the rules and the LGU and state agency's more effective and efficient administration and implementation of them.

Department/Agency Costs

The probable costs to the agency and to any other agency of the implementation and enforcement of the proposed rule and any anticipated effect on state revenues.

State agencies affected by the rule include the Board; the DNR for matters of enforcement, permits to mine, and when applicable, as an LGU; the Minnesota Department of Transportation (MNDOT) as the largest LGU in the state; and other state agencies that act as LGUs. Local governments that act as LGUs and SWCDs are also affected.

DNR is the state agency affected to the greatest by the proposed rules due to their responsibility for enforcement of the rules. The enforcement provisions were amended in consultation with DNR to clarify roles and responsibilities in the enforcement process. This improved clarity is expected to result in more effective and efficient enforcement of the rules, and thus, no increased costs for DNR are anticipated.

Neither the Board, local governments that act as LGUs, nor SWCDs are expected to incur any additional costs as a result of implementation or enforcement of the proposed rules. Dedicated appropriations exist to fund the implementation and enforcement of the rule, and the proposed amendments are expected to result in more effective and efficient implementation of the rule and will not require increased appropriations.

The effect on state revenues is expected to be unchanged as the only sources of revenue under the rule are fees for administering appeals and fees associated with wetland bank establishment and transactions. Neither of those revenue sources are expected to change as a result of the proposed rules.

Less Costly or Intrusive Methods

A determination of whether there are less costly methods or less intrusive methods for achieving the purpose of the proposed rule.

Because the proposed rules will not increase costs for any entity, there are not less costly methods to achieve the purposes of the proposed rules. With respect to intrusiveness, the board has limited options for proposing rules that implement statutory amendments enacted by the Minnesota Legislature; however, such proposed rules are designed to be as minimally intrusive as possible while still effectuating the Legislature's intent. Further, the rule that is proposed to satisfy a legislative directive is an explicitly mandated rule; therefore, the Board must accept that the Legislature has already considered this question and has determined that there is no method less invasive than rulemaking to achieve the Legislature's intent.

The proposed rules that are not related to statutory conformance or legislative directives are designed to be as minimally intrusive as possible while still fulfilling the needs enumerated in Section 1(B) of this document. These amendments are not newly established rules, nor do they impose new requirements or expand the agency's jurisdiction. Rather, they are amendments to existing rules that intend to make those rules more efficient, more effective, improve their outcome, and correct deficiencies as described above. Accordingly, they will make compliance by the regulated community easier and more efficient, and do not appear to have the capacity to be intrusive.

For the foregoing reasons, there are not less costly or less intrusive methods for achieving the purposes of the proposed rules.

Alternative Methods

A description of any alternative methods for achieving the purpose of the proposed rule that were seriously considered by the Agency and the reasons why they were rejected in favor of the proposed rule.

The alternative of not conducting this rulemaking was considered. However, this would not achieve the goal of the proposed rules and would result in a rule that is in substantial conflict with multiple statutes. The amendments that are not related to statutory conformance or legislative directives are not newly established rules nor do they impose new requirements or expand the agency's jurisdiction. Rather, they are amendments to existing rules and intended to make those rules more efficient, more effective, improve their outcome, and correct deficiencies as described above. The proposed changes could not be addressed through agency policy or development of guidance. The only practical approach for achieving those goals for existing rules is to amend them; that is, through rulemaking. Therefore, not amending the existing rules was rejected by the Board in favor of the proposed rule amendments.

Moreover, the Board's alternatives were limited, particularly for changes to conform the rule to statutes enacted by the Minnesota Legislature and/or to implement their explicit directive. Concerning the legislative directive to develop bank application review timelines, because the related amendment is an explicitly mandated rulemaking, the Board must accept that the Legislature has already considered this question and has determined that there is no alternative method to achieve the same purpose.

For these reasons, the Board has determined that there are no alternative methods for achieving the purpose of the proposed rule.

Costs to Comply

The probable costs of complying with the proposed rule, including the portion of the total costs that will be borne by identifiable categories of affected parties, such as separate classes of governmental units, businesses, or individuals.

The proposed rules are not expected to increase compliance costs for any category of affected parties, including those referenced above.

Cost of Non-Adoption

The probable costs or consequences of not adopting the proposed rule, including those costs or consequences borne by identifiable categories of affected parties, such as separate classes of government units, businesses, or individuals.

The alternative of not conducting this rulemaking was considered. However, this would not achieve the purpose(s) of the proposed rules. The purpose of the proposed rules that conform the rule to state statute is to make the rule more consistent with the statute and to enable implementation of the statute as the Minnesota Legislature intended. Similarly, the purpose of the proposed amendment resulting from an explicit legislative directive is to implement that legislative directive. Failure to adopt either of these classes of proposed rules would effectively subvert the intent of the Legislature. In the case of the latter, explicitly. In the case of the former, indirectly, by leaving in place conflicts, gaps, and/or inconsistencies between the statute and rule, hindering applicants' ability to comply with the statute and the LGUs ability to implement the rule consistent with the statute.

For example, in 2024 the Legislature amended Minn. Stat. § 103G.2242, subdivision 2a(c) to direct the Board to establish, by rule, timelines for project review and comment for wetland banking projects. A primary purpose of this directive is to minimize inconsistencies and conflicts with the banking review and approval process under section 404 of the CWA. These inconsistencies and conflicts result in increased costs for applicants and inefficient implementation by LGUs. The proposed rules address this problem by improving consistency with the section 404 review process and by providing realistic review timeframes that are more appropriate for the nature and complexity of banking projects. The consequence of not adopting the proposed rules would be a continuation of the high costs and inefficiencies of the current bank review and approval process.

The probable consequence of not adopting the proposed amendments that increase the efficiency, effectiveness, and outcomes of the rule, as well as those that correct the multiple deficiencies that have been described, is that the relevant rule provisions will continue to be unclear, inconsistent, and inefficient. Accordingly, they would remain difficult for applicants to interpret and comply with, and for LGUs to interpret and implement.

Differences from Federal Regulations

An assessment of any differences between the proposed rule and existing federal regulations and a specific analysis of the need for and reasonableness of each difference.

Minn. Stat. § 14.131 requires that the Board consider the proposed amendments in relation to any corresponding federal requirements "to the extent that the agency can get this information through reasonable effort."

Some portions of Minn. R., part 8420, generally correspond with 40 CFR part 230 and 33 CFR parts 320-330, the implementing regulations for the CWA Section 404 permit program, simply by regulation of the same resource and/or similar activities through different programs. However, the portions of the rule that are affected by the proposed amendments either decrease differences between the rule and existing federal regulations or result in no change in differences at all. Rather, when the proposed rules correspond with federal regulations, they generally have the effect of increasing consistency, or decreasing differences, with the corresponding federal regulations.

Cumulative Effect

An assessment of the cumulative effect of the rule with other federal and state regulations related to the specific purpose of the rule.

Minn. Stat. § 14.131 defines “cumulative effect” as “the impact that results from incremental impact of the proposed rule in addition to the other rules, regardless of what state or federal agency has adopted the other rules. Cumulative effects can result from individually minor but collectively significant rules adopted over a period of time.”

There are no state administrative rules related to the specific purposes of the rules other than those adopted and administered by the board. Therefore, there is no cumulative effect to be assessed.

Impacts to wetlands regulated under Minn. R., part 8420 may also be regulated by the USACE under Section 404 of the CWA and its implementing regulations. However, the proposed rules are specific to the implementation of statutes enacted by the Minnesota Legislature and to implementation of the board’s existing regulatory authority. They do not increase the board’s jurisdiction, the scope of activities regulated, or the requirements for compliance. That is, the burden on the regulated community across the two regulatory programs and their respective rules remains unchanged. Thus, while the board and the USACE’s regulatory programs do overlap, there is no increased incremental impact of the proposed rules in addition to existing federal rules. Therefore, no cumulative effect exists to be assessed.

Notice plan

Minn. Stat. §§ 14.131 and 14.23 require that an agency include in its SONAR a description of its efforts to provide notice to persons or classes of persons who may be affected by the proposed rules, or an explanation of why those efforts were not made. Minn. Stat. § 14.131 also requires that the SONAR describe how the board provided additional notification of the rulemaking to potentially affected parties, if applicable.

The board intends to publish a Notice of Hearing (Notice). This section describes how the board will provide the required Notices and additional notification. All documents related to this rulemaking (recorded meetings, presentations, technical papers, comments received, Notice, etc.) will be published on the board’s dedicated rulemaking webpage at: https://bwsr.state.mn.us/wca-rulemaking.

The board maintains a list of all persons who have registered with the agency for the purpose of receiving notice of rule proceedings regarding WCA rulemaking, as required under Minn. Stat. § 14.14, subdivision 1a. The board’s list is not limited to persons who independently register through a third-party platform. It includes every person who has requested to receive any communication regarding WCA rulemaking, including routine updates. Notification by United States mail is also available on request, although the board currently has no persons on the list requesting notice in that manner.

Except as indicated otherwise below, the board will use GovDelivery, a digital communications platform, to provide notification. The board will also use GovDelivery to provide news releases, newsletters, agency announcements and targeted bulletins related to this rulemaking. GovDelivery provides high-quality metrics and data about how these communications perform, allowing the board to document and analyze reach, engagement and the overall effectiveness of notification.

Required Notice

Request for Comments

On October 9, 2015, the Board published a notice requesting comments on planned rule amendments to Minnesota Rules Chapter 8420. Rulemaking was then temporarily deferred, with a supplemental notice being published on January 18, 2022, to resume the rulemaking process. An additional notice requesting comments was published on July 8, 2024, to address changes to the scope of rulemaking resulting from the 2024 WCA statute changes. All requests for comments and all comments received were posted on the homepage of the board's dedicated rulemaking page. In addition, a press release was distributed for the 2022 Request for Comments via electronic mail to interested individuals, organizations, and the media.

Other Required Notice:

1. Minn. Stat. § 14.14, subdivision 1a. On the day the proposed amendments are published in the *State Register,* the board will send an electronic notice with a hyperlink to the dedicated rulemaking webpage where electronic copies of the Notice, proposed rule amendments, SONAR, and other rulemaking documents can be viewed. The electronic notice will be sent to all parties who have requested the board to send updates on and/or notices of the WCA rulemaking. Any parties who request to receive non-electronic notice will receive copies of the Notice and the proposed rule amendments via U.S. mail. Both the electronic and U.S. mail notice will be sent at least 33 days before the end of the public comment period.

2. Minn. Stat. § 14.116. The board will send a cover letter by electronic or U.S. mail to the chairs and ranking minority party members of the legislative policy and budget committees with jurisdiction over the subject matter of the proposed amendments, and to the Legislative Coordinating Commission, as required by Minn. Stat. § 14.116. The letter will include a link to electronic copies of the Notice, proposed rule amendments, and SONAR. This Notice will be sent at least 33 days before the end of the comment period.

3. Minn. Stat. § 14.131. The board will send a copy of the by U.S. mail to the Legislative Reference Library in accordance with Minn. Stat. § 14.131 when the Notice required under Minn. Stat. § 14.14, subdivision 1a is sent. This Notice will be sent at least 33 days before the end of the comment period.

4. Minn. Stat. § 14.111 requires an agency to provide a copy of the proposed rule changes to the Commissioner of Agriculture no later than thirty days before publication of the proposed rule in the State Register if the rule affects farming operations. The board has determined that the rule itself will not have a significant impact on farming operations as no regulatory controls were directed at or triggered by farming operations and the rules were not specifically designed to affect farming operations. However, because the proposed rule implements recent statutory amendments that may significantly affect farming operations, and because the Commissioner of Agriculture has participated in the review of the proposed rule amendments as a member of the board's Wetland Conservation Committee and in the approval of the draft rule as a member of the board, the board will send a copy of the proposed to the commissioner no later than thirty days before publication of

the proposed rule in the State Register. Additionally, following publication of the Notice, the board will hold a hearing in an agricultural area of the state.

Additional Notice

Minn. Stat. § 14.14 requires that, in addition to its required notices:

> *"each agency shall make reasonable efforts to notify persons or classes of persons who may be significantly affected by the rule being proposed by giving notice of its intention in newsletters, newspapers, or other publications, or through other means of communication."*

The board considered these statutory requirements governing additional notification and, as detailed in this section, intends to fully comply with them. In addition, as described in Section 3, Public Participation and Stakeholder Involvement, the board has made greater than reasonable efforts to notify and involve the public and stakeholders in the rule development process, including conducting various meetings and listening sessions, and publishing three formal and two informal Requests for Comments.

The board intends to request that the Office of Administrative Hearings review and approve the Additional Notice Plan, pursuant to Minn. R. 1400.2060. The board's plan to notify additional parties includes the following:

1. Publish its Notice of Intent to Adopt Rules and all related documents (proposed rules, SONAR, recorded meetings, presentations, technical papers, comments received, etc.) on the board's dedicated rulemaking webpage at: https://bwsr.state.mn.us/wca-rulemaking.
2. Provide an extended comment period. The board will provide at least a 60-day comment period on the proposed rule amendments. Extending the comment period beyond the 30-day minimum provides additional opportunity for potentially interested parties to learn about the proposed rule amendments and submit comments.
3. Provide notice to Tribal authorities. The board will send specific electronic notice to the designated Tribal contact person for each of the 11 federally recognized Tribes in Minnesota, and Tribal organizations or groups that have expressed an interest in rulemaking, on or before the day the proposed amendments are published in the State Register, including a hyperlink to the webpage with electronic copies of the Notice of Intent to Adopt Rules, proposed rule amendments, and SONAR. Though specific proposed rule provisions have not been identified that may "significantly affect" Indian Tribes, the board acknowledges that Tribes are best positioned to assess what may significantly impact their communities and/or interests.
4. Provide specific notice to federal and state agencies who may be affected by or otherwise have an interest in this rulemaking. Those agencies include the USACE St. Paul District, EPA Region 5, USFWS Regional Office; NRCS, DNR, MPCA, MnDOT and the MDA. The Notice will be sent to each agency on or near the day that the proposed rule amendments are published in the State Register. The Notice will include a hyperlink to the webpage where the Notice, proposed rule amendments, and SONAR can be viewed.
5. Provide specific notice to LGUs and SWCDs. Electronic notice will be sent to these entities on or near the day the proposed rule amendments are published in the State Register and will include a hyperlink to the webpage where electronic copies of the Notice, proposed rule amendments, and SONAR can be viewed.

6. Provide specific notice to Wetland Bank owners, for whom the board maintains an e-mail list. The Notice will be sent to each owner on or near the day that the proposed rule amendments are published in the State Register. The Notice will include a hyperlink to the webpage where the Notice, proposed rule amendments, and SONAR can be viewed.
7. Provide specific notice to interested organizations, including but not limited to those representing local governments, agriculture, environment and natural resources, business and industry, and wetland professionals. At a minimum, the notice will be sent electronically to the following associations and groups on or near the day the proposed rule amendments are published in the State Register and will have a hyperlink to the webpage where electronic copies of the Notice, proposed rule amendments, and SONAR can be viewed.
   - MN Farm Bureau
   - MN Farmer's Union
   - MN Agricultural Water Resources Center
   - MN Corn Growers Association
   - MN Wheat Growers Association
   - MN Soybean Growers Association
   - MN Forestry Association
   - MN Center for Environmental Advocacy
   - Sierra Club North Star Chapter
   - MN Environmental Partnership
   - Izaak Walton League of America – MN Division
   - The Nature Conservancy
   - Freshwater
   - CURE MN
   - Minnesota River Collaborative
   - Environmental Working Group
   - Association of MN Counties
   - League of MN Cities
   - MN Rural Counties Caucus
   - MN County Engineers Association
   - MN Intercounty Association
   - MN Watersheds
   - MN Association of Soil and Water Conservation Districts
   - MN Association of Townships
   - Northern Counties Land Use Coordinating Board
   - Red River Watershed Management Board
   - Red River Basin Commission
   - MN Drainage Work Group
   - Housing First MN
   - Mining MN
   - Builders Association of MN
   - Builders Association of the Twin Cities
   - Aggregate Ready-Mix Association of MN
   - Iron Mining Association of MN
   - MN Chamber of Commerce
   - MN Wetland Professionals Association
   - MN Association of County Planning and Zoning Administrators
   - Minnesota Association of Watershed Administrators
   - Basin Alliance for the Lower Mississippi River in Minnesota
   - SWCD wetlands staff
   - LGU wetlands staff

   Note that many of these entities already subscribe to the board's email notification list to receive rulemaking updates and official notices.
8. Provide notice through the Press, a board publication, and social media:

a. Issuance of a press release on or near the day that the proposed rule amendments are published in the State Register.

b. Inform the public of the Notice through the board's *Snapshots* publication on or near the day that the proposed rule amendments are published in the State Register. *Snapshots* is the board's staff-written monthly newsletter that is distributed to over 2,800 subscribers including our staff, board, LGU partners, and interested members of the public. It is published monthly and contains stories that highlight the work of the board and its partners and provides insights on how these partnerships impact our state's soil and water resources. The Snapshots article will include the address to a webpage where the Notice, proposed rule amendments, and SONAR can be viewed.

c. Inform the public of the issuance of the notice through an announcement on the board's Facebook and Twitter accounts on or near the day that the proposed rule amendments are published in the State Register. The social media posts will include a hyperlink to the webpage where electronic copies of the Notice, proposed rule amendments, and SONAR can be viewed.

9. Continue to post rulemaking updates and documents on: https://bwsr.state.mn.us/wca-rulemaking, including schedules for hearings and any other public meetings, new documents, timely responses to comments received during this Notice's public comment period, and other relevant documents and information.

The board believes that by following the steps of this Additional Notice Plan and its regular means of public notice, including early development of the GovDelivery mail list for this rulemaking, publication in the State Register, and posting on the board's webpages, the board will adequately provide additional notice pursuant to Minn. Stat. § 14.14, subdivision 1a.

The Board will submit this Additional Notice Plan to the Office of Administrative Hearings for review and approval pursuant to Minnesota Rules, part 1400.2060, prior to publishing the Notice of Intent to Adopt Rules.

Performance-based Rules

Minnesota Stat. § 14.002 requires state agencies, whenever feasible, to develop rules that are not overly prescriptive and inflexible, and rules that emphasize achievement of the board's regulatory objectives while allowing maximum flexibility to regulated parties and to the board in meeting those objectives. The board complies with this rule by:

- Providing multiple approaches through which compliance with WCA rule requirements may be achieved. For example:
  - The rare natural communities provision contained in Minn. R. 8420.0515, subpart 3 requires denial of a replacement plan that permanently adversely affects a rare natural community. The proposed rules now define what constitutes a permanent adverse effect, allow for replacement of the associated loss of public value, and specify options for replacement. Those options provide several actions that can be taken to obtain replacement plan approval, where previously there were none.
  - Substantial flexibility is introduced in Minn. R., part 8420.0526, subpart 4 of the proposed rules through the establishment of two additional options for obtaining credit for the restoration of partially drained or filled wetland areas occurring on cultivated

fields. In addition to being better correlated to wetland function, the new options allow additional lands to qualify for credit under the subpart which increases the options available to comply with the replacement requirements of the rule.

- Allowing the regulated party discretion in determining how a standard or requirement is met. For example:
  - Minn. R. 8420.0520, subpart 7b was altered to remove the specific requirement to complete a functional assessment using a board-approved method to show qualification for sequencing flexibility and it was replaced with a more general requirement to assess wetland functions. Multiple methods and information sources can be appropriate and sufficient to determine a wetland’s function and public value for purposes of sequencing based on the unique circumstances of the wetland and the proposed impacts. This utilization of other methods and/or information increases flexibility by enabling applicants and TEPs to assess wetland functions commensurate with the complexity and severity of proposed wetland impacts as they relate to the sequencing requirements of the rule.
  - Multiple amendments are proposed to the Replacement Wetland Monitoring Requirements (Minn. R. 8420.0820) to remove overly prescriptive requirements, increase flexibility, and provide regulated parties greater discretion in how monitoring requirements are met. For example:
    - The timing and duration of monitoring is revised to increase consistency with the Federal Mitigation Rule, which has a more flexible standard to accommodate various types of replacement projects and credit actions.
    - The specific, itemized list of required monitoring report contents was eliminated and replaced with a less prescriptive requirement for which the regulated party has greater discretion in the manner of achievement.
    - The requirement to submit a monitoring report after the first full growing season that follows construction certification was eliminated. A regulated party may now propose its own monitoring report submittal interval and schedule for approval in its monitoring plan.
- Establishing waivers and/or exceptions to provide flexibility to the regulated party. For example:
  - Proposed amendments to Minn. R. 8420.0705, subdivision 5 eliminate overly prescriptive details related to conservation easement acquisition and add a provision that allows credits to be deposited in the state wetland bank without a perpetual conservation easement being granted to and accepted by the state on certain lands where easement acquisition is prohibited or difficult, but where adequate access and protection can still be provided.
  - An LGU may waive all remaining replacement wetland monitoring requirements if the TEP determines that the replacement wetland has met all performance standards prior to the conclusion of the required monitoring period.
- Allowing applicants to request extensions to the time limits for meeting specific requirements. For example:
  - Minn. R. 8420.0810, subpart 3(B) includes a new provision to authorize the LGU to

extend the required wetland monitoring period, based on a request from the applicant and in consultation with the TEP, when additional time is needed to achieve performance standards for wetland banks.

As demonstrated, the board has proposed rules that are not overly prescriptive or inflexible, and rules that emphasize achievement of the board's regulatory objectives while allowing maximum flexibility to regulated parties and LGUs in meeting those objectives.

Consideration of Economic Factors

In exercising its powers, the board is required by provisions in Minn. Stat. § 116.07, subdivision 6, and Minn. Stat. § 115.43, subdivision 1, to give due consideration to:

> *…the establishment, maintenance, operation and expansion of business, commerce, trade, industry, traffic, and other economic factors and other material matters affecting the feasibility and practicability of any proposed action, including, but not limited to, the burden on a municipality of any tax which may result there from, and shall take or provide for such action as may be reasonable, feasible, and practical under the circumstances…*

As demonstrated in Section 7 (Regulatory Analysis) of this SONAR, the board considers the effects that economic factors have on the feasibility and practicability of the proposed rule when determining whether and how to adopt rules and seeks to implement the lowest-cost regulatory solutions that do not compromise environmental goals or regulatory responsibilities. The board has met the requirements of this statute by the discussions provided in Section 7, Regulatory Analysis, of this SONAR regarding the possible economic effect of the proposed rules.

Consult with MMB on Local Government Impact

As required by Minn. Stat. § 14.131, the board will consult with Minnesota Management and Budget (MMB) to help evaluate the fiscal impact and fiscal benefits of the proposed rule on units of local government. To accomplish this, prior to publication of the Notice of Intent to Adopt Rules, the board will provide to MMB copies of all documents described below on the same day that such documents are submitted to the Governor's Office for review and approval. The documents will include: the Governor's Office Proposed Rule and SONAR Form; the proposed rules; and the SONAR. The Board will submit a copy of the cover correspondence and any response received from MMB to the Office of Administrative Hearing (OAH) at the hearing or with the documents it submits for Administrative Law Judge (ALJ) review.

Impact on Local Government Ordinances and Rules

Minn. Stat. § 14.128, subdivision 1, requires an agency to make a determination of whether a proposed rule will require a local government to adopt or amend any ordinances or other regulation in order to comply with the rule. The proposed amendments do not explicitly require a local government to adopt or amend any ordinance or other regulation in order to comply with the rule.

Costs of Complying for Small Business or City

Minn. Stat. § 14.127, subds. 1 and 2, require an agency to

> "...*determine if the cost of complying with a proposed rule in the first year after the rule takes effect will exceed $25,000 for (1) any one business that has less than 50 full-time employees; or (2) any one*

statutory or home rule charter city that has less than ten fulltime employees."

The board has determined that the cost of complying with the rules in the first year after the rules take effect will not exceed $25,000 for any small business or small city. The agency made this determination based on the probable costs of complying with the proposed rule as described in the Regulatory Analysis section of this SONAR. Further, this determination was presented to the Rulemaking Advisory Committee for review and discussion. Members were requested to provide any concerns, opinions, and/or information that they may have that could contradict this determination. The Committee raised no concerns or objections, nor was any contrary information provided, indicating its concurrence with the determination.

The proposed rules are amendments to an existing, comprehensive set of rules for the administration and implementation of WCA and are expected to make implementation of the existing rule more efficient and effective. They do not expand jurisdiction, impose new regulatory requirements, or modify existing ones in a manner that makes compliance more costly. To the extent that any unanticipated costs arise, they would predominantly stem from the underlying legislative changes that the proposed rules reflect; that is, statutory changes that are already in effect regardless of the rules themselves. Small businesses and small cities subject to WCA are likely to benefit from the proposed rules because they provide increased clarity and certainty, increase the efficiency of regulatory processes, and make it easier to comply with relevant statutory and regulatory provisions.

Authors, Witnesses and SONAR Exhibits

Authors

- Primary: Lewis Brockette, Wetlands Policy Coordinator, Wetlands Section, BWSR. Mr. Brockette is the primary author of the SONAR, with experience in rule development and drafting, rulemaking procedures (federal), policy analysis, and topics related to the NRCS-based agricultural exemption in the proposed rule.
- Secondary: Ken Powell, Wetland Conservation Act Operations Supervisor, Wetlands Section, BWSR. Mr. Powell supervises the operation of the WCA regulatory program responsibilities of the Wetlands Section, is a WCA subject matter expert, and was the primary contributor to the content of the Specific Reasonableness section of the SONAR.
- Secondary: Les Lemm, Wetlands Section Manager, Wetlands Section, BWSR. Mr. Lemm is a WCA and rulemaking subject matter expert and contributed to and conducted final review of all sections of the SONAR.

Witnesses and Other Staff

The agency expects that the proposed amendments will be noncontroversial. In the event that a hearing is necessary, the agency anticipates having the listed authors testify as witnesses in support of the need for and reasonableness of the rules.

- Craig Engwall, General Counsel, BWSR. Mr. Engwall is a staff attorney to the agency and will introduce the required jurisdictional documents into the record and will assist in providing testimony on Minnesota Administrative Procedures Act (APA) process questions and other legal matters as necessary.

- Les Lemm, Wetlands Section Manager, BWSR. Mr. Lemm is the primary rule coordinator and WCA subject matter expert and will testify on APA process questions and/or will assist Ken Powell in testifying on questions specific to the content of the proposed rules.
- Ken Powell, Wetlands Section Supervisor, is the primary WCA subject matter expert, and will testify on questions specific to the content of the proposed rules.
- Lewis Brockette, Wetland Policy Coordinator, is the primary author of the SONAR and assisted Mr. Lemm in coordinating development of the rule. He will testify on questions of SONAR preparation, APA compliance, and will assist Ken Powell with testimony on questions concerning the proposed NRCS-based agricultural exemption amendments and other topics as appropriate.

SONAR Exhibits

1) Requests for Comments and Comments Received
2) Stakeholder and Public Outreach Events
3) Preliminary Draft Rule Comments
4) Tribal Consultation and Coordination Events
5) HGM Justification
6) Rare Natural Communities - Authority, Issues, and Potential WCA Rule Language
7) State and Federal Wetland Bank Review Process Comparison

Conclusion

In this SONAR, the agency has established the need for and the reasonableness of each of the proposed amendments to Minn. R., part 8420. The agency has provided the necessary notifications and, in this SONAR, has documented its compliance with all applicable administrative rulemaking requirements of Minnesota statute and rules.

Based on the foregoing, the proposed amendments are both needed and reasonable.

____
John Jaschke, Director
Board of Water and Soil Resources

____
Date

MASTER LIST OF EXHIBITS

Statement of Need and Reasonableness (SONAR)

Proposed Amendments to Minnesota Rules, Chapter

8420 Revisor ID: RD-4356

Exhibit 1: Requests for Comments (2015, 2022, 2024) and Comments Received

Exhibit 2: Stakeholder and Public Outreach Events Summary Log

Exhibit 3: Comments Received on the Preliminary Draft Rules

Exhibit 4: Tribal Consultation and Coordination Events Summary Log

Exhibit 5: Technical Justification for Hydrogeomorphic (HGM) Classification

Exhibit 6: Rare Natural Communities — Statutory Authority & Rule Language Evaluation

Exhibit 7: State and Federal Wetland Bank Review Process Comparison

~~Exhibit 8: MMB Local Government Fiscal Impact Consultation Letter & Response~~

Exhibit 1

The July 8, 2024, January 18, 2022, and October 19, 2015 State Register Notices and Comments Received

Comments from the July 8, 2024 State Register Notice

Minnesota State Register, Vol. 49, No. 2, Page 31

Public Hearing Information

- The public hearing starts on time and continues until all attendees have an opportunity to offer comments and ask questions, or until 2:00pm, whichever comes first
- You may join the Webex meeting up to 10 minutes early
- Minnesota Department of Commerce staff run the hearing and are available to answer questions
- You may share verbal comments at the hearing or you may submit written comments as described below

Submit Comments

Please share your comments about the FFY2025 State Plan and about Minnesota's Energy Assistance Program (EAP). We are especially interested in these topics.

- What part of applying for Energy Assistance is most difficult? If you could change one thing about the application process, what would it be?
- Are Energy Assistance applications readily available in your community and/or easy to get? What is the easiest way to get one? What is one thing that would make getting an application easier?
- Due to static funding, Minnesota's Energy Assistance Program plans to transfer approximately 10% of its FFY25 award to the Weatherization program. This transfer has been as high as 15% in recent years. Please comment on any impacts that this change may have.

Comment Period: Open through **Friday, August 5, 2024 at 4:30 pm**

Online: ***https://mn-commerce.formstack.com/forms/eap_feedback***
*use the dropdown option 'Feedback/comments about the program' to leave feedback

U.S. Mail: Michael Schmitz, Director
Office of Energy Assistance Programs
Minnesota Department of Commerce
85 7th Place East, Suite 280
St Paul MN 55101-2198

Fax: 651-539-0109

Important: Comments are publicly available, except in limited circumstances, consistent with the Minnesota Government Data Practices Act.

If any reasonable accommodation is needed to enable you to fully participate in the public hearing (e.g., sign language or large print materials), please contact 651-539-0109 at least one week in advance of the hearing.

This document can be made available in alternative formats (e.g., large print or audio) by calling 651-539-1809 (voice). Persons with hearing or speech disabilities may call us through their preferred Telecommunications Relay Service.

Minnesota Board of Water and Soil Resources

REQUEST FOR COMMENTS for Possible Amendment to Rules Governing Wetland Conservation, *Minnesota Rules*, Chapter 8420; Revisor's ID Number R-04356

Subject of Rules. The Minnesota Board of Water and Soil Resources (Board) requests comments on possible amendments to the rules governing wetland conservation (i.e. the Wetland Conservation Act). The Board is considering rule amendments to:

- reconcile the rule with statute changes that have occurred since publication of the current WCA rule, including those resulting from the 2024 legislative session (details on these statute changes can be found on the wetlands page of the Board's website at: ***2009 Wetland Conservation Act Rule and 2011-2024 Statute Changes | MN Board of Water, Soil Resources (state.mn.us)***);
- clarify requirements and procedures, update and modernize outdated rule provisions, improve wetland mitigation outcomes, and increase consistency with federal wetland regulations; and
- as time and capacity allows, implement changes identified during the rulemaking process and other miscellaneous changes that will improve the efficiency, effectiveness, and/or outcomes of the rule.

This request for comments supplements requests for comments published in the State Register on October 9, 2015, and January 18, 2022. This supplemental request for comments is necessary due to additional statute changes having occurred since the issuance of the 2022 request, specifically those contained in Laws of Minnesota 2024, Chapter 90, Article 3. The board will consider comments submitted in response to this supplemental request, and comments received in response to the 2015 and 2022 requests.

Persons Affected. The amendments to the rule will affect the many sectors whose activities may impact Minnesota's wetland resources, including landowners and organizations proposing to impact wetlands; local governments responsible for implementing the Wetland Conservation Act; and individuals and organizations with an interest in wetland protection such as environmental, agricultural, development, and public advocacy groups.

Statutory Authority. *Minnesota Statutes,* section 103G.2242, requires the Board to adopt rules governing the approval of wetland value replacement plans. 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; the administrative, monitoring, and enforcement procedures to be used; and a procedure for the review and appeal of decisions under this section.

Public Comment. Interested persons or groups may submit comments or information on these possible rules in writing until 4:30 p.m. on August 12, 2024. Additionally, the Board has appointed an advisory committee to comment on the possible rules.

Rules Drafts. The Board has not yet drafted the possible rule amendments.

Agency Contact Person. Written comments, questions, requests to receive a draft of the rules when it has been prepared, and requests for more information on these possible rules should be sent via e-mail to ***bwsr.wcarulemaking@state.mn.us***. Alternatively, written comments can be mailed to: Lewis Brockette, Minnesota Board of Water and Soil Resources, 520 Lafayette Road North, St. Paul, MN 55155. Specific questions can also be directed to Lewis Brockette via e-mail at: ***lewis.brockette@state.mn.us***.

Alternative Format. Upon request, this information can be provided in an alternative format, such as large print, braille, or audio. To make such a request, please contact the agency contact person at the e-mail address listed above.

NOTE: Comments received in response to this notice will not necessarily be included in the formal rulemaking record submitted to the administrative law judge if and when a proceeding to adopt rules is started. The agency is required to submit to the judge only those written comments received in response to the rules after they are proposed. If you submitted comments during the development of the rules and you want to ensure that the Administrative Law Judge reviews the comments, you should resubmit the comments after the rules are formally proposed.

Dated: July 8, 2024

John Jaschke, Executive Director
Minnesota Board of Water and Soil Resources

From: Doug Ploof
To: Lemm, Les P (BWSR)
Subject: Wetlands law imput
Date: Monday, August 5, 2024 9:49:30 AM

[You don't often get email from dplooftreeman@gmail.com. Learn why this is important at https://aka.ms/LearnAboutSenderIdentification]

This message may be from an external email source.
Do not select links or open attachments unless verified. Report all suspicious emails to Minnesota IT Services Security Operations Center.

Dear Mr. Lemm,
I would like to express my concern over the protection of the states wetlands.
I would like to see continued scrutiny on the allowance of wetlands to be altered. I would propose no easing of rules to allow drainage or filling of wetlands. While the banking system appear to replace a natural wetland of the same quality of a developed wetland there is a loss of quality whenever this happens.
*Therefore I would like to see rules that go to strict levels of avoidance before any permits are allowed.
Also, we continue to consider drain tiles and ditches entering wetlands to be non-point pollution sources. I believe we are treating these pollution sources in a way that is weak in protecting the water quality and biologic species in these wetlands.
*Therefore I would like to see rules that do not allow ditches or drain tiles to enter a wetland. Rules protecting from these point sources of pollution need to be addressed.
Thank You Doug Ploof

August 8, 2024

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

Dear Mr. Brockette,

This correspondence is in regard to the request for comments by the Minnesota Board of Water and Soil Resources (BWSR) related to Wetland Conservation Act (WCA) rulemaking as noticed in the State Register on July 8, 2024. The Red River Watershed Management Board (RRWMB) appreciates the opportunity to comment and offers the following comments and recommendations:

1. **Section 75:** No comments as this is a minor change.

2. **Section 76:**
    a. **Statute Changes:** The RRWMB supports this change, which has the potential to make wetland impacts and replacement easier to manage. This change will allow for greater ease in replacing ecological functions. We believe that the benefits of including the HGM Classification system will outweigh mitigation challenges.

    b. **Rule Changes:** The RRWMB requests that BWSR clarify the rules to allow for in-kind mitigation for the same HGM category, and to allow for in-kind replacement of the same Circular 39 category if the HGM category is not available within the Bank Service Area.

3. **Section 77:**
    a. **Rules Changes:** The RRWMB requests provisions be incorporated to allow deepwater habitat mitigation to be the same HGM type as adjacent wetlands. This would allow a deepwater habitat to be replaced in-kind with impacts to the fringe pothole wetland areas. There should also be provisions to clarify impacts to deepwater habitat as fill and excavation only. We believe that water level changes should not be identified as adverse impacts.

4. **Section 78:**
    a. **Rule Changes:** The RRWMB recommends provisions that would allow impacts for sediment removal in ponds or channels, such as ditch repair projects.

5. **Section 79:**
    a. **Statute Changes:** The RRWMB does not support this change. Local Governmental Units (LGU) will have to depend on the USDA Natural Resources Conservation Service (NRCS) to make permitting decisions and LGUs do not have access to farm program files. Depending on NRCS to make timely decisions will only exacerbate permitting delays.

    b. **Rule Changes:** The RRWMB recommends provisions that direct LGUs to make exemption determinations based on NRCS rules if NRCS determinations are not available or were done incorrectly. The RRWMB requests that BWSR clarify that ditch cleanout activities allowed by NRCS also apply to legal drainage systems.

6. **Section 80:**
    a. **Statute Changes:** The RRWMB does not support this change as drainage authorities are tasked with the responsibilities of maintaining legal drainage systems. Drainage authorities manage these systems both technically and financially. Drainage law includes process and procedure for maintenance actives and tax assessments to ensure these systems are maintained. This new rule leaves drainage authorities with no choice but to schedule ditch cleanouts of the entire system every 20 years regardless of need. The methodology for determining drainage impacts for sediment removal within an existing channel is not technically feasible or reproduceable. Impacted areas that would require mitigation must be able to be identified if replaced through mitigation – these areas could then be impacted without regulatory requirements, which highlights the limitations of this type of negotiated impact assessment.

       In addition, there is no way to delineate wetland boundary changes that occurred 20 years ago versus 30 years ago. Under the current rule the wetland boundary is critical in determining "wetlands that existed for 25 years". Hydric soil boundaries and many primary and secondary hydrology indicators cannot be documented using historic aerial photography. Most wetland/upland boundaries adjacent to ditch systems within northwest Minnesota are annually tilled. Avoidance and minimization are not feasible when drainage is the primary purpose of the project.

b. **Rule Changes:** The RRWMB recommends provisions that remove drainage as an impact in this section. Drainage is the primary purpose of these projects. Provide provisions that limit impacts in this section to fill material placed in wetlands. The RRWMB recommends pursuing additional legislation to exempt all repair activities under drainage law for consistency with the Celan Water Act Section 404 and Minnesota Protected Water Inventory Rules, and to prevent unintended consequences of repair work completed without need.

7. **Section 81:**
   a. **Statute Changes:** The RRWMB does not support the change as LGUs need to be able to make their own determination and process applications per WCA rule. Waiting for the United States Army Corps of Engineers (USACE) is time consuming and this will delay projects with no real benefit.

   b. **Rule Changes:** The RRWMB recommends provisions that direct the LGU to make the determination based on WCA rules or guidance if USACE permits are not processed within the timeline of the WCA (60-day rule).

8. **Section 82:**
   a. **Statute Changes:** The RRWMB does not support the revisions to the de minimus areas and we do not support removing "draining and filling". The de minimus exemptions depend on specific area determinations of impact. Qualitative impacts are not easily converted into a measurable area.

   b. **Rule Changes:** The RRWMB recommends provisions that clarify the de minimus exemption applies to wetland losses, converting wetlands to non-wetlands.

9. **Section 83:**
   a. **Statute Changes:** The RRWMB does not support the change. Most of these areas are agricultural ditches or legal drainage systems, private ditch systems, or have subsurface drain tile. It is not clear how impact assessments will be determined. This will create regulatory burdens with little or no resource protection benefits. These areas are also not able to be delineated in the field. The boundaries are not clear and regulatory programs depend on clear identification of the resource to be regulated.

b. **Rule Changes:** The RRWMB recommends provisions that clarify and define the limits of intermittent and perennial watercourses. The RRWMB recommends provisions that exempt watercourses on agricultural fields, and impacts associated with installation and maintenance of public and private ditch or subsurface tile systems.

10. **Section 84:** No Comments.

11. **Section 85:**
    a. **Statute Changes:** The RRWMB does not support the change as wetland banking projects have cost-benefit challenges making it costly to restore small wetland areas. Removing the banking process from the required timelines in Statute 15.99 will only add additional time and cost to the process. Efforts should be made to shorten and streamline the process rather than extend the timelines.

    b. **Rule Changes:** The RRWMB recommends provisions that streamline and shorten the banking process.

12. **Section 86:**
    a. **Statute Changes:** The RRWMB supports the change. An in-lieu fee program will allow credit purchases within Bank Service Areas that are short on credits allowing mitigation to be completed at a later date. This offers simplicity and efficiency for project permitting.

    b. **Rule Changes:** The RRWMB recommends provisions that determine how the cost per credit will be determined. The RRWMB recommends provisions that prioritize Bank Service Areas with few credits to enable future restorations to be completed within the same Bank Service Area.

We have several multipurpose water storage projects constructed or in the RRWMB funding process located in the Red River Basin (RRB) of Minnesota that have gone through various levels of wetland delineation and review, wetland monitoring, development of preservation plans, and wetland replacement and/or mitigation. Some of the larger water storage projects in the RRB can involve 18 permits and approvals from all levels of government. Public drainage projects also involve various levels of permitting, environmental review, and field investigations depending on the complexity of the project and number of funding partners involved.

Once constructed, these water storage projects will result in approximately 100,000 acre-feet of new water storage along with thousands of acres of new habitat and significant water quality benefits. In addition, our member watershed districts are involved with ongoing water quality projects in the RRB that often include work within public drainage systems. We estimate that our membership has spent $4.375 million in permitting and environmental review costs just for water storage projects in our funding process.

We realize that larger-scale projects take time, extensive financial resources, and involve permitting and environmental review. However, continued rulemaking by state agencies erodes our local financial capacity and hinders the ability of our members to move forward on public drainage, water storage, flood mitigation, habitat, and clean water projects. The RRWMB believes that the changes to WCA will place additional permitting and regulatory burdens on our drainage authorities and the taxpayers in the RRB of Minnesota.

The citizens of the RRB and State of Minnesota both want habitat and clean water and the RRWMB is committed to working on the meet these needs along with water storage and flood mitigation. Should you have questions or need clarification of these comments, please contact me at rob.sip@rrwmb.us or via cell at 218-474-1084.

Sincerely,

Robert L. Sip
RRWMB Executive Director

CC: Red River Basin Legislators
RRWMB Managers
RRWMB Membership

Memorandum

DATE: August 12, 2024

TO: Lewis Brockette, BWSR

FROM: Jan Voit, Executive Director

RE: Wetland Conservation Act Rulemaking

The following comments are submitted on behalf of Minnesota Watersheds regarding Wetland Conservation Act (WCA) rulemaking as noticed in the State Register on July 8, 2024. We appreciate the opportunity to comment.

Minnesota Watersheds requests/recommends:

- That BWSR clarify the rules to allow for inkind mitigation for the same HGM category and to allow for inkind replacement of the same Circular 39 category if the HGM category is not available within the Bank Service Area.
- provisions be incorporated to allow deepwater habitat mitigation to be the same HGM type as adjacent wetlands.
- provisions that would allow impacts for sediment removal in ponds or channels, such as ditch repair projects.
- Provisions that remove drainage as an impact in the section related to "wetlands that existed for 25 years".
- Provisions that direct the LGU to make determinations based on WCA rules or guidance if the US Army Corps of Engineers permits are not processed within the 60-day rules timeline.
- Provisions that clarify the de minimus exemption applies to wetland losses, converting wetlands to non-wetlands.
- Provisions that exempt watercourses on agricultural fields and impacts associated with installation and maintenance of public and private ditch or subsurface tile systems.
- Provisions that streamline and shorten the banking process.
- Provisions that determine how the cost per credit will be determined and that prioritize Bank Service Areas with few credits to enable future restorations to be completed within the same Bank Service Area.

Minnesota Watersheds believes that many of the changes to WCA will place additional permitting and regulatory burden on drainage authorities and landowners with the State of Minnesota. Our organization supports the comments submitted by the Red River Watershed Management Board (RRWMB). That letter is included with this memo to provide context and clarity for the above-listed requests/recommendations.

Minnesota Watersheds is committed to working with our members and the State of Minnesota to provide clean water and wetland habitat. Should you have questions or need further information, please contact me at jvoit@mnwatersheds.com or 507-822-0921.

August 8, 2024

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

Dear Mr. Brockette,

This correspondence is in regard to the request for comments by the Minnesota Board of Water and Soil Resources (BWSR) related to Wetland Conservation Act (WCA) rulemaking as noticed in the State Register on July 8, 2024. The Red River Watershed Management Board (RRWMB) appreciates the opportunity to comment and offers the following comments and recommendations:

1. **Section 75:** No comments as this is a minor change.

2. **Section 76:**
    a. **Statute Changes:** The RRWMB supports this change, which has the potential to make wetland impacts and replacement easier to manage. This change will allow for greater ease in replacing ecological functions. We believe that the benefits of including the HGM Classification system will outweigh mitigation challenges.

    b. **Rule Changes:** The RRWMB requests that BWSR clarify the rules to allow for in-kind mitigation for the same HGM category, and to allow for in-kind replacement of the same Circular 39 category if the HGM category is not available within the Bank Service Area.

3. **Section 77:**
    a. **Rules Changes:** The RRWMB requests provisions be incorporated to allow deepwater habitat mitigation to be the same HGM type as adjacent wetlands. This would allow a deepwater habitat to be replaced in-kind with impacts to the fringe pothole wetland areas. There should also be provisions to clarify impacts to deepwater habitat as fill and excavation only. We believe that water level changes should not be identified as adverse impacts.

4. **Section 78:**
    a. **Rule Changes:** The RRWMB recommends provisions that would allow impacts for sediment removal in ponds or channels, such as ditch repair projects.

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    b. **Rule Changes:** The RRWMB recommends provisions that direct LGUs to make exemption determinations based on NRCS rules if NRCS determinations are not available or were done incorrectly. The RRWMB requests that BWSR clarify that ditch cleanout activities allowed by NRCS also apply to legal drainage systems.

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    a. **Statute Changes:** The RRWMB does not support this change as drainage authorities are tasked with the responsibilities of maintaining legal drainage systems. Drainage authorities manage these systems both technically and financially. Drainage law includes process and procedure for maintenance actives and tax assessments to ensure these systems are maintained. This new rule leaves drainage authorities with no choice but to schedule ditch cleanouts of the entire system every 20 years regardless of need. The methodology for determining drainage impacts for sediment removal within an existing channel is not technically feasible or reproduceable. Impacted areas that would require mitigation must be able to be identified if replaced through mitigation – these areas could then be impacted without regulatory requirements, which highlights the limitations of this type of negotiated impact assessment.

       In addition, there is no way to delineate wetland boundary changes that occurred 20 years ago versus 30 years ago. Under the current rule the wetland boundary is critical in determining "wetlands that existed for 25 years". Hydric soil boundaries and many primary and secondary hydrology indicators cannot be documented using historic aerial photography. Most wetland/upland boundaries adjacent to ditch systems within northwest Minnesota are annually tilled. Avoidance and minimization are not feasible when drainage is the primary purpose of the project.

b. **Rule Changes:** The RRWMB recommends provisions that remove drainage as an impact in this section. Drainage is the primary purpose of these projects. Provide provisions that limit impacts in this section to fill material placed in wetlands. The RRWMB recommends pursuing additional legislation to exempt all repair activities under drainage law for consistency with the Celan Water Act Section 404 and Minnesota Protected Water Inventory Rules, and to prevent unintended consequences of repair work completed without need.

7. **Section 81:**
   a. **Statute Changes:** The RRWMB does not support the change as LGUs need to be able to make their own determination and process applications per WCA rule. Waiting for the United States Army Corps of Engineers (USACE) is time consuming and this will delay projects with no real benefit.

   b. **Rule Changes:** The RRWMB recommends provisions that direct the LGU to make the determination based on WCA rules or guidance if USACE permits are not processed within the timeline of the WCA (60-day rule).

8. **Section 82:**
   a. **Statute Changes:** The RRWMB does not support the revisions to the de minimus areas and we do not support removing "draining and filling". The de minimus exemptions depend on specific area determinations of impact. Qualitative impacts are not easily converted into a measurable area.

   b. **Rule Changes:** The RRWMB recommends provisions that clarify the de minimus exemption applies to wetland losses, converting wetlands to non-wetlands.

9. **Section 83:**
   a. **Statute Changes:** The RRWMB does not support the change. Most of these areas are agricultural ditches or legal drainage systems, private ditch systems, or have subsurface drain tile. It is not clear how impact assessments will be determined. This will create regulatory burdens with little or no resource protection benefits. These areas are also not able to be delineated in the field. The boundaries are not clear and regulatory programs depend on clear identification of the resource to be regulated.

   b. **Rule Changes:** The RRWMB recommends provisions that clarify and define the limits of intermittent and perennial watercourses. The RRWMB recommends provisions that exempt watercourses on agricultural fields, and impacts associated with installation and maintenance of public and private ditch or subsurface tile systems.

10. **Section 84:** No Comments.

11. **Section 85:**
    a. **Statute Changes:** The RRWMB does not support the change as wetland banking projects have cost-benefit challenges making it costly to restore small wetland areas. Removing the banking process from the required timelines in Statute 15.99 will only add additional time and cost to the process. Efforts should be made to shorten and streamline the process rather than extend the timelines.

    b. **Rule Changes:** The RRWMB recommends provisions that streamline and shorten the banking process.

12. **Section 86:**
    a. **Statute Changes:** The RRWMB supports the change. An in-lieu fee program will allow credit purchases within Bank Service Areas that are short on credits allowing mitigation to be completed at a later date. This offers simplicity and efficiency for project permitting.

    b. **Rule Changes:** The RRWMB recommends provisions that determine how the cost per credit will be determined. The RRWMB recommends provisions that prioritize Bank Service Areas with few credits to enable future restorations to be completed within the same Bank Service Area.

We have several multipurpose water storage projects constructed or in the RRWMB funding process located in the Red River Basin (RRB) of Minnesota that have gone through various levels of wetland delineation and review, wetland monitoring, development of preservation plans, and wetland replacement and/or mitigation. Some of the larger water storage projects in the RRB can involve 18 permits and approvals from all levels of government. Public drainage projects also involve various levels of permitting, environmental review, and field investigations depending on the complexity of the project and number of funding partners involved.

Once constructed, these water storage projects will result in approximately 100,000 acre-feet of new water storage along with thousands of acres of new habitat and significant water quality benefits. In addition, our member watershed districts are involved with ongoing water quality projects in the RRB that often include work within public drainage systems. We estimate that our membership has spent $4.375 million in permitting and environmental review costs just for water storage projects in our funding process.

We realize that larger-scale projects take time, extensive financial resources, and involve permitting and environmental review. However, continued rulemaking by state agencies erodes our local financial capacity and hinders the ability of our members to move forward on public drainage, water storage, flood mitigation, habitat, and clean water projects. The RRWMB believes that the changes to WCA will place additional permitting and regulatory burdens on our drainage authorities and the taxpayers in the RRB of Minnesota.

The citizens of the RRB and State of Minnesota both want habitat and clean water and the RRWMB is committed to working on the meet these needs along with water storage and flood mitigation. Should you have questions or need clarification of these comments, please contact me at rob.sip@rrwmb.us or via cell at 218-474-1084.

Sincerely,

Robert L. Sip
RRWMB Executive Director

CC: Red River Basin Legislators
RRWMB Managers
RRWMB Membership

The Nature Conservancy
Protecting nature. Preserving life.™

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August 12, 2024

Lewis Brockette
Minnesota Board of Water and Soil Resources
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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.

<u>Improving the assessment of wetland and stream values for implementing the 2024 Wetland Conservation Act</u>

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 change[1]. 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 guidelines[3] 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.
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[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.

GISLASON & HUNTER LLP
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August 12, 2024

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Lewis Brockette
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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 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 20^{th} 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 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; <u>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)</u>; 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 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*)

STATE OF MINNESOTA
BOARD OF WATER AND SOIL RESOURCES

Todd Holman	Chair
Rich Sve	Co-Commissioner
Neil Peterson	Co-Commissioner
Ronald Staples	Co-Commissioner

In the Matter of the 2024 Wetlands Conservation Act Rule-Making

COMMENT FROM JOINT COMMENTERS ON THE 2024 WCA RULE-MAKING PROCESS

August 12, 2024

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I. Introduction

The Minnesota Center for Environmental Advocacy ("MCEA") and the undersigned environmental organizations (collectively the "Joint Commenters") provide these comments in response to the notice published July 8, 2024 in the State Register.[1] In the notice, the Board of Water and Soil Resources ("BWSR") indicated that it was seeking comment on three topics: (1) reconciling its rules with recent statutory changes to the Wetland Conservation Act ("WCA"); (2) "clarify requirements and procedures, update and modernize outdated rule provisions, improve wetland mitigation outcomes, and increase consistency with federal wetland regulations"; and (3) and other changes that will improve the "efficiency, effectiveness, and/or outcomes of the rule."[2] We appreciate the opportunity to provide comment on these topics.

MCEA is a Minnesota non-profit organization whose mission is to use the law, science, and research to preserve and protect Minnesota's natural resources, its wildlife, and the health of its people. For fifty years, MCEA has worked with citizens and government decision-makers to protect and improve the quality of Minnesota's environment. The Joint Commenters are all environmental nonprofits whose missions include the protection of Minnesota's waters.

Minnesota's WCA enhances wetland protections at the state level and complements several different regulatory programs for wetland protection at the federal level. These include the Clean Water Act ("CWA"), which requires Section 404 permits to discharge dredged or fill material into wetlands that are considered Waters of the United States ("WOTUS"), [3] and the Food Security Act of 1985 ("FSA"), which includes wetland conservation provisions that make agricultural producers ineligible for federal farm program benefits if they farm on or alter wetlands after a certain date.[4] The CWA is administered by the Army Corps of Engineers ("Corps") and the U.S. Environmental Protection Agency ("EPA"), while the FSA is administered by the United States Department of Agriculture ("USDA") with technical determinations made by the Natural Resources Conservation Service ("NRCS"). Minnesota's Wetland Conservation Act is administered by local government units ("LGUs") with oversight from the Board of Water and Soil Resources ("BWSR"). The Joint Commenters assert that it is valuable and appropriate to have independent levels of review under separate authorities for state and federal regulatory programs that serve different programmatic purposes.

In the wake of the *Sackett v. EPA* U.S. Supreme Court decision in May 2023 and the amended WOTUS definition that became effective in September 2023, staff at the Minnesota Department of Natural Resources ("DNR"), Pollution Control Agency ("MPCA"), and BWSR made a preliminary assessment in January 2024 of how the revised WOTUS definition would impact statewide waters and wetland protections.[5] These agencies concluded that the geographic scope of federal wetland protections under the CWA was significantly narrowed.

[1] Minnesota State Register, Monday July 8, 2024. Volume 49, no. 2. https://mn.gov/admin/assets/SR49_02_tcm36-631015.pdf.
[2] *Id.*
[3] Permits for dredged or fill material, 33 U.S.C.A. § 1344 (West 2024).
[4] Program ineligibility, 16 U.S.C.A. § 3821 (West 2018).
[5] BWSR, MPCA, & DNR, *Preliminary Assessment: Waters of the United States (WOTUS) Rule Changes and Impacts to Minnesota*, (2024), https://bwsr.state.mn.us/sites/default/files/2024-01/WOTUS%20Preliminary%20Assessment%201-22-24%20Draft.pdf.

In light of this assessment, BWSR proposed and passed statutory amendments in the 2024 legislative session that extended WCA protections to newly unregulated wetlands and revised the WCA exemptions. One of the stated goals of these amendments was to fill regulatory "gaps" created by the *Sackett v. EPA* decision and ensure that wetland protections in Minnesota remain as comprehensive as they were before the WOTUS Rule was revised.[6] The Joint Commenters agree that the statutory amendments are important to extend protections, but we urge BWSR to use the upcoming rulemaking process to address some gaps that remain. First, the rules should clarify the definition of "deepwater aquatic habitats." Second, to address concerns about the impact of the newly enacted agricultural activity exemption, we urge BWSR to improve its data collection procedures for WCA exemption applications. Third, to mitigate possible negative impacts from this new exemption, we ask that, at a minimum, BWSR incorporate criteria into the rule for when cropland has been abandoned. Fourth, BWSR should issue an APO Plan to ensure that WCA violations are effectively deterred. Fifth, the rules should adopt bioassessment and climate change requirements as a component of the functional assessment process to ensure that the biodiversity and carbon sequestration functions of wetlands are addressed in replacement plans. Finally, BWSR should adopt rules that mitigate impacts to perennial, intermittent, and ephemeral streams in Minnesota for the critical ecological services they provide.

II. Analysis

A. BWSR should clarify the definition of deepwater aquatic habitat

The 2024 statutory amendments attempt to ensure the protection of deepwater aquatic habitats that have lost federal jurisdiction under the amended WOTUS definition. However, there is a discrepancy between how the amendments define deepwater aquatic habitats and how BWSR interprets the effect of this change. In the 2024 legislative session, WCA was amended to include as jurisdictional wetlands "deepwater aquatic habitats that are not public waters or public waters wetlands."[7] The statute further outlines that "deepwater aquatic habitats have the meaning given in Corps of Engineers Wetlands Delineation Manual, United States Army Corps of Engineers (January 1987)."[8] The 1987 Delineation Manual defines deepwater aquatic habitats as "areas that are permanently inundated at mean annual water depths >6.6 ft or permanently inundated areas 6.6 ft in depth that do not support rooted-emergent or woody plant species."[9] However, BWSR's interpretation of the effect of the change is that "deepwater habitats are permanently flooded lands lying below the deepwater boundary of wetlands (*generally greater than 8.2 feet of water depth*) as defined in the "Classification of Wetlands and Deepwater Habitats of the United States" (adapted from Cowardin et al., 1979)."[10] Because WCA regulatory authority will now apply to all

[6] BWSR, MPCA, & DNR, *Preliminary Assessment: Waters of the United States (WOTUS) Rule Changes and Impacts to Minnesota*, (2024), https://bwsr.state.mn.us/sites/default/files/2024-01/WOTUS%20Preliminary%20Assessment%201-22-24%20Draft.pdf.
[7] Minn. Stat. § 103G.005 subd. 19(c).
[8] *Id*.
[9] Corps of Engineers Wetlands Delineation Manual, United States Army Corps of Engineers (January 1987).
[10] BWSR, 2024 Wetland Conservation Act Statute Changes, June 18, 2024. https://bwsr.state.mn.us/sites/default/files/2024-06/2024%20Statute%20Change%20Summary%206-18-24.pdf.

deepwater aquatic habitats that are not designated as public waters, it is imperative to clarify this definition for assessment, mitigation, and replacement requirements.

B. The newly enacted agricultural activity exemption may be at odds with the overall "no net loss" goal of the Wetland Conservation Act

The 2024 statutory amendments included the addition of a broad new agricultural activity exemption, which outlines that a replacement plan for wetlands is not required for "impacts to wetlands on agricultural land labeled prior-converted cropland and impacts to wetlands resulting from drainage maintenance activities authorized by the United States Department of Agriculture ("USDA"), Natural Resources Conservation Service ("NRCS"), on areas labeled farmed wetland, farmed-wetland pasture, and wetland."[11] The Joint Commenters have several concerns about this new agricultural activity exemption and its compatibility with the overall "no net loss" goal of WCA. This new exemption raises particular concern for Type 1 and Type 2 wetlands, which are more likely to be farmed because of their seasonal nature. Type 1 wetlands are either seasonal flooded basins or floodplains, while Type 2 wetlands are usually identified as wet meadows with visible vegetation. Both wetland types provide waterfowl and wildlife habitat, flood mitigation, water quality, water storage, and groundwater recharge benefits.[12] In addition, Type 1 and Type 2 wetlands support aquatic invertebrate diversity—including unique taxa found nowhere else—and support the reproduction of spring breeding amphibians. Finally, these wetland types are often isolated without a continuous surface water connection to navigable waters, and therefore are more likely to have lost federal jurisdiction under the amended WOTUS rule.

Administrative simplification between different federal and state programs should only be pursued if it does not compromise either program's purpose. This has been recognized in memoranda of agreement and joint guidance issued by the USDA, the Corps, and the EPA about wetland regulations over the years. For example, in 2005 the USDA and the Corps issued joint guidance that reaffirmed their commitment to ensure that the Clean Water Act and Food Security Act wetland programs were administered in a way that minimized impacts to landowners and fulfilled wetland conservation goals. However, the guidance recognized that "because of the differences… between the CWA and FSA on the jurisdictional status of certain wetlands (e.g. prior converted or isolated wetlands may be regulated by one agency but not the other) it is frequently impossible for one lead agency to make determinations that are valid for the administration of both laws." Despite the different programmatic purposes of the federal FSA and Minnesota's WCA, the effect of the newly enacted agricultural activity exemption is to make NRCS determinations valid for the administration of both laws.

We further explore these programmatic differences below. A NRCS technical determination does not on its own require mitigation for wetland impacts. The NRCS is authorized to make technical determinations under Title XII of the 1985 FSA,[13] but it is the responsibility of

[11] Minnesota Board of Water and Soil Resources. 2024 Wetland Conservation Act Statute Changes. June 18, 2024. https://bwsr.state.mn.us/sites/default/files/2024-06/2024%20Statute%20Change%20Summary%206-18-24.pdf.

[12] Gilbert, Michael C. et al. A Regional Guidebook for Applying the Hydrogeomorphic Approach to Assessing Wetland Functions of Prairie Potholes. U.S. Army Corps of Engineers. May 2006 https://wetlands.el.erdc.dren.mil/pdfs/trel06-5.pdf.

[13] Erodible Land and Wetlands Conservation Definitions, 16 U.S.C.A. § 3801(4)(A) (West 2024).

the USDA to use the technical determinations to administer and enforce the Swampbuster provisions of the Act (see Section E for USDA enforcement concerns). Therefore, while an NRCS technical determination incentivizes wetland conservation compliance to remain eligible for USDA program benefits, it does not require it. Furthermore, on prior converted cropland no mitigation is required for wetland impacts to remain eligible for FSA benefits.

There are also important differences between the drainage maintenance criteria under the NRCS determinations that implement the FSA Swampbuster provisions and Minnesota's WCA. On land has been labeled prior converted cropland, farmed wetland, or farmed wetland pasture on a valid NRCS technical determination, the landowner has the ability under the Food Security Act to maintain the best drained conditions prior to the Act's effective date of December 23, 1985 "so long as the previously accomplished drainage or manipulation is not significantly improved upon…"[14] However, NRCS itself has limited oversight of drainage maintenance activities in Minnesota. When a landowner wants to do drainage maintenance, he or she is provided with documentation of a valid NRCS determination if one exists, and a maintenance exemption factsheet.[15] NRCS relies heavily on voluntary compliance, with limited technical guidance available to guide drainage maintenance activities.

Under WCA, the drainage maintenance exemption instead requires that the drained wetland is less than 25 years old to qualify, regardless of wetland type.[16] In instances where the Technical Evaluation Panel ("TEP") that administers WCA at the local level disagrees with an NRCS-certified wetland determination or the activity it authorizes and believes that it violates the provisions of WCA, the TEP will not have the ability to challenge it under the new exemption. In fact, only the "affected person" of the impacted property is authorized by statute to challenge NRCS wetland determinations.[17] Below, we've included recommendations (Sections C, D, and E) to address concerns about whether the new exemption is consistent with the overall "no net loss" goal of WCA.

C. There are currently inadequate data to evaluate the impact of the new agricultural activities exemption

One of our key concerns with the newly enacted agricultural activity exemption is the lack of publicly accessible data to assess what the impact of this new exemption will be on the ground in Minnesota. It is currently illegal for NRCS to share the location of NRCS wetland determinations to agencies outside of the USDA or to the general public. [18] As a result, neither BWSR nor the general public can determine the amount of land in Minnesota with a valid NRCS determination that this exemption will apply to. Estimates, however, are high: a BWSR staff member said that an estimated 40% of agricultural land in the Fergus Falls area had a valid NRCS

[14] Barthel v. U.S. Dept. of Agric. 181 F.3d 934, 939 (8th Cir. 1999).
[15] NRCS, Maintenance Exemption Fact Sheet, n.d.
[16] 103G.2241 subd. 2(a).
[17] NRCS responsibilities regarding wetlands, 7 C.F.R. § 12.30(c) (2020); NRCS, https://www.nrcs.usda.gov/getting-assistance/financial-help/conservation-compliance-appeals-process (last visited Aug. 6, 2024, 11:10 AM).
[18] Administrative requirements for conservation programs, 16 U.S.C.A. § 3844(b)(1)(A) (West 2022).

certified wetland determination and therefore would qualify for the new WCA agricultural activity exemption.[19]

To address this concern, we ask BWSR to improve the WCA exemption evaluation data it collects. The current evaluation data that BWSR collects demonstrates the widespread use of agricultural activity exemptions but lacks the necessary specificity to evaluate the impact of particular exemptions like the ones that were added in the 2024 legislative session. BWSR's data reveal an overall increase in replacement plans: the data reflect that approved replacement acreage increased by approximately 63% from 2016 to 2021 and the exemption applications acreage increased by approximately 163% during the same period. [20]

The publicly available evaluation data illustrate broad overall trends but do not specify which types of exemptions were approved.[21] Instead, it groups exemption data by category (i.e. agricultural activities, drainage, utilities, de minimis, etc.) but not by the specific subpart in each category. To properly evaluate the impact of the newly added agricultural activity exemption relative to WCA's overall "no net loss" purpose, the Joint Commenters request that BWSR implement the below changes to exemption applications and publicly available exemption evaluation data: First, include a selection for the Agricultural Activities exemption subpart the application falls under. Second, for applicants that select the newly enacted WCA exemption for lands with a valid NRCS determination, include a selection to designate the type of NRCS determination, i.e. prior converted cropland, farmed wetland, farmed-wetland pasture, or wetland. Third, include a selection for the geographic region the impacted area falls within, such as those outlined in the DNR Administrative Regions or Statewide Emergency Communications Board Regions. Lastly, have the applicant indicate whether this is a first-time or repeat exemption application, and if repeat, whether the applicant has been approved or denied in the past. Finally, the Joint Commenters request that BWSR include an aggregate summary of these more detailed data points in the annual exemption evaluation data on its website. We further request that this data be available with a one-year delay rather than the current two-year delay in access to exemption data.

The requested amendments would allow BWSR to collect more specific exemptions data but would not compromise the personal privacy of program applicants. Improved exemption evaluation data will be critical to evaluate the impact of the 2024 statutory changes relative to WCA's "no net loss" regulatory purpose.

D. To effectively address diminished federal jurisdiction under the Clean Water Act, BWSR should adopt the five-year abandonment criteria for prior converted cropland

One of the stated goals of the 2024 statutory amendments proposed by BWSR was to "ensure that wetlands are protected to the same extent as they were prior to *Sackett.*"[22] In other

[19] Minnesota Drainage Work Group Presentation, July 11, 2024.
[20] BWSR, *2016 – 2022 WCA Data Comparison Figures*, at 2 (2024), https://bwsr.state.mn.us/sites/default/files/2024-07/2016-2022%20WCA%20Data%20Graphs_0.pdf.
[21] See, for example: BWSR, Wetland Conservation Act (WCA) Implementation Data as Reporter by Local Government Units (LGUs) for Calendar Year 2022 https://bwsr.state.mn.us/sites/default/files/2024-07/CY%202022%20WCA%20Reporting%20Data%20Summary-FINAL.pdf.
[22] BWSR Policy Bill, S.F. No. 3559 § 75, at 5 (Mar. 8, 2024).

words, one of the goals was to ensure that state-level wetland protections fill the gaps created by losses in federal jurisdiction so that overall wetland protections are equally or more protective than they were before the *Sackett* decision. A second stated goal of the 2024 statutory amendments was to "repeal exemptions to the requirement to prepare a wetland replacement plan that have no federal counterpart and replace them with an exemption that does."[23] However, the outright exemption for wetland impacts on land designated as prior converted cropland ("PCC") by the NRCS goes beyond what is allowable under the CWA, even before the *Sackett* decision and 2023 WOTUS rule revision.

While the CWA does not define or mention PCC explicitly, regulations issued by the Corps and the EPA do. In 1993, the policy that PCC are not WOTUS was codified into regulation, with the important caveat that if PCC were abandoned and reverted to wetlands, they could be "recaptured" under the Clean Water Act.[24] The preamble states that PCC that "now meets wetland criteria is considered to be abandoned unless: For once in every five years the area has been used for the production an agricultural commodity, or the area has been used and will continue to be used for the production of an agricultural commodity in a commonly used rotation with aquaculture, grasses, legumes, or pasture production."[25] This was reaffirmed in 2015, when the Corps and EPA promulgated the Clean Water Rule which maintained the PCC exclusion and abandonment criteria as they existed in the 1993 rule.[26] The PCC exclusion and the abandonment criteria were maintained in January 2023, when the Corps and EPA issued a new WOTUS rule.[27] The 2023 WOTUS Rule specifies that PCC designated by the USDA is excluded from the definition of WOTUS, *but that the exclusion ceases upon a change in use* such that the area is no longer available for the production of agricultural commodities.[28] There were no changes to the eight categories of exclusions from the January 2023 Rule when it was amended in September 2023 to conform with the *Sackett* decision.

Therefore, if the goal of the 2024 statutory changes is to (1) ensure that wetlands are protected to the same extent they were prior to *Sackett* and (2) use exemptions that have a valid federal counterpart, then the rules should at a minimum adopt the five-year abandonment criteria for PCC that has been consistently upheld in rules issued by Corps and EPA. This interpretation of the statute is also consistent with the goal to achieve "no net loss in the quantity, quality, and biological diversity" of Minnesota's wetlands that is clearly articulated in both the plain language of the Wetland Conservation Act and the Minnesota Rules Chapter 8420 that implement it.

E. Violation enforcement is already a concern under the Food Security Act and should be improved under WCA

The U.S. Government Accountability Office ("GAO") published a report in April 2021 that found evidence of lax enforcement by NRCS and USDA of the wetland conservation

[23] *Id*.
[24] Revised Definition of "Waters of the United States", 58 Fed. Reg. 45008 (Aug. 25, 1993).
[25] Revised Definition of "Waters of the United States", 58 Fed. Reg. 45034(V)(G) (Aug. 25, 1993).
[26] Clean Water Rule: Definition of "Waters of the United States", 80 Fed. Reg. 37054 (June 29, 2015).
[27] Revised Definition of "Waters of the United States", 88 Fed. Reg. 3004 (Jan. 18, 2023).
[28] Revised Definition of "Waters of the United States", 88 Fed. Reg. 3004-01(7)(a)(i) (Jan. 18, 2023).

provisions of the Food Security Act. Specifically, it found that the NRCS does compliance checks on about 1% of applicable land a year based on a random sample rather than a risk-based framework. Furthermore, the USDA Farm Service Agency waived penalties in 81% of cases where farmers said they acted in good faith, which the GAO found often relied on weak justification.[29] The issues highlighted in this 2021 GAO report are further bolstered by a 2017 report from the USDA Inspector General, which found that the NRCS had implemented wetland determination procedures in the prairie pothole region inconsistently – a region that includes Minnesota.[30]

The GAO made six recommendations to the NRCS and the USDA based on its research. While four of these recommendations have been implemented, two remain open – namely that the NRCS should use risk-based criteria to select applicable land for annual compliance checks rather than a randomized sample, and that the Secretary of Agriculture should "ensure that the Chief of the Natural Resources Conservation Service instructs state and field offices to consistently report any potential violations they observe."[31] In response to this last recommendation, the NRCS told the GAO in May of 2024 that it "is concerned that the agency lacks statutory or regulatory authority to implement the recommendation, and that doing so would damage its relationships with the agricultural community."[32] However, the GAO finds that the NRCS does have the authority to implement the recommendation and that if potential violations are not consistently reported, the programmatic goal to ensure that farm program benefits are only provided to farmers who comply with the wetland conservation provisions will be compromised.

Similarly lax enforcement is a problem in Minnesota. While BWSR was granted the authority to issue administrative penalty orders for WCA violations by the legislature in 2007, we are unable to find a record of its use.[33] There are public concerns around the inadequate enforcement of WCA violations in Minnesota, as documented in a May 2023 *Star Tribune* article about a violation in Lyon County.[34] Now, BWSR has incorporated a new agricultural activity exemption under WCA that hinges on a federal program with significant enforcement concerns. Given these circumstances, it is imperative that BWSR make full use of its APO authority to ensure WCA violations are effectively deterred. Currently, BWSR has a legislatively mandated APO Plan for the implementation of Minnesota's Buffer Law but not the Wetland Conservation Act. As part of WCA rule development, BWSR should issue an APO Plan for WCA violations with penalties that are forgivable, non-forgivable, or a combination and provides violators a 30-day notice to prove evidence of full correction. It can incorporate stakeholders into the process to increase education and awareness of WCA's provisions and the importance of voluntary compliance. Finally, if the $10,000 APO maximum is a barrier to its use, then BWSR could seek an increase in the maximum APO penalty.

[29] U.S. Gen. Accounting Office, GAO-21-241, Farm Programs: *USDA Should Take Additional Steps to Ensure Compliance with Wetland Conservation Provisions* (April 2, 2021).
[30] USDA Office of Inspector General, *NRCS: Wetland Conservation Provisions in the Prairie Pothole Region*, Audit Report 10601-003-31 (Jan. 2017).
[31] U.S. Gen. Accounting Office, GAO-21-241, Farm Programs: *USDA Should Take Additional Steps to Ensure Compliance with Wetland Conservation Provisions* (April 2, 2021).
[32] U.S. Gen. Accounting Office, https://www.gao.gov/products/gao-21-241, (May 2024).
[33] BWSR 2007 Annual Report, https://www.lrl.mn.gov/docs/2008/mandated/080949.pdf & https://www.revisor.mn.gov/statutes/cite/103B.101/versions.
[34] Jennifer Bjorhus, "Farmers' trench digging raises concerns about wetlands protection in Minnesota," *The Star Tribune,* May 8, 2023.

F. BWSR should integrate bioassessment and climate change into the functional assessment of wetland values

BWSR has the authority to develop rules under WCA that govern the approval of wetland value replacement plans and the "criteria, procedure, timing, and location of acceptable replacement of wetland values."[35] Furthermore, special considerations establish the need to protect endangered and threatened species, rare natural communities, and special fish and wildlife resources. Specifically, if a wetland replacement plan would harm endangered or threatened species, modify a rare natural community, or have a significant adverse effect on a special or locally significant fish or wildlife resource that cannot be functionally replaced, it must be denied.[36] Wetland replacement should not be based only on the quantity of acres, but should also be based on the quality of the wetland to be destroyed: this should include the quality of the biological communities of both aquatic invertebrates and plants, not just rare species. To implement these special considerations, BWSR should integrate a more robust bioassessment process as part of the functional assessment of wetland values, informed by the Index of Biological Integrity that the Minnesota Pollution Control Agency uses for watershed assessment.[37] This tool is a good model because it measures all species in a community, not just the rare species.

To implement Minnesota's Climate Action framework, BWSR should also integrate carbon sequestration into the functional assessment of wetland values. This could be added as an additional special consideration under Minnesota Rule 8420.0515, and the functional assessment process could include factors like the thickness of the organic soil and the density of standing trees like tamarack and black spruce. This would align with BWSR's ongoing work to protect peatlands, which store up to 30% of the world's terrestrial carbon and only occupy 3% of the terrestrial land surface.[38] Minnesota has over 6 million acres of peatlands, more than any other state outside of Alaska, and should integrate the protection of these critical resources and the carbon sequestration they provide as part of the WCA functional assessment process.

G. BWSR should adopt rules that mitigate impacts to perennial, intermittent, and ephemeral streams in Minnesota for the critical ecological services they provide

Statutory amendments in the 2024 legislative session gave BWSR the authority to develop rules with "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)."[39] The Joint Commenters strongly support the need for administrative rule development to protect these critical watercourses. Post-*Sackett*, ephemeral streams are no longer considered WOTUS, and therefore have no federal protection under the CWA. Intermittent streams *may* be considered WOTUS, but the bar is now higher to reach that determination through the "continuous surface connection" standard. In the wake of these changes, the journal *Science*

[35] Minn. Stat. 103G.2242 subd. 1.
[36] Minn. R. 8420.0515 subd. 2-4.
[37] Minnesota Pollution Control Agency, Index of biological integrity https://www.pca.state.mn.us/air-water-land-climate/index-of-biological-integrity.
[38] BWSR, Peatlands – A Restorable, Carbon-Rich Resource https://bwsr.state.mn.us/node/9861.
[39] Minn. Stat. 103G.2242 subd. 1.

published a study in June 2024 on the importance of ephemeral streams to U.S. drainage networks. The researchers found that an estimated 55% of the water that flows out of America's river basins can be traced back to ephemeral streams that only flow periodically but are critical to our nationwide water quality.[40] This follows on earlier studies, such as a 2019 American Fisheries Society (AFS) report on the critical ecological benefits of ephemeral, intermittent, and perennial headwater streams and a 2014 report from the Association of State Wetland Managers on compensatory mitigation practices for streams.[41] AFS reported that headwater streams sustain aquifers and supply clean water for "more than one-third of the U.S. population."[42] Additionally, they sustain aquatic biodiversity, provide critical habitat for fish and other aquatic species, cycle nutrients, and provide flood mitigation. AFS documented that as "many of the 33% of streams in the conterminous western USA mapped as perennial were found to be intermittent or ephemeral."[43] Since these streams act as tributaries to wetlands and navigable waters, impacts to these watercourses are proximate impacts to larger bodies of water.

Headwaters streams can be tributaries to wetlands within and outside of floodplains and are important to the wetland protection goals of WCA, especially for isolated wetlands that have lost federal jurisdiction under the revised WOTUS rule. While the statutory language added in the 2024 legislative session does not mention ephemeral watercourses explicitly, the Joint Commenters ask BWSR to expand its future rule development to include these streams, as "ephemeral headwater streams can support levels of aquatic invertebrate diversity and abundance comparable to, or greater than, those estimated for perennial headwaters, as well as taxa found nowhere else in the watershed."[44] While intermittent streams are often seasonal with occasional groundwater influence and perennial streams have continuous groundwater influence, ephemeral streams are generally considered to be precipitation-based and perched above the water table, with no influence from groundwater. Any future rule development should clearly define what streams are covered and how streams will be delineated, with some upland area included.

Similar to the functional assessment process for wetlands under WCA, the assessment of perennial, intermittent, and ephemeral streams should include biological, wildlife, and fish habitat (aquatic organisms, macroinvertebrates, mollusks, amphibians, endangered species); buffer health if a buffer exists; water quality and applicable TMDL standards; physical stability of the bank and erosivity; meanders, flow volumes and rates as well as pool and riffle complexes; canopy cover; recreational environment; adjacent land use; and downstream resource sensitivity. Potential mitigation activities should include stream restoration; upland buffer requirements; cattle fences; bank stabilization; riffle-pool complexes; drainage system discharge treatment; and stream

[40] Brinkerhoff, Craig B. et al. "Ephemeral stream water contributions to United States drainage networks." Science 384 (2024): 1476-1482.

[41] Zollitsch, Brenda and Jeanne Christie, *Report on State Definitions, Jurisdiction and Mitigation Requirements in State Programs for Ephemeral, Intermittent, and Perennial Streams in the United States*. The Association of State Wetland Managers, 2014.

[42] American Fisheries Society, *Headwater Streams and Wetlands are Critical for Sustaining Fish, Fisheries, and Ecosystem Services*, (2019): 75-76.

[43] *Id.* at 74.

[44] *Id.* at 76.

creation. U.S. Army Corps of Engineers procedures for compensatory mitigation should inform future rule development for headwaters streams in Minnesota.[45]

III. Conclusion

Together, the above concerns raise questions about the impact that the federal *Sackett* decision and recent statutory changes to WCA will have on wetland conservation in Minnesota. To understand the impact of the new agricultural activity exemption under WCA, the Joint Commenters ask BWSR to include greater specificity in exemption application form and publicly available annual exemption evaluation data. To ensure that wetlands in Minnesota are protected to the same extent they were prior to *Sackett*, we ask that, at a minimum, BWSR incorporate the five-year abandonment criteria for prior converted cropland under the Clean Water Act into the implementation of the PCC exemption at the state level. While the five-year abandonment criteria are not explicit in the statutory language of the Clean Water Act, federal agencies have adopted it through the administrative rules it has promulgated to meet the purpose of the statute – BWSR can and should do the same. To ensure that WCA violations are effectively deterred, BWSR should adopt an APO Plan for WCA violations as it has for Buffer Law violations. Additionally, the rules should incorporate bioassessment and climate change requirements as a component of the functional assessment process to ensure that the biodiversity and carbon sequestration functions of wetlands are addressed in replacement plans. Finally, BWSR should adopt rules that mitigate impacts to perennial, intermittent, and ephemeral streams in Minnesota for the critical ecological services they provide.

Respectfully submitted,

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[45] U.S. Army Corps of Engineers South Pacific Division, Regulatory Program Uniform Performance Standards for Compensatory Mitigation Requirements, n.d. https://www.spd.usace.army.mil/Portals/13/docs/regulatory/qmsref/ups/12505.pdf.

Comments from the January 18, 2022 State Register Notice

Minnesota State Register, Vol. 46, No. 29, Page 842

Official Notices

Current Procedural Terminology Code	Type of Service	Procedure Description	Maximum
94729	LAB	CO DIFFUSING CAPACITY, ANY METHOD	120.00
94729-26	LAB	CO DIFFUSING CAPACITY -- PROF COMP ONLY	48.00
94729-TC	LAB	CO DIFFUSING CAPACITY -- TECH COMP ONLY	72.00
95860	LAB	NEEDLE ELECTROMYOGRAPHY (EMG); ONE EXTREMITY	130.14
95860-26	LAB	EMG - ONE EXTREMITY -- PROF COMP ONLY	23.04
95860-TC	LAB	EMG - ONE EXTREMITY -- TECH COMP ONLY	107.10
95861	LAB	EMG - TWO EXTREMITIES	222.93
95863	LAB	EMG - THREE EXTREMITIES	264.65
95864	LAB	EMG - FOUR EXTREMITIES	346.22
95930	LAB	VISUAL EVOKED POTENTIAL (VEP) TESTING CENTRAL NERVOUS SYSTEM,	137.00

TRANSPORTATION

Vocational Rehabilitation Services and Disability Determination Services Consultative Examination (CE) Providers

We will reimburse clinicians performing consultative examinations who must travel to perform a consultative examination at the current IRS mileage rate, effective the date the travel occurs.

Travel in a specially-equipped van: Current rate in Commissioner's Plan, effective the date the travel occurs.

Travel in excess of 50 miles: Current mileage rate plus $50.00 per hour (in 50 mile increments) round trip for clinicians. Clients will be reimbursed at the IRS mileage rate for travel to exams in cities more than 50 miles away from the client's home city, effective the date the travel occurs.

Minnesota Board of Water and Soil Resources (BWSR)

REQUEST FOR COMMENTS for Possible Amendment to Rules Governing Wetland Conservation, *Minnesota Rules*, Chapter 8420; Revisor's ID Number R-04356

Subject of Rules. The Minnesota Board of Water and Soil Resources (Board) requests comments on possible amendments to the rules governing wetland conservation (i.e. the Wetland Conservation Act). The Board is considering rule amendments to:

- reconcile the rule with statute changes from 2011, 2012, 2015, and 2017 – for details on these statute changes, see the wetlands page on the Board's website at ***https://bwsr.state.mn.us/2009-wetland-conservation-act-rule-and-2011-2017-statute-changes***;
- improve outcomes relating to the replacement of unavoidable wetland impacts; and
- as time and capacity allows, implement changes identified during the rulemaking process and other miscellaneous changes that will improve the efficiency, effectiveness, and/or outcomes of the rule.

The Board is publishing this request for comments as supplemental to a request for comments published in the State

Register on October 9, 2015. This supplemental request for comments is necessary because of the passage of time since the first request and additional statute changes that have occurred since 2015. Comments submitted in response to the 2015 request are part of the rulemaking record and will be considered along with comments submitted in response to this request.

Persons Affected. The amendment to the rules will affect many sectors whose activities may influence Minnesota's wetland resources, including landowners and organizations proposing to impact wetlands; local governments responsible for implementing the Wetland Conservation Act; and individuals and organizations with an interest in wetland protection such as environmental, agricultural, development, and public advocacy groups.

Statutory Authority. *Minnesota Statutes*, section 103G.2242, requires the Board to adopt rules governing the approval of wetland value replacement plans. 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; the administrative, monitoring, and enforcement procedures to be used; and a procedure for the review and appeal of decisions under this section.

Public Comment. Interested persons or groups may submit comments or information on these possible rules in writing until 4:30 p.m. on March 19, 2022. The Board does plan to appoint an advisory committee to comment on the possible rules.

Rules Drafts. The Board has not yet drafted the possible rule amendments.

Agency Contact Person. Written comments, questions, requests to receive a draft of the rules when it has been prepared, and requests for more information on these possible rules should be directed to: Les Lemm at the Minnesota Board of Water and Soil Resources, 520 Lafayette Road North, St. Paul, MN 55155, phone 651-296-6057; or by *email* at ***les.lemm@state.mn.us***.

Alternative Format. Upon request, this information can be made available in an alternative format, such as large print, braille, or audio. To make such a request, please contact the agency contact person at the address or telephone number listed above.

NOTE: Comments received in response to this notice will not necessarily be included in the formal rulemaking record submitted to the administrative law judge if and when a proceeding to adopt rules is started. The agency is required to submit to the judge only those written comments received in response to the rules after they are proposed. If you submitted comments during the development of the rules and you want to ensure that the Administrative Law Judge reviews the comments, you should resubmit the comments after the rules are formally proposed.

Dated: January 18, 2022

John Jaschke, Executive Director
Minnesota Board of Water and Soil Resources

From: Kristina Bloomquist
To: Lemm, Les P (BWSR)
Subject: WCA Rulemaking Comments
Date: Monday, March 14, 2022 3:37:44 PM
Attachments: image001.png

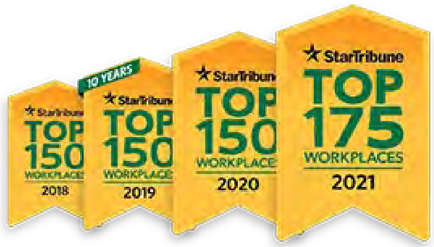
Les,

Please see below for my comments regarding WCA.

- Definition of utility: include structures associated with utilities such as lift stations and manholes, as they are necessary for the utility to function.
- Ditch shifting as a form of self-mitigation should be addressed, for example if a road ditch wetland that cannot be proven as incidental is shifted as part of a road widening, no mitigation should be required if the cross section of the proposed wetland will remain the same.
- Minor watershed should be removed from the wetland replacement siting. The BWSR site to search for credits does not provide the minor watershed of the banks, and with the amount of minor watersheds to banks ratio it is unlikely that a bank will be present in the same minor watershed as the impact location.
- Definitions of reasonable and practicable should be defined in the context of section 103G.222, subdivision 3 (d)
- With files being available and stored electronically, the need to retain decisions for only 10 years should be abolished. In perpetuity or as long as the LGU remains in place, would be more appropriate.

Thank you,

Kristina Bloomquist
Senior Natural Resources Specialist
Bolton & Menk, Inc.
7533 Sunwood Drive Northwest #206
Ramsey, MN 55303
Phone: 763-433-2851 x3324
Mobile: 507-327-6014
Bolton-Menk.com


10 YEARS
StarTribune TOP 150 WORKPLACES 2018
StarTribune TOP 150 WORKPLACES 2019
StarTribune TOP 150 WORKPLACES 2020
StarTribune TOP 175 WORKPLACES 2021

March 16, 2022

Les Lemm
BWSR
520 Lafayette Road North
Saint Paul, MN 55155

Regarding: Public comments related to Wetland Conservation Act rulemaking

Dear Mr. Lemm,

Outlined below are my comments relating to the news release dated January 20, 2022.

-The priority order for wetland replacement siting should be as follows: 1) minor watershed; 2) major watershed; 3) BSA; 4) other BSA. There should be absolutely no clauses that allow for the circumvention of this.

-Wetland Bank owners should have representation as stakeholders.

-In Lieu fee banking should not be allowed for any wetland impacts if wetland credits are available, regardless of location or BSA.

Sincerely,

Jeremy Donabauer

MEEKER COUNTY SOIL & WATER SWCD CONSERVATION DISTRICT

522 South Johnson Drive • Litchfield, MN 55355
320.693.7287
www.meekerswcd.com

March 1, 2022

BWSR Wetlands Section Manger
Less Lemm
520 Lafayette Road North
St. Paul, MN 55155

RE: WCA Rulemaking Comments

Mr. Lemm,

There have been positive strides made in recent years with the working relationship with NRCS/Swampbuster provisions and WCA as it relates to wetland replacement. The use and implementation of the Agricultural Wetland Bank has streamlined the wetland replacement process for both staff and landowners. This works well when the Certified Wetland Determination matches wetlands that are also regulated by WCA.

Many of the "old" Certified Wetland Determinations have matched up well with what would be regulated by WCA. More often, these wetlands would be on a Certified Wetland Determination, and they would end up meeting a WCA Exemption. Due to the NRCS process, a number of these Wetland Determinations have been considered "Not Certified" for several different reasons and have required a new wetland determination to be completed. These redeterminations have changed many of the labels for the wetlands, and in a number of cases, completely removed Wetland and Farmed Wetland labels.

These redeterminations have caused confusion for landowners. Many landowners now get the impression that their fields are free of any wetland restrictions, and neglect to check with other agencies with interest in wetlands before new drainage work is planned and completed. While it does state on the NRCS forms that landowners need to check with other State and Federal Agencies concerning wetland compliance, often this is overlooked. This can be a very costly mistake for landowners, in some cases costing hundreds of thousands of dollars to correct.

From a landowner perspective this can be extremely confusing. Why would a wetland be a wetland for one agency and not another? As a landowner I would get the impression that if it is a wetland, it's a wetland, and if its not, its not.

We understand each agency has a different process for how these determinations are made. Due to these different processes, we have different outcomes. This is a problem.

MEEKER COUNTY SOIL & WATER SWCD CONSERVATION DISTRICT

522 South Johnson Drive ▪ Litchfield, MN 55355
320.693.7287
www.meekerswcd.com

Meeker SWCD is requesting that there is unity among agencies making wetland determinations for Wetlands in a cultivated field/Wetlands located on agricultural land. There are several options that could be considered that would allow for agencies to have a unified front on these wetland situations. A few considerations we have discussed locally would be to introduce a new exemption that would align Certified Wetland Determinations and WCA regulated wetlands on agricultural land. Or a process could be developed with NRCS to allow for WCA review of Certified Wetland Determinations before they are sent to the landowners.

Meeker SWCD welcomes the opportunity to further discuss this issue and possible solutions during this rulemaking process.

Thank you,

Joe Norman
District Technician
Meeker SWCD

Robert Schiefelbein
Board Chair
Meeker SWCD

March 14, 2022

Les Lemm
Wetlands Section Manager
Minnesota Board of Water and Soil Resources
520 Lafayette Road North
St. Paul, MN 55155

RE: Possible Amendments to Rules Governing Wetland Conservation, Minnesota Rules, Chapter 8420; Revisor's ID Number R-04356 – MnDOT Comments

Dear Mr. Lemm,

Staff at the Minnesota Department of Transportation (MnDOT) appreciate the opportunity to comment on the possible amendments to the Wetland Conservation Act (WCA) rules. MnDOT has participated in state wetland rules development since the inception of the WCA. As a transportation authority and WCA local government unit, we are involved in WCA administration and compliance activities on a daily basis.

As a result, MnDOT has a significant interest in any potential amendments to the rule, especially in the areas of wetland replacement siting and development of the in-lieu fee mitigation program. We are also interested in supporting efforts to clarify the current rule to make it more efficient and user-friendly both for local government units and for regulated parties.

We look forward to continuing dialogue on possible WCA rule amendments, including through participation on stakeholder or advisory groups.

Thank you for your consideration, and please feel free to contact me should you have any questions or need additional information.

Sincerely,

for

Marni Karnowski
Chief Environmental Officer
Director, Office of Environmental Stewardship

CC: Mark Gieseke, MnDOT Deputy Commissioner
Michael Beer, MnDOT Assistant Commissioner, Engineering Services
Jay Hietpas, MnDOT Assistant Commissioner, Operations
Kristine Elwood, MnDOT Assistant Commissioner, State Aid
Erik Rudeen, MnDOT Government Affairs

From:	Caleb Anderson
To:	Lemm, Les P (BWSR)
Cc:	Demmer, David (BWSR); Jeremy A. Williamson
Subject:	BWSR"s MN 8420 Rule Making
Date:	Wednesday, March 16, 2022 9:58:36 AM

Mr. Lemm:

It is my understanding that BWSR is accepting comments for possible changes to MN 8420. Pine County Planning and Zoning staff, who administer WCA on behalf of Pine County, recommend that BWSR consider changing the language contained in 8420.0420 Subp 8(C). The language is cumbersome and difficult to interpret. My interpretation is that item 3 in the bottom of said section, when read at face value, limits all de minimis exemptions to not exceed 400 square feet. If that is the intent, then the language above, providing 10,000 square feet of de minimis exemption for wetland types 1,2,6, and 7 (Subp 8A1a), is essentially meaningless and thus misleading.

Respectfully submitted by:
Caleb Anderson
Land & Resources Manager
Pine County Planning, Zoning, and Solid Waste Dept.
PH: 320-591-1657
Caleb.anderson@co.pine.mn.us
1610 Hwy 23 N
Sandstone, MN 55072

From: DAN SCHULTZ
To: Lemm, Les P (BWSR)
Subject: Amendments to State"s Wetland Conservation Act
Date: Thursday, January 20, 2022 1:53:17 PM

Hello Les Lemm,

I hope any amendments to the State's Wetland Conservation Act are going in the right direction. No more wetlands should be drained or adjusted. Any new land usage requests, if anything, should be required to restore a percentage of wetlands in an area that previously had them.

The value of wetlands for filtering pollution, providing essential wildlife habitat, and creating a more balanced ecosystem overall, are major values that Minnesotans care deeply about. These things are what makes Minnesota a nice place to live, and must be protected and expanded. I have seen homeowner associations in new developments preserve their wetlands and meadows and market them as an amenity. They have great walking paths, and lots of incredible wildlife. This will hopefully become the norm sooner rather than later.

After many decades of loss, wetlands must be preserved and restored everywhere for human health and wellbeing. Ducks and migratory birds need them. Wild Rice areas need them. Many of our threatened plant and animal species need them: wood turtles, fireflies, moose, frogs, etc., etc.

Thank you,

Daniel Schultz

From:	Fuchs, Dennis - NRCS-CD, Waite Park, MN
To:	Lemm, Les P (BWSR)
Cc:	Berg, Greg - NRCS-CD, Waite Park, MN; Cymbaluk, Wayne - NRCS-CD, Waite Park, MN
Subject:	public comments to inform Wetland Conservation Act rulemaking
Date:	Wednesday, January 26, 2022 3:08:30 PM

Les,

The Stearns County SWCD would like to submit the following comments:

Stormwater and hydrology impacts to wetlands has been increasing. Examples:

- Stormwater ponds adjacent to wetlands (33rd avenue south in St. Cloud)
- Stormwater discharge to wetlands (recent Sauk Centre application)
- Changes to watersheds or drainage areas to wetlands (recent Sauk Centre application)

Banking process needs to be simplified, if greater participation is the goal.

I have cc'd Greg and Wayne on this email if have you any questions.

Thank you for the opportunity to comment.
Dennis

Dennis J. Fuchs
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Stearns County Soil and Water Conservation District
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STEARNS COUNTY SOIL & WATER SWCD CONSERVATION DISTRICT

wetland credit resources for buyers & sellers

2022 BWSR Rulemaking Comments

1. Who are “Stakeholders”?: 2015 changes to section 103B.101 require BWSR to work with wetland stakeholders. Wetland bankers need to be included as a stakeholder throughout BWSR’s rulemaking process. The significant investments and risks undertaken by wetland bankers allow for an efficient wetland replacement process for applicants, LGUs, and BWSR, and there is no greater stakeholder in the wetland banking system than wetland bankers themselves.

2. Siting Criteria: One statute change that will significantly affect wetland bankers and their investments is the 2015 siting criteria change to 103G.222, Subdivision 3(c). Since WCA’s inception, wetland replacement has been structured and touted as a “watershed-based” system. When the statute was changed in 2015 to eliminate minor and major watersheds from the siting priority order WCA walked away from this watershed-based replacement priority. Wetland bankers have made significant financial investments based on this watershed-based siting priority and rule changes could nullify these investments, especially in developing areas where wetland losses and land values are high. Wetland bankers need to be at the table when siting rules are discussed and drafted.

3. BWSR Conflicts of Interest: Section 103G.2242, subdivision 2(b) was amended in 2015 to require TEP members with a financial interest in a wetland bank to disclose that interest, in writing, to the TEP and LGU. BWSR and LGUs have a conflict of interest when they have a financial interest in, or propose, wetland bank projects and then review and approve projects they directly benefit from financially. These conflicts are not currently disclosed as required by statute and for an LGU or BWSR to disclose a financial interest to themselves has no effect. Any time an entity is allowed to propose, review, and decide on their own project or a project they have an existing financial interest in creates a conflict of interest. No LGU or decision making authority should be allowed to review or approve their own project or a project they have direct interest in, financial or otherwise. WCA rules need to include information about conflicts of interest and procedures for the public and affected parties to learn of these conflicts and seek administrative remedies when they exist.

4. BWSR Fees and Fiscal Responsibility: As noted previously, wetland bankers and their credits generate and pay significant fees to BWSR. Statute directs BWSR to spend wetland bank fees to administer the wetland bank. Despite this the wetland bank review and approval process is often delayed by BWSR review times, information demands, and slow response times. WCA rule should require BWSR to provide an annual reporting of all fees collected and how these fees are used. 2015 statute changes allowed BWSR also collects easement stewardship fees (separate from easement acquisition fees) from wetland banker’s and annual reporting of all easement stewardship fees collected and used for long term protection activities should be required.

5. Public Noticies: BWSR should implement, similar to the Corps of Engineers, a public notice process for all new wetland banking projects. This should occur immediately upon receipt of a new Draft Prospectus and include an online repository of documents available for public download and review.

Eric Trelstad, Owner
12940 Overlook Road, Dayton, MN 55327
info@wetlandcreditagency.com
612-360-4700

WETLAND CREDIT AGENCY

Comments from the October 19, 2015 State Register Notice

Minnesota State Register, Vol. 40, No. 16, Page 458

Official Notices

Minnesota Board of Water and Soil Resources (BWSR)

REQUEST FOR COMMENTS on Possible Amendment to Rules Governing Wetland Conservation, *Minnesota Rules*, Chapter 8420; Revisor's ID Number R-04356

Subject of Rules. The Minnesota Board of Water and Soil Resources (Board) requests comments on possible amendments to the rules governing wetland conservation (i.e. the Wetland Conservation Act). The Board is considering rule amendments to:

Ø reconcile the rule with statute changes from 2011, 2012, and 2015 – for details on these statute changes, see the wetlands page on the Board's website at ***http://www.bwsr.state.mn.us/wetlands/index.html***;

Ø improve outcomes relating to the replacement of unavoidable wetland impacts, including provisions to establish priorities and replacement ratios that encourage the use of high priority areas for wetland replacement, develop the standards and procedures for an in-lieu fee wetland replacement program, establish new actions eligible for wetland replacement credit in the greater than 80 percent pre-settlement wetland area of the state (northeast), and modify the requirements and process for wetland replacement; and

Ø as time and capacity allows, implement changes identified during the rulemaking process and other miscellaneous changes that will improve the efficiency, effectiveness, and/or outcomes of the rule.

Persons Affected. The amendment to the rules will affect many sectors whose activities may influence Minnesota's wetland resources, including landowners and organizations proposing to impact wetlands; local governments responsible for implementing the Wetland Conservation Act; and individuals and organizations with an interest in wetland protection such as environmental, agricultural, development, and public advocacy groups.

Statutory Authority. *Minnesota Statutes*, section 103G.2242, requires the Board to adopt rules governing the approval of wetland value replacement plans. 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; the administrative, monitoring, and enforcement procedures to be used; and a procedure for the review and appeal of decisions under this section.

Public Comment. Interested persons or groups may submit comments or information on these possible rules in writing until 4:30 p.m. on December 18, 2015. The Board does plan to appoint an advisory committee to comment on the possible rules.

Rules Drafts. The Board has not yet drafted the possible rule amendments.

Agency Contact Person. Written comments, questions, requests to receive a draft of the rules when it has been prepared, and requests for more information on these possible rules should be directed to: Les Lemm at the Minnesota Board of Water and Soil Resources, 520 Lafayette Road North, St. Paul, MN 55155, **phone:** (651) 296-6057; or by **e-mail** at: ***les.lemm@state.mn.us***.

Alternative Format. Upon request, this information can be made available in an alternative format, such as large print, braille, or audio. To make such a request, please contact the agency contact person at the address or telephone number listed above.

NOTE: Comments received in response to this notice will not necessarily be included in the formal rulemaking record submitted to the administrative law judge if and when a proceeding to adopt rules is started. The agency is required to submit to the judge only those written comments received in response to the rules after they are proposed. If you submitted comments during the development of the rules and you want to ensure that the Administrative Law Judge reviews the comments, you should resubmit the comments after the rules are formally proposed.

Dated: October 9, 2015

John Jaschke, Executive Director
Minnesota Board of Water and Soil Resources

BATC
BUILDERS ASSOCIATION
OF THE TWIN CITIES

December 17, 2015

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

Mr. Lemm,

I am submitting this letter on behalf of the Builders Association of the Twin Cities (BATC), in response to the Minnesota Board of Water and Soil Resources' recently noticed process for amending the Wetland Conservation Act Rules (MN Rule Chapter 8420). By way of background, BATC represents over 1,100 member firms engaged in all phases of the home building, land development and remodeling industries in the Twin Cities area, including contractors, sub-contractors and suppliers. BATC is dedicated to providing a diverse selection of quality and affordably-priced homes in our region.

BATC has been a long-time stakeholder and participant in BWSR policy forums and looks forward to participating in the upcoming rulemaking process. We reserve specific comment for the rulemaking process itself, but offer the following general comment as this two-year process commences.

Wetland Stakeholder Coordination

The 2014 legislative directive for BWSR to work with wetland stakeholders 'to foster mutual understanding and provide recommendations for improvements to the management of wetlands…' is strongly supported by BATC. The establishment of a standing work-group is an important step to formalize communications channels and to develop policy recommendations. BATC seeks representation on the standing work-group and looks forward to providing Twin Cities regional development perspective to BWSR and fellow work-group members.

In-Lieu Fee Program

The establishment of an in-lieu fee (ILF) program and the requirement that an ILF be approved by the US Army Corps of Engineers (COE) provides project flexibility and a common-sense approach for wetland replacement. Acknowledging the likelihood of a lengthy implementation period for the ILF program to achieve appropriate federal approval, BATC emphasizes the need to craft the ILF program with language that provides for the presence of an essential nexus and reasonable fee structure.

Mitigation Fees Established

BWSR now has the authority to recoup costs associated with establishing easements or other long-term protection mechanisms on land used for wetland replacement. In the upcoming rulemaking process, BATC supports the creation a fee structure that is fair, reasonable and proportionate to the costs associated with the underlying activity.

Conclusion

BATC supports the goals of WCA improvement that will result in a more efficient process and improved conservation outcomes. Concurrently, BATC challenges BWSR and its fellow stakeholders to consider the cost impacts on the end users impacted by the WCA rules. For BATC members, these are Twin Cities homeowners looking to build their home while facing regulatory costs that are among the highest in the nation. As we enter into this process we aim to keep this issue at the forefront as we attempt to balance conservation goals and affordability for homeowners.

Respectfully,

David Siegel
Executive Director

CROW WING COUNTY
MINNESOTA

Land Services Department
Mark B. Liedl, Director

322 Laurel Street
Brainerd Minnesota 56425

Environmental Services:
218-824-1125
environmental.services@crowwing.us

Property Valuation and Classification:
218-824-1010
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Public Land Management:
218-824-1115
landservices@crowwing.us

December 15, 2015

Les Lemm
Wetland Conservation Act Coordinator
Minnesota Board of Water & Soil Resources
500 Lafayette Road North
St. Paul, MN 55155

RE: Comments related to WCA rulemaking

Crow Wing County hereby offers the following comments for consideration during the rule-making process for amending the Minnesota Wetland Conservation Act (WCA). Comments are in order by specific sections of WCA, as found in Minnesota Rules Chapter 8420.

8420.0111 Definitions.

It is recommended to define the terms "incidental" and "non-jurisdictional" so it can be clearly determined what WCA has jurisdiction over and avoid confusion with past language in WCA that mentioned such terms.

8420.0415 No-loss criteria.

It is recommended that BWSR grant LGUs flexibility in allowing a "no-loss" for buildings that have been built over wetlands to be replaced without being subject to sequencing and replacement. In recent years, Crow Wing County has experienced severe ice damage along many larger lakes. This has resulted in significant damage to shorelines, including historic boathouses. Landowners seeking to replace these pre-ordinance structures under Statute 394 have often wanted to move the new structure back slightly. In addition to causing issues with Statute 394, this often causes problems with WCA because some of these areas are wetland, even though converted to a lawn many years ago (pre-WCA). One consideration would be to require performance standards such as a shoreline buffer, which would be adopted locally along with the granting of a no-loss.

8420.0420 Exemption Standards.

8420.0420 Subp. 2. Agricultural Activities. (E: Aquaculture)

It is recommended that this exemption be removed from the rule. It is our understanding that the federal permit no longer exists for this activity. If BWSR does keep it in the rule, it is requested that DNR standards be incorporated (directly or by reference) to assist LGUs.

8420.0420 Subp. 8. De Minimis.

It is recommended that BWSR implement a more gradual or incremental scale on de minimis exemption amounts. There is a drastic change in the De Minimis exemption amount (especially in a >80% county like Crow Wing) from 400 square feet to 10,000 square feet once outside Shoreland or from 100 square feet to 10,000 square feet from a cattail-infested type 3 to a more natural looking type 2. It is very difficult to explain this to landowners. Advances in GIS availability have allowed LGU's and landowners the ability to have a better understanding of wetland locations relative to lakes and streams.

It is also recommended that BWSR better define what a project is for this exemption. If the exemption is only supposed to apply once for any type of current and future development on a project such as "land construction/development," that would be considered the project as some BWSR wetland specialists have indicated in years past. Defining the duration limits and scope of a project is very challenging especially when two or more exemptions could be granted concurrently for related, but truly separate projects.

Also, there is apparently internal BWSR guidance related to applying the appropriate wetland type for use with this exemption, especially as it relates to the 300 foot rule and larger wetland complexes. It is recommended that this be clarified in the rule to better guide LGUs.

8420.0420 Subp. 9. Wildlife Habitat.

It is recommended that BWSR provide more flexibility to LGUs under the wildlife habitat exemption. The question is whether there is still a need to require the SWCD to certify these exemptions by using the lengthy and dated guidance document referenced in the rule. In many cases, SWCD staff do not have any more knowledge related to wildlife habitat than LGU staff. Flexibility is important to consider particularly if more current or site-relevant guidance from a different plan or Department (i.e. DNR) is available.

8420.0520 Sequencing.

8420.0520 Subp. 3. C
It is recommended that BWSR clarify WCA's avoidance and alternatives analysis especially as it relates to the degree of off-site consideration that should be used as part of the avoidance discussion. Does this vary depending on residential, commercial or transportation projects? Is the size or economic scope of the project relevant? For example, is an individual landowner to be held to one standard while a large commercial development or road project be held to a different one? This also begs the question of how far LGUs need to get into the economics of projects. What sort of economic analysis should be required for these projects? Is it right to ask for that type of information?

It is also recommended that BWSR clarify what situations always meets avoidance according to MN Rules Chapter 8420, such as elevated boardwalks compared to a fill path to the lake.

8420.0705 Establishing a Wetland Bank Site.

It is recommended that each wetland bank complete a MnRAM that would be available to LGUs and consultants for assistance in determining the applicability of sequencing flexibility (8420.0520 subp. 7a.).

8420.0745 Withdrawals and Transfers.

It is recommended that BWSR develop a simpler way to transfer credits once a project is approved. One option would be to implement an electronic system which would replace the current paper form (which is cumbersome, time consuming, limiting (especially for projects with several different ratios) and not clear on who should be signing at each step). BWSR does not have a consistent process when it comes to reporting the amount of credits being transferred as some parts of this process require rounding to 2 decimals for the acreage amount, while some parts have 4 decimals and other utilize square feet.

It is recommended that BWSR modify the rule to have a consistent standard unit of measure across the entire rule and related forms.

8420.0830 Local Comprehensive Wetland Protection and Management Plan.

It is recommended that BWSR develop guidance to help LGU's develop a plan that would be approved by the Army Corp of Engineers. Many LGUs are hesitant to adopt a Local Comprehensive Wetland Protection and Management Plan because of the struggle to get the Army Corps of Engineers to approve the plan. It is recommended that BWSR provide examples of counties with approved Local Comprehensive Wetland Protection and Management Plan to other LGU's.

8420.0900 Enforcement Procedures.

Subp. 3. B. Restoration and Replacement Orders

It is recommended that LGU's be given the authority to write Restoration and Replacement Orders. Currently SWCD's are the only LGU that can write a Restoration and Replacement Orders. One option to consider would be that the TEP or SWCD review and comment on the order, but to have rule/statute require a certain person/entity complete the order seems like an unnecessary hurdle and adds delay to efficient administration of WCA, especially when many counties have staff that are equally capable of writing these orders.

Thank you for providing the opportunity to comment.

Sincerely,

Chris Pence
Land Services Supervisor

cc. County Board of Commissioners
Mark Liedl, Land Services Director
Mitch Brinks, Water Protection Specialist
Cade Steffenson, BWSR Wetland Specialist

Lemm, Les P (BWSR)

From: Mikeo <mikeobriens@gmail.com>
Sent: Friday, December 18, 2015 2:19 PM
To: Lemm, Les P (BWSR)
Subject: Rule Changes to WCA

I am co-president of Crow Wing County LARA (Lakes and Rivers Alliance) and also president of the Lower South Long Lake Improvement District. I apologize for waiting until the last minute to respond. Too busy even in retirement!

Basically our concern is with the wetland replacement rules. We believe the intent is or should be applied to situations where roads and agricultural areas are involved not where wetlands abut lakeshore, rivers or streams. We have had a few incidents in Crow Wing County where individuals were allowed to fill in wetlands near or abutting lakes, rivers or streams then allowed to purchase credits in other counties.

We realize that the wetland replacement program is statewide and that Crow Wing County has no wetland areas for replacement to purchase either by governmental or private sale. By allowing this to happen lakes,rivers and streams are endangered and purchases of wetland areas outside of the county do nothing to mitigate the negative impact here in Crow Wing County.

We believe the best practices should be to enforce the "least amount of negative impact" to the environment.

Thank You!

Regards,

Mike O'Brien

Life is full of choices. Choices have consequences

sent from my Acer C720p Chromebook

Lemm, Les P (BWSR)

From:	Norris, Doug J (DNR)
Sent:	Thursday, December 17, 2015 2:57 PM
To:	Lemm, Les P (BWSR)
Cc:	Hovey, Tom E (DNR); Gleason, John (DNR); Mixon, Kevin (DNR); Engstrom, Jennifer N (DNR); Sullivan, Colleen (DNR); Pierce, Ann M (DNR)
Subject:	WCA Rule Revision Topics

Les,
Per the State Register Notice soliciting input on the WCA rule revisions (10-19-2015), here are some potential revisions that the DNR would like to at least discuss. I circulated the Notice throughout the DNR and received very little response, but I want to be clear that we may identify issues in addition to those listed here as the rule revision process proceeds.

- 8420.0111, Definitions, Subp. 26, Fill – We've had reports of solar installations being installed in wetlands without WCA authorization because the panels are mounted on posts, even though there is significant shading and a need to continuously cut the wetland vegetation. Need to discuss if the existing definition of fill is clear enough.

- 8420.0415, No-Loss Criteria, Paragraph D – Revise the language to better clarify the intent of this provision.

- 8420.0515, Special Considerations -- Clarify that Subpart 2 (Endangered and threatened species) and Subpart 3 (Rare natural communities) only apply to resources affected by activities authorized under a wetland replacement plan, including proposed replacement areas. For Subpart 3, consider whether to add a statement that compensatory mitigation may be considered in determining whether there will be permanent adverse effects (currently in guidance).

- 8420.0526. Actions Eligible for Credit -- Allow the restoration of public waters wetlands as compensation for wetland impacts authorized by a WCA replacement plan under certain circumstances.

- 8420.0544, Replacement for Public Transportation Projects, Paragraph I – The reference to "impacts to public waters" should be changed to "impacts to the wetland areas of public waters" in order to be consistent with statute (103G.222, Subd. 1(m)).

We look forward to participating in the rule revision process. As always, please contact me if we need to discuss further. Thanks.

Doug Norris
Wetlands Program Coordinator
Minnesota Dept. of Natural Resources
Division of Ecological and Water Resources, Box 25
500 Lafayette Road, Box 25
St. Paul, MN 55155
651-259-5125
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IRON MINING ASSOCIATION OF MINNESOTA

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

324 West Superior Street Suite 502 Duluth, Minnesota 55802 www.taconite.org Phone (218) 722-7724

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 DNRs 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,

Craig Pagel
President
Iron Mining Association of Minnesota

LAKE OF THE WOODS COUNTY

Soil & Water Conservation District
P.O. Box 217
Baudette MN 56623
Phone: (218) 634-1842 ext 4

Land & Water Planning Office
206 8th Ave SE Suite #290
Baudette MN 56623
Phone: (218) 634-1945

TO: Les Lemm
Wetland Conservation Act Coordinator
Minnesota Board of Water and Soil Resources

FROM: Mike Hirst, Resource Technician
Josh Stromlund, Land & Water Planning Director

RE: Minnesota Wetland Conservation Act Rule Amendments
Minnesota Rules, Chapter 8420
Revisor's Number R-04356

DATE: December 18, 2015

Please consider the following comments to be addressed during the rule making process that has been initiated by the Board of Water and Soil Resources (BWSR). While we fully recognize that some of the comments relate to statute, we feel compelled to provide context in support of appropriate rule and/or statute changes.

Wetland Banking vs. Project-Specific Wetland Mitigation Under a Permit to Mine

During the 2011 Legislative session, Minnesota Statute §103G.005, subdivision 10e, was amended to establish the Department of Natural Resources (DNR) as a local government unit (LGU), for wetland banking projects established solely for replacing wetland impacts under a permit to mine (PTM) under Minnesota Statute §93.481. The intent was to increase flexibility for the DNR and mining companies, while also increasing transparency for local governments and other interested parties, as the banking process provides a formal role for the locals and BWSR.

Minnesota Statute §93.481 establishes the boundaries of the proposed mining area and reclamation or restoration operations while, MN Rule 8420.0200, subpart 1, D, establishes the DNR as the approving authority for activities associated with projects requiring a PTM under Minnesota Statute §93.481. Minnesota Statute §103G.222, subdivision 1, provides the link to a wetland replacement and mining reclamation plans. A reclamation plan is specific to an established PTM boundary; therefore, any off-site (outside the PTM boundary) project-specific mitigation is outside of DNR's authority to approve under a PTM, and subject to approval of all LGU's in accordance with MN Rule 8420.0200, subpart 1, H. This provision is not being complied with and should be clarified and reinforced in the new rule.

We agree that for determining wetland impacts and on-site mitigation, within the established PTM boundary, it is appropriate for DNR Lands and Minerals to address that through their PTM process. It is incorrect to believe that when the project-specific wetland mitigation is located off-site, in a different county, and many miles away, it is covered under the PTM process without any LGU approval. That position is not only unsupported, but contrary to both the intent and plain language of statute and rule.

Recommendations

1. Clarification of MN Rule 8420.0200, subpart 1, D, is warranted to formally establish DNR as a LGU for project-specific wetland replacement conducted under a permit to mine.

2. Clarify and enforce 8420.0200, subpart 1, H, which applies to off-site wetland mitigation.

3. Utilize MN Rule 8420.0200, subpart 1, J.

4. Clarification of MN Rule 8420.0111, subparts 55 and 67, is warranted to further define what constitutes a wetland banking and a project-specific wetland mitigation project.

5. Clarification of MN Rule 8420.0930, subparts 2 and 3 is warranted. Additional language needs to recognize existing mining operations and new wetland replacement plans.

6. Clarification of MN Rule 8420.0930, subpart 4, is warranted to ensure the BWSR has oversight of the credits generated. The credits can be used to offset mining-related wetland impacts or be sold on the open market.

Siting Requirements for Wetland Replacement

Wetland mitigation siting requirements, specifically Minnesota Statute §103G.222, subdivision 3, was amended by the 2011 and 2015 Legislative sessions. The most recent Legislative change directs the BWSR to improve the siting and targeting of wetland replacement, including the use of high priority areas, through replacement ratios and BSA priorities. While we are encouraged by the concept of using high priority areas for wetland mitigation, currently, there is no incentive or requirement to utilize the high priority areas.

Recommendations

1. Modification of the current siting criteria is warranted. An additional step which identifies high priority areas must be incorporated to ensure these areas are included in the review of potential mitigation opportunities.

2. The establishment of replacement ratios will be directly related to this item. Make it simple for everyone to understand.

3. Specify what a high priority area will consist of. Will it be a major or minor watershed, county or BSA, or a specific area/corridor identified by section, township and range?

4. Establish a process by which the LGU can work with the BWSR in designation of high priority areas.

BSA 1 Wetland Impacts Replaced in BSA 2

Currently, wetland impacts in BSA 1are allowed to be replaced in BSA 2 with no increased replacement ratio. Minnesota Statute §103G.222, subdivision 1, states, *"For project-specific wetland replacement completed prior to wetland impacts authorized or conducted under a permit to mine within the Great Lakes and Rainy River watershed basins, those basins shall be considered a single watershed for purposes of determining wetland replacement ratios."*

As mentioned above, the most recent Legislative change directs the BWSR to improve the siting and targeting of wetland replacement, including the use of high priority areas, through replacement ratios and BSA priorities.

Recommendation

1. Clarification of MN Rule 8420.0522, subpart 4, B, is warranted by removing the connection between BSA 1 and BSA 2. If the intent of the Legislation is to further the concept of public value of wetland replacement, severing these BSA's is essential and is consistent with the intent of the Legislature.

Buffers for Mitigation Projects

There has been much discussion regarding existing wetland areas qualifying as buffer credit according to MN Rule 8420.0526, subpart 2. Although a buffer may be required according to MN Rule 8420.0522, subpart 6, the current language allows the LGU to vary the standards in this subpart based upon the recommendations by the TEP. However, the language in this subpart doesn't specify what standards the LGU is allowed to vary from. For example, can the LGU vary from the upland standard and utilize existing wetland as buffer, or the minimum average width requirement, or can the LGU vary from the requirement of a buffer completely?

Depending on the location of the proposed wetland mitigation site, there may not be any upland associated with the proposed site. In some instances, the existing wetland, proposed as buffer, would not qualify for preservation credit as it would not meet the criteria as outlined in MN Rule 8420.0526, subpart 9; however, the existing wetland, if included as buffer, would further the sustainability of the overall wetland mitigation site.

If the purpose of wetland replacement is to ensure adequate replacement of lost public value from unavoidable impacts, it would make sense to include existing wetland as buffer to further the purpose of MN Rule 8420.0500, .0522, and other pertinent subparts. It shouldn't matter if the buffer is upland or wetland; there still resides an undisputed fact that there is public value in a buffer.

Recommendations

1. Clarification of MN Rule 8420.0526, subpart 2, is warranted to include existing wetland areas as buffer.

2. Clarification of what standards the LGU may vary from in MN Rule 8420.0522, subpart 6 is warranted.

3. In certain circumstances, the buffer (wetland or upland) has unique or rare species, provides unique functions, and contributes to overall value of the project. Therefore, keeping a sliding scale for credit allocation allows for flexibility to encompass these situations.

4. Define a "buffer" in MN Rule 8420.0111.

5. Clarification of MN Rule 8420.0100, subpart 2, is warranted as it needs to be re-worded such as, "…replace any wetland impact with another area of at least equal function and value."

De minimis

During the 2012 Legislative session, Minnesota Statute §103G.2241, subdivision 9, which is specific to MN Rule 8420.0420, was amended to add clarity. While clarity has been provided in certain parts of statue and rule, it still is complicated and administratively burdensome in others. In order to lessen the complication and administration, removal of MN Rule 8420.0420, subpart 8, C, and the 20 square feet de minimis amount should be considered.

Recommendations

1. Remove MN Rule 8420.0420, subpart 8, C.

2. Remove those parts of MN Rule 8420.0420 referencing the 20 square feet de minimis requirement.

Preservation

During the 2011 Legislative session, Minnesota Statute §103.2251 was amended to allow the use of preservation regardless of property ownership in the greater than 80% area. Prior to this change, the use of preservation was strictly limited to public lands in the greater than 80% area. MN Rule 8420.0526, subpart 9, is self-explanatory, protection of an unique resource, while the use of Exceptional Natural Resource Value (ENRV), MN Rule 8420.0526, subpart 8, requires restoration and protection. Because these two subparts are very similar and the use of preservation is an important component of an ENRV project, they should be merged into a single action eligible for credit.

During the 2015 Legislative session, MN Statute §103B.3355 was amended to require the BWSR to establish high priority areas of the state for preservation, enhancement, restoration, and establishment of wetlands where these actions would have a high public value. Because preservation is currently limited to the greater than 80% area and in order to comply with the intent of the Legislature, the option to utilize preservation will have to be allowed statewide.

Recommendations

1. Merge MN Rules 8420.0526, subparts 8 and 9, into a single action eligible for credit. In the guidance document for ENRV projects, a table is present which outlines potential credit allocation. This table could be simply modified to include a preservation project with no restoration activities.

2. Keep the subparts separate but, increase the credit allocation for MN Rule 8420.0526, subpart 9, to allow for unique sites.

3. The use of MN Rule 8420.0526, subpart 9, should be allowed on a statewide basis.

In conclusion, we thank you for the opportunity to provide comments to the current rule making process. It is the intent of these proposed recommendations to further improve upon the efficiency and effectiveness of the Minnesota Wetland Conservation Act. In the event you need further clarification of an item above, please contact us.

MINNEHAHA CREEK WATERSHED DISTRICT
QUALITY OF WATER QUALITY OF LIFE

The Minnehaha Creek Watershed District is committed to a leadership role in protecting, improving and managing the surface waters and affiliated groundwater resources within the District, including their relationships to the ecosystems of which they are an integral part. We achieve our mission through regulation, capital projects, education, cooperative endeavors, and other programs based on sound science, innovative thinking, an informed and engaged constituency, and the cost effective use of public funds.

December 18, 2015

Les Lemm
Wetland Conservation Act Coordinator
Minnesota Board of Water and Soil Resources
520 Lafayette Road North
Saint Paul, MN 55155

RE: Preliminary Input on Wetland Conservation Act Rulemaking

Dear Mr. Lemm,

I am writing on behalf of the Minnehaha Creek Watershed District (MCWD) to contribute to the initial scoping discussion for the Board of Water and Soil Resources (BWSR) process for amending the Wetland Conservation Act (WCA) Rules (MN Rule Chapter 8420). The District understands that BWSR will be coordinating throughout the rule drafting process with groups of external stakeholders (WCA Rule Advisory Committee) and LGU staff responsible for implementing the rules (Technical Review Committee), and is very interested in formal participation in both committees. In the meantime, the MCWD would like to offer preliminary input for consideration during the rulemaking process.

In recent years, the MCWD has established a brand as a leader in innovative and collaborative water resource management. This has been accomplished, in part, through an initiative to bridge the gap between land use change and water resource improvement by proactively partnering to produce natural resource outcomes that exceed those possible through compliance with regulation alone.

In the past year, for example, the MCWD has partnered with the local development community on two major wetland restoration projects that will help conserve local wetland functions and values and reverse the current trend for wetland replacement to be achieved outside of the MCWD boundaries. The first project, proactively identifying and nurturing a potential wetland banking applicant within the MCWD, saw the District develop a creative land use plan enabling the applicant to achieve its economic goals while simultaneously restoring 45 acres of degraded land into the first wetland bank within the MCWD. The second project, proactively partnering with a national developer to produce a mixed on-site wetland replacement project and MCWD capital project, will provide 15 acres of wetland restoration within the MCWD boundaries that would otherwise be replaced for in a different watershed.

This approach of forming creative partnerships to produce exceptional natural resource outcomes motivates the District’s interest in seeing two major subjects addressed in the upcoming WCA amendments. The first major priority for the District is the efficient coordination of WCA with other regulatory programs. The MCWD is currently conducting a concerted, exhaustive effort to align our permitting program with those of the Department of Natural Resources (DNR) and Army Corps of Engineers (ACOE) in order to efficiently capitalize on partnership opportunities. This alignment effort includes a DNR General Permit and frequent DNR waiver of Public Water Wetland regulation to the MCWD, as well as the development of an ACOE Special Area Management Plan and potential General Permit for the MCWD's priority subwatershed. The District's close regulatory coordination with these two agencies depends, in part, on our administration of current WCA rules; thus, the WCA rule changes serve as an opportunity to enhance MCWD's aligned administration of WCA, DNR, and ACOE regulation to effectively partner for improved natural resource outcomes.

The second subject of major interest to the District during the WCA rulemaking process is the opportunity the revisions present for WCA to appropriately review resource improvement projects in addition to regulating resource impacts. The District's particular interests in this regard are that rules written to manage impacts from land development not inadvertently impede resource improvement; that regionalizing wetland replacement or introducing an In-Lieu Fee program not create disincentives for local partnerships; and that flexibility be provided for local capacity and knowledge to operate. To these ends, several WCA rule topics that the MCWD looks forward to discussing include:

- Adjustment of WCA no-loss, replacement, or other criteria to appropriately accommodate wetland disturbance for resource improvement projects;
- Structuring of the In-Lieu Fee program to support both WCA compliance as well as local partnerships that achieve results exceeding compliance;
- Designation of High Priority Areas and siting of replacement wetlands; and
- The capacity of local government units to fully implement WCA to achieve exceptional resource outcomes.

The District believes that addressing these two major subjects during WCA rulemaking will foster both water resource improvement and innovative ways of partnering to achieve such improvement.

Additionally, a number of topics related to streamlining WCA administration that the MCWD also looks forward to discussing include:

- Clarification of wetland buffer standards;
- Refinement of actions eligible for credit;
- Handling of mixed wetland types;
- Duration of different types of approvals; and
- Requirements for re-noticing and electronic transmission of notices.

Thank you for the opportunity to provide input during this informal, pre-rulemaking comment period. We look forward to learning about next steps the MCWD can pursue to get involved in the review committees, and further engaging with you throughout the rulemaking process!

Sincerely,

Lars Erdahl
District Administrator

Minnesota Pollution Control Agency

520 Lafayette Road North | St. Paul, Minnesota 55155-4194 | 651-296-6300

800-657-3864 | Use your preferred relay service | info.pca@state.mn.us | Equal Opportunity Employer

December 3, 2015

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

RE: Request for Comments on Possible Amendment to Rules Governing Wetland Conservation, Minnesota Rules, Chapter 8420; Revisor's ID Number R-04356

Dear Mr. Lemm:

The Minnesota Pollution Control Agency (MPCA) is very interested in this rulemaking to revise Minnesota's wetland conservation rules. This rulemaking provides an opportunity to consider both wetland and water quality protection and improvement activities in the creation of wetland replacement credits.

We have worked with the Board of Water and Soil Resources through the Interagency Northeast Mitigation Siting Team to consider the high demand for compensatory wetland mitigation in that region. We look forward continuing to collaborate with you as you work to implement some of that team's recommendations in rules. In particular, we are interested in working with you and our other partners, such as the U.S. Army Corps of Engineers, to develop replacement credit strategies and ratios related to high priority areas for wetland replacement and new actions eligible for wetland replacement credit in the Northeast area of the state.

We welcome the opportunity to be involved in the process as you form your advisory committee and move forward with developing the rules.

Sincerely,

Cat Neuschler

Catherine Neuschler
Supervisor, Agency Rules Unit
Environment and Energy Section
Resource Management and Assistance Division

CN:je

Lemm, Les P (BWSR)

From: Matt Danzl <matt.danzl@co.todd.mn.us>
Sent: Thursday, December 17, 2015 4:35 PM
To: Lemm, Les P (BWSR)
Subject: WCA Rule Comments

Mr. Lemm,

I have put much thought into identifying some problem areas that I see from the LGU side of the fence. I will provide some comments below to address a few of these concerns I've seen. If there are already answers out there for my questions/comments, forgive me as I am fairly new to WCA in the last six months, although well-versed in natural resource issues.

1. Drainage exemption-
   a. Private ditch maintenance (subp. 3 B) is a moving target which makes it near impossible to administer. Every year we need to look back 25 years to determine size of wetlands. It is extremely complicated when you add in factors such as changing climate patterns. If 25 years ago it was a dry year (ie. 1990), and presently (2015) it is a wet year then you can allow maintenance to remove the "extra" hydrology this year. Then you have an applicant come in the following year (2016) and review of the same wetland looks at (1991) and find it was a normal or a wet year, then there is potential that "allowed maintenance" would drain the wetland from what is "normal". It not only is a disservice of protecting the wetlands but also it doesn't give landowners a clear idea of what is allowed. One of the main reasons that this is difficult to administer is because the lack of evidence of wetland size 25 years before impact. We have aerial photographs but those often times do not have clear enough resolution, or not defensible enough because it is only veg. and not soil and hydrology. It sets up a system that relies on review in future years to see if the maintenance did indeed have a drainage impact. This guess and check system is not fiscally and logically practical, and also is not likely to bring penalties forth due to landowner changes etc. One way this could be potentially(?) be remedied is by putting a single date for wetland size or having language about average "normal" year wetland size etc.
   b. Sub C; this should not apply if the wetland was impacted in the past and thus allowing it to be cropped though.
2. General
   a. This comment refers to the process of exemption applications and decisions. Without requiring TEP review or noticing the application it can tend to lead the LGU to misuse the exemption. Exemptions clearly can impact greater acreage of wetlands than often times the amounts in replacement plans. This is also related to how people carry out their projects. Also, the LGU may have made an informed decision at the time based on the applicants ideas but the applicant didn't understand the importance of WCA and "took a mile, instead of an inch". With a more intense review process this may have thwarted. Because of political pressure and lack of hard evidence impacts that are discovered at a later time are often not able to be mitigated/rectified.
   b. Subsurface drainage or ditching can often put more water on other people's property/wetlands etc. People higher in the watershed may have qualified for an exemption or installed illegally. Either way the person lower now has more water than they did before and can now remove some of that hydrology back to "normal". When this happens on a whole watershed the effects are compounding. I suggest wording on what is allowed with the water when it qualifies for an exemption. These effects can have large implications for county waterplans.
   c. Regarding the prioritizing campaign. I think it's good to have goals but not at the expense of exiting good. I feel it's wrong to say "we don't value wetlands as much in >80 counties" in essence because they are not being prioritized. It is well documented that restorations are never as good as the original. I

would hate to lose pristine northern wetlands in order to increase sub-par restored prairie potholes. That being said, I am totally for protecting native, prairie potholes with high functions and values. My hope is that we don't devalue northern wetlands as development will continue to encroach there.

Thank you for your time and review.

Matt

Matthew Danzl, Certified Wetland Delineator
Wetland & Natural Resource Technician

Todd County SWCD
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Long Prairie, MN 56347
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Todd Soil and Water Celebrating 50 Years in Conservation

Lemm, Les P (BWSR)

From: Anne Williamson <awilliamson@twin-metals.com>
Sent: Friday, December 18, 2015 1:53 PM
To: Lemm, Les P (BWSR)
Subject: Twin Metals Minnesota Comments on Possible Wetland Conservation Rule Amendments

December 18, 2015

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

Dear Mr. Lemm:

Twin Metals Minnesota LLC is a company focused on developing and operating an underground copper, nickel, platinum, palladium, gold and silver mining project in the Iron Range region of northeast Minnesota. Twin Metals is currently in the early stages of project development. Twin Metals offers the following comments in response to the Minnesota Board of Soil and Water Resources (BWSR) invitation for comments regarding possible amendments to the rules governing wetland conservation:

- Rules should be developed for an in-lieu fee program that provides an alternative for projects located in Bank Service Areas (BSA) where mitigation bank credits are limited or not available. If bank credits are unavailable in sufficient type or quantity, as is often the case in BSA 1, an in-lieu fee program should give permittees the opportunity to provide compensatory mitigation through fees paid to mitigation projects approved by BWSR. In these cases, in-lieu fee payments should be considered as equivalent in priority to bank credits in the same BSA as the project being permitted.

- The benefits of an in-lieu fee program to Minnesota would be to promote large, sustainable wetland replacement projects in the highest priority areas within the state. Also, such a program would increase the appeal to permittees of providing mitigation in advance of impacts, thereby accelerating enhancements to the state’s wetland resources. Permittees would benefit from the certainty that compensatory mitigation options other than bank credits and self-performed mitigation will be available regardless of the timing of projects being considered for the future.

Respectfully,

Anne L. Williamson
Vice President – Environment & Sustainability
Twin Metals Minnesota
380 St. Peter St.
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Lemm, Les P (BWSR)

From: Jed Chesnut <JChesnut@mnwcd.org>
Sent: Wednesday, December 16, 2015 1:17 PM
To: Lemm, Les P (BWSR)
Subject: WCA Rule comments - WCD

Les,

The Washington Conservation District offers the following comments on the current Wetland Conservation Act Rule:

1. 8420.0420 Exemptions: Reinstate incidental wetland exemption. From a Rule implementation perspective, LGU's commonly receive applications for a decision to allow wetland impact without replacement based on the wetland being "incidental." The exemption remains in Statute and putting it back into Rule would make regulation of these waterbodies much easier. Currently, "no loss" decisions are frequently used citing the project doesn't impact wetland, by definition. While this approach seems to work, having the specific exemption would make implementation of the Rule clearer.

2. 8420.0105 Scope and 8420.0111 Subp. 32 Impact: The Rule limits excavation activities in Type 3, 4, 5 wetlands or in all wetland types if the activity results in a conversion to nonwetland. The real-word effect of this definition of impact (and scope of WCA) allows for activities that impact wetland via excavation. For the other wetland types, especially native Type 2, 6, and 8 wetlands, the excavation activity significantly disturbs the natural system, most likely introduces invasive species via equipment, and creates disturbed soils that provides the ecological opportunity for invasive species to thrive, all of which impacts the wetland. The excavation truly results in a loss in the quality and possibly the biological diversity of these other Types of wetlands, but the activity is allowed by the definition of impact. Additionally, excavation in seasonally flooded basins can result in the loss of breeding habitat for organisms that rely on seasonally flooded wetlands. Conversely, an excavation activity in a Type 3 or 4 wetland may have less of an adverse impact since the result is often just a slightly deeper wetland with no significant loss in quality, quantity or diversity. Obviously if the excavation occurs in a high quality native-dominated shallow marsh, there would be impact, but generally the potential for significant impact seems less for excavation in deeper wetland regimes. A revision to the rule would add protection to the other wetland types for excavation. A "quality" based process that allows for impacts to degraded Types 1, 2, 6, 8 could also be included since excavation in a reed canary grass wet meadow, for example, could enhance the wetland by provided more habitat in a highly altered system. The wildlife habitat exemption could be slightly changed to cover this scenario.

3. 8420.0420, Subp. 5 Restored wetlands – the exemption also applies to created wetlands, not just restored wetlands. Changing the section title to "Restored or Created wetlands" would add clarity to the Rule and make it easier to find the exemption covering created wetlands.

This concludes the WCD's comment on the current WCA Rule. Thank you,

Jed Chesnut
Wetland/Natural Resource Specialist
Washington Conservation District
455 Hayward Ave | Oakdale, MN 55128
Ph: (651) 330-8220 x25 | Fax: (651) 330-7747
jchesnut@mnwcd.org | www.mnwcd.org

Exhibit 2 — Stakeholder and Public Outreach

Wetland Conservation Act Rulemaking — Minnesota Rules, Chapter 8420   Revisor's ID Number: RD-4356

Last updated 6/29/2026

Position Abbreviations (BWSR Staff)

ED = Executive Director   AD-P&P = Assistant Director for Programs and Policy   AD-S&O = Assistant Director for Strategy and Operations   AD-RO = Assistant Director for Regional Operations   GC = General Counsel   ARCC = Appeals and Regulatory Compliance Coordinator   LC = Legislative Coordinator   PRAP-C = PRAP Coordinator   WSM = Wetlands Section Manager   WCA-OS = WCA Operations Supervisor   WPC = Wetlands Policy Coordinator   WMS = Wetland Mitigation Supervisor   WMC = Wetland Mitigation Coordinator   WS = Wetland Specialist

Date	Type	Audience	BWSR Staff	Purpose
07/23/2025	Virtual	MN Department of Natural Resources	WSM, WCA-OS	Discussed Rare Natural Communities feedback.
06/05/2026	In-Person	Minnesota Association of County Planning and Zoning Administrators	ED	Provided a general WCA Rulemaking update, including purpose, rule development work completed, current status, and upcoming schedule.
04/09/2026	In-Person	U.S. Army Corps of Engineers, EPA	WCA-OS, WMS	Reviewed the 2/2/26 Preliminary Draft WCA Rule.
04/01/2026	Virtual & In-Person	BWSR Wetland Conservation Committee	WSM, WCA-OS, WPC, AD-P&P	Reviewed the 2/2/26 Preliminary Draft WCA Rule.
03/05/2026	In-Person	Association of MN Counties Environment Committee	WSM, AD-P&P	Discussed WCA Rulemaking, incuding drainage and agricultural topics.
03/04/2026	In-Person	Red River Watershed Management Board	WSM, AD-P&P	Discussed WCA Rulemaking, incuding drainage and agricultural topics.
03/03/2026	Virtual	MN Center for Environmental Advocacy	WSM, WCA-OS, WPC	Discussed the Rare Natural Communities provision in the Special Considerations rule part.
02/17/2026	Virtual & In-Person	BWSR Wetland Conservation Committee	WSM, WCA-OS, WPC, AD-P&P	Reviewed the 2/2/26 Preliminary Draft WCA Rule.
02/11/2026	Virtual	MN Natural Resources Conservation Service	ED, AD-P&P, WSM, WPC	Discussed Certified Wetland Determinations, WCA statute and rule implementation.
02/03/2026	Virtual	Wetlands Advsiory Committee	WSM, WCA-OS, WPC	Reviewed the 2/2/26 Preliminary Draft WCA Rule.
01/12/2026	Virtual	MN Department of Natural Resources	WSM, WCA-OS	Discussed the Rare Natural Communities provision in the Special Considerations rule part.
01/08/2026	Virtual	MN Department of Natural Resources	WSM, WCA-OS	Discussed the Rare Natural Communities provision in the Special Considerations rule part.
12/30/2025	Virtual	MN Department of Natural Resources	WSM, WCA-OS	Discussed the Rare Natural Communities provision in the Special Considerations rule part.
09/03/2025	Virtual	Wetlands Advisory Committee members, MN Department of Natural Resources	WSM. WCA-OS, AD-P&P	Discussed the Rare Natural Communities provision in the Special Considerations rule part.
08/21/2025	Virtual	Drainage Work Group	WSM	Provided a WCA Rulemaking update, including topics pertaining to drainage.
07/07/2025	Virtual	MN Department of Natural Resources	WSM, WCA-OS, AD-P&P, GC	Discussed DNR rulemaking comments/proposals.
05/22/2025	Virtual	Wetlands Advisory Committee	WSM, WCA-OS, WPC, WMS	Reviewed the 4/25/25 Preliminary Draft WCA Rule
04/28/2025	Virtual	BWSR Wetland Conservation Committee	WSM, WCA-OS, WPC	Reviewed the 4/25/25 Preliminary Draft WCA Rule
04/28/2025	E-Mail	WCA LGU and SWCD Staff	WCA-OS	Provided notification of 4/25/25 Preliminary Draft Rule and solicition of comments.

04/25/2025	E-Mail	Wetland Stakeholders	BWSR Rulemaking Email List	Provided a rulemaking update, notification of 4/25/25 Preliminary Draft Rule, and solicitation of comments.
04/25/2025	Website	Preliminary Draft Rule #2 Posted	NA	Preliminary Draft Rule language, incorporating changes since the 11/12/24 Preliminary Draft
04/15/2025	Virtual	MN Department of Natural Resources	WSM, WCA-OS, GC	Discussed draft enforcement section language.
04/10/2025	In-Person	NW MN Local Gov't Staff	WS, Lynda Peterson	Presented information on and discuss WCA rulemaking, including LGU & TEP duties and exemptions (agricultural, drainage, utilities, de minimis).
04/02/2025	Virtual	MN Department of Natural Resources	WSM, WCA-OS, GC, AD-P&P, ARCC	Discussed draft enforcement section language.
03/18/2025	E-Mail	WCA LGU and SWCD Staff	WCA-OS	Rulemaking info posted on BWSR website, timeline.
03/18/2025	In-Person	Red River Watershed Management Board	WS	Discussed 2024 WCA statute changes and rulemaking, focusing on topics of interest to watershed districts.
02/18/2025	Virtual	SWCD Ag Exemption Session	WPC, WSM, WCA-OS	Provided information on implementation of the draft agricultural exemption rule language and solicited feedback on draft language.
02/13/2025	Virtual	SWCD Ag Exemption Session	WPC, WCA-OS	Provided information on implementation of the draft agricultural exemption rule language and solicited feedback on draft language.
02/02/2025	Website	Preliminary Draft Rule #2 Posted	NA	Preliminary Draft Rule language, incorporating changes since the 4/25/25 Preliminary Draft
01/23/2025	Virtual	MN Department of Transportation	WSM, WCA-OS, WPC	Discussed BSAs/presettlement areas, siting, application contents, replacement ratios, type, determining LGU, de minimis, utilities
01/15/2025	Virtual	Wetlands Advisory Committee	WSM, WCA-OS, WMS	Continued review of 11/12/24 Peliminary Draft WCA Rule.
01/15/2025	In-Person	Red River Basin Commission	ED	Provided a general update on WCA rulemaking, inform of preliminary draft rule, and solicit input.
01/10/2025	Virtual	MN Department of Natural Resources	WSM, WCA-OS	Discussed the proposed Rare Natural Communities rule language.
12/18/2024	Virtual	Wetlands Advisory Committee	WSM, WCA-OS, WPC, WMS	Continued review of 11/12/24 Peliminary Draft WCA Rule.
12/17/2024	Virtual	LGU Listening Session	WSM, WCA-OS, WPC, WMS	Reviewed specific draft WCA rule language, with focus on the most subtantial changes.
12/12/2024	In-Person	Association of MN Counties	ED, AD-S&O	Discussed AMC priorities and agency initiatives, including rulemaking.
12/04/2024	In-Person	MASWCD Conference	WSM, WPC	Presented information on the Agricultural Activities Exemption - implementation and potential rule language.
11/26/2024	Virtual	BWSR Wetland Conservation Committee	WSM, WCA-OS, WPC, WMS	Reviewed the 11/12/14 Preliminary Draft Rule Language
11/25/2024	Virtual	LGU Listening Session	WSM, WCA-OS, WPC, WMS	Reviewed specific draft WCA rule language, with focus on the most subtantial changes.
11/20/2024	Virtual	Wetlands Advisory Committee	WSM, WCA-OS, WPC	Began review of 11/12/24 Peliminary Draft WCA Rule.
11/19/2024	In-Person	Area 1 SWCD Supervisors & Staff	WS	Discussed the 2024 WCA statute changes and associated rulemaking.
11/15/2024	E-Mail	Wetland Stakeholders	BWSR Rulemaking Email List	Provided rulemaking background and info, notification of 11/12/24 Preliminary Draft WCA Rule, and solicitation of comments.
11/12/2024	E-Mail	WCA LGU and SWCD Staff	WCA-OS	Provided notification of 11/12/24 Preliminary Draft Rule and solicition of comments.
11/12/2024	Website	Preliminary Draft Rule Posted	NA	Preliminary Draft Rule language
10/31/2024	E-Mail	WCA LGU and SWCD Staff	WCA-OS	Provided a rulemaking update, notification of LGU listening sessions, and solicitation of comments.
10/04/2024	Virtual	MN Inter-County Association	WSM, AD-P&P	Discussed the 2024 WCA statute changes and associated rulemaking.

09/20/2024	E-Mail	WCA LGU and SWCD Staff	WCA-OS	Promoted LGU rulemaking listening sessions, provide rulemaking information, solicit comments.
09/19/2024	In-Person	Area 5 MASWCD mtg.	WS	Discussed 2024 WCA statute changes and associated rulemaking.
09/18/2024	Virtual	Basin Alliance for the Lower Mississippi River in MN (BALMM)	WS	Discussed 2024 WCA statute changes with emphasis on the agricultural exemption, and rulemaking.
09/12/2024	In-Person	Association of MN Counties	AD-P&P	Discussed 2024 WCA statute changes and associated rulemaking.
09/05/2024	In-Person	Area 8 SWCD Supervisors & Staff	WS	Discussed 2024 WCA statute changes and associated rulemaking.
08/21/2024	Virtual	MN DNR Land Use LGU Forum	WSM, WCA-OS	Discussed 2024 WCA statute changes and associated rulemaking.
08/08/2024	In-Person	Northern Counties Land Use Coordinating Board	WSM, WPC	Discussed 2024 WCA statute changes and associated rulemaking.
08/07/2024	Virtual	USACE Coordination Mtg.	WSM, WCA-OS, WPC	Discussed exemptions, Bank Service Areas, streams, HGM, buffers, replacement ratios, monitoring.
07/31/2024	Virtual	Metro Conservation District Managers Mtg.	WSM, WCA-OS	Discussed the 2024 WCA statute changes and associated rulemaking.
07/22/2024	Virtual	Local gov't staff, wetland professionals, and interested individuals/organizations	WSM, WCA-OS, WPC	Provided an overview and Q&A of 2024 WCA statute changes and related rulemaking. Also recorded and posted on the BWSR website.
07/11/2024	In-Person	Drainage Work Group	WSM, WPC	Presented information on 2024 WCA statute changes and related rulemaking.
07/09/2024	E-Mail	WCA LGU and SWCD Staff	WCA-OS	Provided a rulemaking update, discussed 2024 statute changes, information posted on BWSR website, and the State Register request for comments.
07/09/2024	Virtual	MN Association of Watershed Administrators	WSM	Provided information on the 2024 WCA statute changes and related rulemaking.
07/08/2024	E-Mail	Wetland Stakeholders	BWSR Rulemaking Email List	Provided information on 2024 WCA statute changes and rulemaking, state register request for comments and deadline, and solicitation of comments.
07/01/2024	Website	Local governments, landowners, consultants, and any interested individual or organization.	WPC	Narrated presentation of 2024 WCA statute changes posted on the BWSR website.
06/04/2024	Virtual	BWSR Wetland Conservation Committee	WSM, WCA-OS, WPC	Continued review of initial draft rule amendments; public comment period and expanded scope of rulemaking for 2024 statute changes.
05/21/2024	Virtual	MN Center for Environmental Advocacy	ED, WSM, WPC, AD-P&P	Discussed WCA agricultural activities exemption.
04/29/2024	Virtual	BWSR Wetland Conservation Committee	WSM, WCA-OS, WPC	Began review of initial draft rule revisions.
04/04/2024	Virtual	Northern Counties Land Use Coordinating Board	WSM	Discussed WCA rulemaking topics, process, and schedule.
03/13/2024	In-Person	USDA Natural Resource Conservation Service	WSM, WPC	Discussed WCA agricultural activities exemption.
02/22/2024	In-Person	Association of MN Counties Transportation & Infrastructure Committee	AD-P&P, WSM	Discussed LGRWRP and potential statute/rule clarifications.
02/08/2024	Virtual	MN Department of Natural Resources	ED, AD-P&P, WSM, LC	Provided a WCA statute/rule language walk-through.

02/07/2024	In-Person	Wetland Professionals Association	WSM, WPC	Discussed WCA rulemaking (typing, BSAs/presettlement areas, siting, and other topics) and WOTUS.
01/23/2024	E-Mail	Wetland Stakeholders	BWSR Rulemaking Email List	Provided an update on WCA rulemaking, link to BWSR rulemaking web-page.
12/07/2023	Virtual	BWSR Wetland Conservation Committee	WSM, WCA-OS, WMS, AD-P&P	Discussed the rulemaking process, public input, and topics, with initial review of select draft language.
11/15/2023	Virtual	MN Wetland Bankers	WSM, WCA-OS, WMS	Discussed rulemaking background, topics to be held for a future rulemaking, wetland typing for mitigation, presettlement areas and BSAs, mitigation siting, and other statute/rule changes relating to wetland banking.
09/18/2023	Virtual	MN Center for Environmental Advocacy	ED, AD-P&P, AD-S&O, WSM, WPC	Discussed various topics, including rulemaking.
04/25/2023	Virtual	Wetlands Advisory Committee	AD-P&P, WSM, WCA-OS, WMS	Discussed WCA statute changes, rulemaking process and scope, and opportunities to participate and comment.
12/01/2022	In-Person	MN Association of Watershed Districts	WSM	Discussed WCA statute changes, rulemaking process and scope, and opportunities to participate and comment.
11/15/2022	Virtual	BWSR Wetland Conservation Committee (workshop)	WCA-OS, WSM	Discussed 2011-2017 WCA statute changes, WCA and wetland banking activity (as contextual information), presettlement areas for wetland replacement and bank service areas (BSAs), siting of wetland replacement when using the wetland bank, wetland typing for impacts and replacement
10/18/2022	In-Person	MN Water Resources Conference	WS	Provided general rulemaking overview including process and scope, summary of statute changes and work done to date, opportunities to participate and comment.
10/14/2022	In-Person	MN Association of County Planning and Zoning Administrators	AD-RO	Provided a general rulemaking overview including process, scope, and opportunities to participate and comment.
10/06/2022	Virtual	Northern Counties Land Use Coordinating Board	WSM	Provided a general rulemaking overview including process and scope, BSAs, siting criteria, typing, buffers, bank plan decisions, ILF & CPFs, 404 assumption/consistency with federal program, opportunities to participate and comment.
10/04/2022	Virtual	WCA Rulemaking Agency Partners	WCA-OS	Provided a general rulemaking overview including process and scope, BSAs, typing, buffers, bank plan decisions, stream restoration/credit, functional assessment, ILF & CPFs, opportunities to participate and comment.
09/27/2022	Virtual	Wetlands Advisory Committee	AD-P&P, WSM, WCA-OS	Discussed presettlement areas for wetland replacement and bank service areas; siting of wetland replacement when using the wetland bank; wetland typing – for impacts and replacement; replacement wetland buffers – requirements and Ccediting; and wetland bank plan approval process.
09/15/2022	In-Person	Association of MN Counties	AD-P&P	Discussed rulemaking scope, process, topics, schedule.
09/14/2022	In-Person	MN Rural Counties Caucus	AD-P&P	Provided a general rulemaking overview including process and scope, BSAs, typing, buffers, bank plan decisions, stream restoration/credit, functional assessment, ILF & CPFs, opportunities to participate and comment.
08/18/2022	Virtual	Wetlands Advisory Committee	AD-P&P, WSM, WCA-OS	Described committee process, roles, and responsibilities; rulemaking background & history; review of 2011-2017 statute changes; overview of progress on potential rulemaking topics; rulemaking schedule.
05/19/2022	Virtual	WCA Rulemaking Agency Partners	WCA-OS	Provided a brief update on WCA rulemaking.
04/21/2022	Virtual	BWSR Wetland Conservation Committee	WSM	Discussed the 3/19/22 Request for Comments, comments received, scope, process, and stakeholder coordination.

02/02/2022	Virtual	MN Wetland Professionals Association	WCA-OS	Provided an update on WCA rulemaking.
06/15/2020	Virtual	BWSR Wetland Conservation Committee	WSM	Discussed new request for comments, work completed on rulemaking-related topics, and a Board resolution.
08/27/2019	In-Person	BWSR Wetland Conservation Committee	WSM	Provided a brief update on WCA rulemaking.
01/31/2019	In-Person	U.S. Army Corps of Engineers	WCA-OS	Discussed rulemaking coordination with Corps
2016 - 2018	In-Person	US Army Corps of Engineers and MN Department of Natural Resources	WCA-OS, WMC	Conducted policy development meetings for rulemaking topics, including BSA boundaries, monitoring, buffers, siting, and credit typing.
12/11/2018	In-Person	U.S. Army Corps of Engineers	WCA-OS	General rulemaking discussion
08/22/2018	In-Person	U.S. Army Corps of Engineers	WCA-OS	Discussed rulemaking update and coordination
08/21/2018	In-Person	Technical Advisory Team	WSM, WCA-OS	Discussed mitigation Decisions, Actions Eligible for Credit, Enforcement
06/19/2018	In-Person	Technical Advisory Team	WSM, WCA-OS	Discussed Wetland Typing/Impact and Replacement Tracking, Actions Eligible for Credit, HPAs, Siting and Replacement Ratios, Wetland Bank Decision Process.
04/30/2018	In-Person	Technical Advisory Team	WSM, WCA-OS	Discussed Monitoring, Construction Certification and First Credit Deposit, Wetland BSA and Pre-settlement Wetland Area Designations, Wetland Impact and Replacement Tracking
04/17/2018	E-Mail	DNR, MPCA, MnDOT	WCA-OS	Provided a rulemaking update and discussed coordination with state agencies
11/02/2017	In-Person	BWSR Academy	WSM, WMC	Provided information on statute changes, ILF, CPFs/High Priority Areas, presettlement areas, BSAs, siting, enforcement, calc fens, rare natural communities, typing, replacement ratios, stream mitigation, buffers, mining, rulemaking request for comments, information/comments.
01/13/2017	In-Person	BWSR Wetland Conservation Committee	WSM, WCA-OS	Provided an update on rulemaking work/progress and coordination with the USACE.
08/19/2016	In-Person	BWSR Wetland Conservation Committee	WSM, AD-P&P	Discussed establishment of a Wetlands Advisory Committee, update on rulemaking progress.
05/04/2016	In-Person	MN Wetland Professionals Association	WSM, WCA-OS	Presented information on statute changes, rulemaking scope and process, legislative report, actions eligible for credit, high priority areas, ILF, replacement ratios, siting, BSAs, mitigation approval process, buffers, opportunities to participate and comment.
04/27/2016	In-Person	BWSR Wetland Conservation Committee	WSM	Discussed replacement wetland buffers; wetland replacement construction standards and construction certification; monitoring; long-term protection of replacement wetlands; actions eligible for credit; mitigation approval process, including the reaction of local governments to the proposal that BWSR staff will be the approval authority; coordination with the USACE; and formation of a Wetlands Advisory Committee.
02/24/2016	In-Person	WCA Open Stakeholder Meeting	WSM, WCA-OS, PRAP-C	Presented information on and discussed ILF, Siting, BSAs, Actions Eligible for Credit incl. streams & preservation, 2016 Legislative Report.
02/10/2016	In-Person	US Army Corps of Engineers	WSM, WCA-OS	Discussed WCA statute and potential rule changes.
02/03/2016	In-Person	WCA Open Stakeholder Meeting	WSM, WCA-OS, PRAP-C	Presented information on and discussed statute changes, legislative report, ILF, actions eligible for credit, ILF, High Priority Areas.
10/28/2015	In-Person	BWSR Academy	AD-P&P, WSM	Presented information on and discussed rulemaking request for comments, scope, statute changes, high priority areas, replacement ratios, siting, ILF, mitigation approval process, actions eligible for credit, buffers, rulemaking process, opportunities to stay informed and provide input.

01/14/2015	In-Person	Wetland Professionals Association	WSM	Discussed programmatic initiatives and reports leading up to rulemaking, stakeholder input process, ILF, federal approvals exemption, siting, actions eligible for credit, mitigation approval process, mitigation quality and sustainabilty, and misc. topics.

Exhibit 3
Comments Received in Response to 2024 Preliminary Draft Rule

February 4, 2025

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 it's 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).

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

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.:

<u>…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.</u>

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 Brockette, BWSR Wetlands Policy Coordinator
Ken Powell, Wetland Conservation Act Operations Supervisor
Luke Johnson, Wright SWCD Manager

Red River Watershed Management Board - Minnesota Watersheds
Analysis of Wetland Conservation Act Changes
Prepared by Mark Aanenson - Senior Scientist/Principal - Houston Engineering, Inc.

Statute	Effect of Change	RRWMB - Minnesota Watersheds Talking Points	Recommended Action / Proposed Rule-Statute Changes
Sec. 75. Minnesota Statutes 2022, section 103G.005, subdivision 14d, is amended. Removes the word "sole" in "sole purpose" . Changes to "purpose" relative to splitting projects to gain exemptions.	Clarifies that the restriction applies even when the gaining of additional exemptions was not the sole purpose for splitting a project into components or phases.	Support this revisions, it provides clarification.	This language revision is not anticipated to have a large effect on Watershed District Projects.
Sec. 76. Minnesota Statutes 2022, section 103G.005, subdivision 17b, is amended. Adds an option under the definition of wetland type to use the HGM classification system.	Allows for use of the Hydrogeomorphic Classification for Wetlands (HGM) for determining wetland type. MN Rules Chapter 8420 (WCA Rule) will be amended to incorporate the use of HGM. Circular 39 remains in statute as an optional wetland typing method and is relevant to the identification of public water wetlands under Minn. Stat. 103G.005, Subd. 15a. Deletion of the "Wetland type" summary does not affect the use of Circular 39. More information about HGM can be found at: HGM Approach (dren.mil)	Support the change, this has potential to make impact and replacement easier to manage. Better fit for replacing ecological functions.	Provide rules that in-kind mitigation requirements apply to the same HGM category, and to allow for in-kind replacement of the same Circular 39 category as an alternative.
Sec. 77. Minnesota Statutes 2023 Supplement, section 103G.005, subdivision 19, is amended. Adds deep water habitats to the wetland definition but excludes protected waters (PWI).	WCA regulatory authority will now apply to deepwater habitats that are not designated as public waters. All replacement requirements, exemptions, application procedures, etc. will apply to projects involving these deepwater habitats. Deepwater habitats are permanently flooded lands lying below the deepwater boundary of wetlands (generally greater than 8.2 feet of water depth) as defined in the "Classification of Wetlands and Deepwater Habitats of the United States" (adapted from Cowardin et al., 1979), which is available here: Classification of Wetlands and Deepwater Habitats of the United States.	Support the change from the context of potential future 404 assumption. Some of these areas are currently regulated by the 404 program. Have some concerns relative to the regulation of flood retention projects, specifically flood pools.	Provide rules that deepwater habitat impacts are categorized the same as adjacent wetlands. Provide rules to clarify impacts to deepwater habitat as fill and excavation only. Water level changes should not be identified as adverse impacts.
Sec. 78. Minnesota Statutes 2022, section 103G.222, subdivision 1, is amended. Removes the Type 3, 4, and 5 from the statement regarding excavation in permanently and semi permanently flooded areas in determining an impact.	Removes Circular 39 wetland type from consideration in determining whether excavation in permanently and semi-permanently flooded areas of a wetland is an impact. Applies the deed restriction prohibiting agricultural use for at least ten years to the new prior-converted cropland exemption (see changes to 103G.2241 subdivision 1). The reference to 103G.2241 subdivision 2(b-e) has been deleted, as those paragraphs were removed from statute. Clarifies that the Minnesota Department of Transportation is responsible for wetland replacement on public transportation projects that occur on state roads, regardless of who the project sponsor or co-sponsor is.	Support. This language revision is not anticipated to have a large effect on Watershed District Projects.	None
Sec. 79. Minnesota Statutes 2022, section 103G.2241, subdivision 1, is amended. Expands the Ag exemption to include PC's as determined by NRCS, allows maintenance activities as allowed by NRCS for FWs and Ws. Adds the deed restriction relative to nonagricultural use to the new ag exemptions.	Eliminates the exemption from WCA replacement requirements for activities that impact wetlands on agricultural land that is cropped 8 of the last 10 years, and on pasture land meeting certain wetland type and acreage requirements. Establishes an exemption for impacts to prior converted cropland as labeled by the USDA Natural Resources Conservation Service (NRCS) and for impacts resulting from drainage maintenance activities on areas labeled by the NRCS as farmed wetland, farmed-wetland pasture, and wetland. Changes to items 4 and 5 clarify that only those wetland impacts authorized under a U.S. Army Corps of Engineers permit are exempt.	Do not support the change. Only land enrolled in the federal farm program would be eligible for this exemption.	Provide rules that direct the LGU to make exemption determination based on NRCS rules if NRCS determinations are not available or were done incorrectly.

Red River Watershed Management Board - Minnesota Watersheds
Analysis of Wetland Conservation Act Changes
Prepared by Mark Aanenson - Senior Scientist/Principal - Houston Engineering, Inc.

Statute	Effect of Change	RRWMB - Minnesota Watersheds Talking Points	Recommended Action / Proposed Rule-Statute Changes
Sec. 80. Minnesota Statutes 2022, section 103G.2241, subdivision 2, is amended. Removes the drainage exemptions for Type 1 wetlands or up to 5 acres of Type 2 or 6 wetlands in the benefitting area of public drainage systems. Removes the exemption for draining of Type 1, 2, 6, and 7 for repairs of legal drainage systems. The 25 year rule now applies to all wetlands and deepwater habitats. Eliminates exemptions for repairs of private drainage systems.	Effect of Change: Eliminates the drainage exemptions in subdivision 2, except for the drainage of wetlands that have existed for 25 years or less resulting from maintenance and repair of existing drainage systems. The amended exemption eliminates wetland type as a consideration for eligibility and applies to both public and private drainage systems. Paragraph (b) clarifies that certain activities associated with repairs completed by public drainage authorities only apply to public drainage systems as defined under 103E.005 Subdivision 12 – this information was previously located in the now deleted paragraph (a).	Do not support this change. This revision is adverse to drainage authorities ability to manage legal ditch systems. It adds significant costs to ditch system management. The language is poorly worded i.e. "wetlands that have existed". There is no technical method to document and map wetland boundaries in the past, i.e. 24 years ago vs 26 years ago.	Pursue legislative changes that provide an exemption for all impacts associated with repairs of legal drainage systems per MN Statute 103E.701. This would be consistent with CWA Section 404 and PWI rules. Under current statutes: Propose rule clarification - For public ditch systems, a wetland replacement plan is not required for impacts from drainage if in the last 25 years 1) a repair of the ditch was completed per MN Statute 103E.701 or 2) a ditch inspection was completed under MN Statute 103E.705 and it was determined that a repair work was not required.
Sec. 81. Minnesota Statutes 2022, section 103G.2241, subdivision 6, is amended. Makes the utilities exemption dependent on getting a USACE permit. This is no longer an LGU decision.	Eliminates the acreage-based condition of the utilities exemption, and now subjects the exemption to a requirement that the wetland impacts be authorized by and conducted in accordance with a U.S. Army Corps of Engineers Section 404 permit. A local government unit can no longer issue a seasonal or annual exemption for a public utility as the exemption is now dependent on a Corps permit.	Do not support the change, LGU's need to be able to make their own determinations and process applications per WCA rule rather than wait for other agencies. This language revision is not anticipated to have a large effect on Watershed District Projects.	Provide rules that direct the LGU to make exemption determination based on WCA rules rather than requiring the applicant to wait for a decision by the USACE.
Sec. 82. Minnesota Statutes 2022, section 103G.2241, subdivision 9, is amended. Revises the de minimums limits, removes wetland type references.	Thresholds based on wetland type (Circular 39) and thresholds specific to the 11-country metro area have been eliminated from the de minimis exemption. Thresholds are now based on presettlement area (<50, 50-80, >80), shoreland zone, shoreland building setback zone, and permanently/semi-permanently flooded water regimes. Statute now clarifies that if project wetland impacts exceed the applicable de minimis threshold, all wetland impacts require replacement. The exemption restrictions related to the landowner's portion of the wetland and the cumulative area drained/filled since 1992 have been eliminated. Additional restrictions have been added to statute to prevent increasing de minimis amounts by dividing property. The statute now refers to all wetland impacts as opposed to just impacts caused by draining and filling.	Do support the revisions to the de minimis areas. Do not support removing "draining and filling". The de minimis exemptions depend on specific area determinations of impact. Qualitative impacts are not easily converted into a measurable area.	Provide rules that clarify this exemption, specifically, that it applies only to wetland losses where wetlands are converted to nonwetlands.
Sec. 83. Minnesota Statutes 2023 Supplement, section 103G.2242, subdivision 1, is amended. BWSR will now regulate intermittent and perennial watercourses outside of the PWI, rules to be developed.	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.	Do not support the change. This legislation could be detrimental to all agricultural drainage throughout Minnesota. This would add an additional layer of regulations to ag ditches and almost all legal drainage systems in the state. The identification and inventory of these resources is problematic.	Pursue legislation to repeal the statute change. Under the current Statutes, provide rules that exempt watercourses on agricultural fields, and impacts associated with installation and maintenance of public and private ditch or tile systems.

Red River Watershed Management Board - Minnesota Watersheds
Analysis of Wetland Conservation Act Changes
Prepared by Mark Aanenson - Senior Scientist/Principal - Houston Engineering, Inc.

Statute	Effect of Change	RRWMB - Minnesota Watersheds Talking Points	Recommended Action / Proposed Rule-Statute Changes
Sec. 84. Minnesota Statutes 2022, section 103G.2242, subdivision 2, is amended. Clarifies guidance on delineation manuals and guidance on classification of wetlands and deepwater habitats.	The edits update references to the Corps of Engineers wetland delineation manual and associated U.S. Fish and Wildlife Service wetland/deepwater habitat classification system. The statute now allows for the use of the HGM wetland classification system in wetland boundary/type determinations according to rules adopted by BWSR (WCA rules). The language also clarifies that future updates, supplements, and replacements of referenced documents can be used.	Support.	None
Sec. 85. Minnesota Statutes 2022, section 103G.2242, subdivision 2a, is amended. BWSR to establish wetland banking timelines for review and comment periods. Removes the banking process from the 60-day rule.	For wetland banking projects only, statute now directs BWSR to establish review and comment period timelines in WCA rule. These timelines will not take effect until formally adopted in rule. Once adopted, these review and comment period timelines for wetland banking projects would no longer be subject to Minnesota Statutes 15.99. This provision, however, does not apply to other WCA application types such as exemptions or replacement plans.	Do not support the change, removing the banking process from the required timelines in Statute 15.99 will only add additional time and cost to the wetland banking process.	Provide rules that streamline and shorten the banking process instead of extending the deadlines for agency review.
Sec. 86. Minnesota Statutes 2022, section 103G.2242, subdivision 3, is amended. Allows BWSR to establish an in-lieu fee program.	Clarifies BWSR's authority to develop, sponsor, and administer the wetland banking program, including an in-lieu fee program and/or the associated collection of payments. It also clarifies BWSR's ability to establish fee payment amounts and hold money associated with deposited wetland credits and in-lieu fee payments.	Support the change. An in-lieu fee program will allow credit purchases within Bank Service Areas that are short on credits allowing mitigation to be completed at a later date. We do have concerns on the value-pricing of existing credits held by WDs.	Provide rules that support consistent pricing of in-lieu fee credits relative to existing wetland banks.

January 24, 2025

Board of Water and Soil Resources **VIA E-MAIL**
520 Lafayette Rd
St Paul, MN, 55155

As a member of the Wetlands Stakeholders Advisory Group, the Minnesota Center for Environmental Advocacy appreciates the opportunity to provide feedback on the initial proposed revisions to Minnesota Rule chapter 8420, which implements the Wetland Conservation Act.

I. BWSR should ensure that the new agricultural activity exemption complies with the "recapture" provisions of federal law

We share the principles outlined by the Board of Water and Soil Resources (BWSR) for this rule revision to (1) minimize negative impacts to Local Governmental Units (LGUs), and (2) limit unintended consequences. The area where we see the greatest risk for unintended consequences is in the implementation of the new statutory exemption allowing impacts to wetlands on certain agricultural land or from certain drainage maintenance activities without a replacement plan.[1] But BWSR can mitigate any unintended consequences of this new exemption by making it explicit in its new rules that a landowner cannot use this exemption if the area is not currently being farmed or has been abandoned.

Minnesota's new statutory exemption states that a wetland replacement plan is not needed for certain impacts to wetlands on "prior converted cropland," "farmed wetland," or "farmed wetland pasture," but that these identified areas must be certified by the Natural Resources Conservation Service (NRCS).[2]

NRCS regulations clarify that, for prior converted cropland, the exemptions allowing for drainage activities only apply "so long as the prior-converted croplands are used for the production of food, forage, or fiber[.]"[3] And, for farmed wetlands and farmed wetland pastures, the drainage activity exemptions only apply if the areas have not been

[1] Minn. Stat. § 103G.2241, subd. 1 (2024).
[2] *Id.* (referring to NRCS' regulations in 7 C.F.R 12).
[3] 7 C.F.R. 12.33(b).

abandoned.[4] Abandonment is defined as "the cessation for five consecutive years of management or maintenance operations related to the use of a farmed wetland or a farmed-wetland pasture."[5] Furthermore, the NRCS regulations state that the drainage maintenance exemption only applies if "the maintenance does not exceed the scope and effect of the original alteration or manipulation, as determined by NRCS, and . . . the area is not abandoned."[6] In other words, federal regulations do not allow for wetland impacts from activities like drainage maintenance on areas that are no longer used for production or have not been maintained for five years or more.

BWSR should make these "recapture" provisions explicit in its rules by adding language to its rule similar to what is contained in NRCS regulations in title 7 part 12.33 of the Code of Federal Regulations. NRCS regulations and criteria are complex and the mere statutory reference to the Code of Federal Regulations seems insufficient to put landowners on notice that the NRCS requirements for continuous use and maintenance of these areas is necessary to exempt them from certain WCA requirements.

BWSR should also clarify in its rule that in order to be eligible for the drainage maintenance exemption a landowner must have a valid certificate from NRCS that is dated within the past five years or include information necessary for BWSR to determine that the abandonment criteria in title 7 part 12.33 of the Code of Federal Regulations have not been met and therefore the NRCS certification remains valid. To satisfy this requirement, the landowner may need to request a review of a certified wetland determination by NRCS, submit a declaration that the area has not been abandoned, or submit a different type of verification approved by BWSR (such as LGU inspection). In other words, an NRCS certificate from 1990 that an area is a "farmed wetland" will not necessarily allow a landowner to drain that area in 2025 without a wetland replacement plan. This area may have been abandoned between 1990 and 2025 and NRCS and/or the landowner and/or the LGU must certify that it has not been abandoned and still meets the definition of farmed wetland before BWSR should exempt drainage maintenance activities from WCA requirements. Additional rule language to clarify this requirement would align with what BWSR has already proposed in Minn. R. 8420.0420 subd. 2(A)(2) to clarify the conditions that must be met on the ground for a parcel of land to qualify for the prior converted cropland exemption in Minn. Stat. 103G.2242 subd. 1.

[4] 7 C.F.R. 12.33(d).
[5] 7 C.F.R. 12.33(c).
[6] 7 C.F.R. 12.33(d)

Such provisions would mirror other federal regulations as well.[7] Specifically, the Navigable Waters Protection Rule states that the exclusion of prior converted cropland from the definition of waters of the United States (WOTUS) "would cease upon a change of use, which means that the area is no longer available for the production of agricultural commodities."[8] And the federal regulations for 404 permits include an exemption for established operations and notes that "an operation ceases to be established [and is therefore subject to 404 permit requirements] when the area in which it was conducted has been converted to another use or has *lain idle so long that modifications to the hydrological regime are necessary to resume operation.*"[9]

These additions to the proposed rule would clarify the conditions that must be met on the ground for a parcel of land to be eligible for the new agricultural activity exemption, and would more closely align with federal wetland regulations – which is an explicitly stated purpose of this rule revision.

II. BWSR should include explicit additional functional assessment tools to ensure that wetland functionality is adequately captured

The Wetland Conservation Act is explicit that the public value of a wetland is dependent on the functions that the wetland provides.[10] The Hydrogeomorphic Classification for Wetlands ("HGM") can provide an excellent description of certain aspects of a wetland, but without further subclassification and analysis, it cannot by itself determine the extent to which a wetland provides particular functions and public value. Additional functional assessment tools need to be specified and required in the WCA rules to augment the HGM classification and characterization.

As has been highlighted in recent reports from the Minnesota Department of Natural Resources and the U.S. Fish and Wildlife Service, change from one wetland *type* to another can still indicate a loss of wetland function or value even though technically there is no "net loss." Moreover, even if the wetland type stays the same, its functionality may

[7] Notably, one of the stated purposes of this rule revision is to "increase consistency with federal wetland regulations."
[8] 40 C.F.R. § 120.2(b)(2).
[9] 40 C.F.R. § 232.3(c)(1)(ii)(B) (emphasis added).
[10] Minn. Stat. 103G.222 subd. 1.

be degraded by a change in input water, water levels due to climate change, or sources of pollution. In order to preserve wetland functionality and improve wetland mitigation outcomes under the Wetland Conservation Act, BWSR must pair HGM with additional functional assessment tools.

While HGM identifies a wetland's geomorphic position in the landscape and its hydrologic characteristics, when used alone it does not ensure adequate functional assessment. It has to be paired with additional tools that identify regional characteristics and reference wetland subclasses – such as the 2006 U.S. Army Corps Regional Guidebook for Prairie Potholes. These tools connect physical characteristics with functionality, and provide a gradient of assessment variables based on disturbance history, land use, and other factors.

We know that BWSR is in the midst of a Wisconsin - Minnesota Wetland Functional Assessment Initiative to develop tools for exactly this purpose, but that initiative and the tools it will create are not referenced in the proposed rule revision. We strongly recommend that BWSR identify specific tools in the proposed rule language that can be used to integrate functional assessment with the HGM methodology to inform regulatory decisions under the Wetland Conservation Act. These resources could be added to the documents that are incorporated by reference into the rule in section 8420.0112. Without this specificity on how to integrate HGM and functional assessment, the current process in the rule may not lead to an accurate determination of the public value of a wetland and may fall short of its statutory requirement to prevent wetland impacts that are not "replaced by actions that provide at least equal public value under a replacement plan."[11]

One approach would be to require the use of subclass guidebooks with well-developed methodologies to establish wetland functions, such as the 2006 regional guidebook for prairie potholes that BWSR has adopted as an approved functional assessment method.[12] However, its use as a functional assessment method under WCA remains limited. The rule could list wetland functions from the various HGM guidance documents (prairie potholes, peatlands, riverine, etc.) and add likely functions from the HGM classes without guidebooks. In addition, the rule could require Technical Review Panels to identify the level at which those functions are represented in a target wetland and use the

[11] Minn. Stat. 103G.222 subd. 1.
[12] BWSR. Wetland Functional Assessment https://bwsr.state.mn.us/wetland-functional-assessment.

methodology in the closest guidebook to determine the functional capacity of a particular wetland. This analysis, while labor intensive, would provide important information for damage assessment and mitigation requirements under WCA.

III. BWSR should keep explicit requirements for the content of wetland replacement applications

Under the Wetland Conservation Act, Wetland Replacement Plans must ensure that any lost wetlands are replaced by those of equal public value, follow a specific sequence of actions, and not violate special considerations criteria.[13] The current rules require applications to include all of the criteria necessary to allow local government units (LGUs) to determine whether a replacement plan complies with the Wetland Conservation Act.[14] In the proposed rule, however, BWSR has removed all application content requirements in the "Replacement Plan Applications" section of the rule and replaced it with: "A replacement plan application must, on a form provided by the board, include all information required by the board."

The removal of these application requirements puts the onus on LGUs to review applications without clearly outlined expectations for the applicant. To meet BWSR's stated principle to "minimize negative impacts to LGUs" and ensure that they receive the necessary information to make these determinations, the rule should explicitly require the applicant to demonstrate how the proposed replacement plan meets the special considerations criteria outlined in part 8420.0515, the sequence standards outlined in part 8420.0520, and the replacement standards outlined in part 8420.0522 such as ecological suitability and sustainability criteria.

IV. BWSR should clarify how to determine whether the special considerations criteria have been met

MCEA appreciates the detail that was added to subpart 3 of Rule 8420.0515 to provide a stronger basis for both DNR and LGU determinations related to the special consideration for rare natural communities. We think that the special considerations criteria in the other

[13] Minn. Stat. § 103G.222, subd. 1.
[14] Minn. R. 8420.0330 (outlining application requirements that include the special criteria from Rule 8420.0515, the sequencing standards outlined in Rule part 8420.0520, and the replacement standards such as ecological suitability and sustainability criteria outlined in Rule 8420.0522).

subparts of Rule 8420.0515 would benefit from similar clarification, and outline specific examples below.

Endangered and Threatened Species (subpart 2): clarify whether this includes threatened and endangered species on both federal and state registries.[15]

Groundwater Sensitivity (subpart 6): Replace reference to an obsolete document with newer reference documents, such as DNR's 2016 publication on "Methods to estimate near-surface pollution sensitivity" or the statewide map available on Minnesota Geospatial Commons for "Pollution Sensitivity of Near Surface Materials." These resources can help the LGU avoid wetland impacts with significant adverse effects on groundwater quality.

Sensitive Surface Waters (subpart 7): Expand sensitive surface waters from just outstanding resource value (ORV) waters or trout waters to include other impaired waters. For example, given the well-established research on disturbed bogs and peatlands as watershed sources of mercury, BWSR should consider a prohibition on impacts to bogs and/or peatlands that fall within the watershed of a waterbody that is impaired for mercury and subject to a TMDL, such as the St. Louis River in northeastern Minnesota. Given the extensive nutrient and sediment impairments across the state and the proven effectiveness of wetlands to filter and remove excess nutrients and sediments, BWSR should also consider criteria to limit impacts to wetlands within watersheds that are impaired for nutrients and/or sediment and subject to a TMDL, such as the Greater Blue Earth River Basin TSS TMDL.

Finally, BWSR should consider additional special considerations criteria for climate change resilience and flood mitigation through water storage and carbon sequestration through peatlands protection. This would build on significant state investments, such as BWSR's recent successful Regional Conservation Partnership Proposal (RCPP) for water storage projects throughout the state, and would help to ensure that we don't undo the benefits of these taxpayer investments through the loss of natural storage on the landscape. Additional protections for peatlands would build on Minnesota's Climate

[15] Minnesota Department of Natural Resources. Minnesota's List of Endangered, Threatened, and Special Concern Species. Effective August 19, 2013.

Action Framework, which identifies the protection and restoration of peatlands as a key action to avoid the acceleration of GHG emissions in the state.[16]

These proposed changes would help to ensure that the special considerations criteria outlined in rule align with the public value of wetlands that the Minnesota legislature identified in 103A.201 subp. 2(4)(b), which include the conservation of surface waters, improved water quality, floodwater retention, reduced stream sedimentation, and help to moderate climate change.

V. BWSR should ensure that the replacement standards are followed with explicit requirements to monitor in-kind replacement sites for priority functions

Currently, Rule 8420.0522 outlines the general requirement that "wetland replacement must replace the public value of wetlands lost as a result of an impact." Furthermore, BWSR has proposed to revise the rule language for in-kind wetland replacement such that in-kind wetland replacement means a wetland of the same hydrogeomorphic class. However, as outlined in Section II of this comment, hydrogeomorphic classification alone does not ensure that priority functions such as biological diversity and plant community are preserved. Commenters appreciate that selected literature emphasizes landscape position and hydrology as drivers of whether the replacement will be successful. But our concerns here stem from the deletion of biological diversity and plant community as indices of whether replacement is in-kind.

To that end, we recommend that BWSR add additional requirements to monitor in-kind replacement sites for priority functions such as aquatic and terrestrial wildlife, vegetation, and ecological function to ensure that the public value of wetlands are not lost as the result of an impact. This rule revision is an opportune time for interagency coordination within the state on wetland protection. Therefore, commenters request that monitoring requirements in the WCA rules align with MPCA's recommendations, which include water quality trends monitoring and biological monitoring.[17]

[16] Minnesota Climate Action Framework. https://climate.state.mn.us/sites/climate-action/files/Climate%20Action%20Framework.pdf.
[17] Minnesota Pollution Control Agency. Wetland monitoring https://www.pca.state.mn.us/air-water-land-climate/wetland-monitoring.

This is especially critical because in Rule 8420.0810 subp. 5(b), BWSR has proposed to remove all of the minimum requirements for annual monitoring reports, which include hydrology measurements, a map of plant communities within the replacement site, and color photographs of all replacement areas that are representative of each plant community type. BWSR has proposed to replace these minimum requirements with the vague requirement that each report include "information sufficient to evaluate progress meeting performance standards and other information required by the board." Based on correspondence with BWSR, it is our understanding that the agency believes monitoring for performance standards will ensure whether wetland replacement is successful. Our overall concerns here, however, remain: eliminating explicit references to account for and monitor native plants and wildlife for in-kind wetland replacement potentially allows wetland functionality to be lost.

If BWSR does not outline explicit requirements to monitor in-kind replacement sites for priority functions, the undersigned do not support the removal of minimum requirements for annual monitoring reports outlined in Rule 8420.0810 subp. 5(b).

VI. BWSR should re-examine proposed changes to the rules for enforcement procedures and articulate when it wields enforcement authority for WCA violations as opposed to LGUs

In 2007, the Legislature granted BWSR "new authority" to issue administrative penalty orders (APO) for WCA violations.[18] That "new authority" is presently codified at Minn. Stat. § 103B.101, subd. 12, and that statute permits BWSR to issue "an order requiring violations to be corrected" and to levy fines of up to $10,000 per violation. But despite possessing APO power for nearly two decades, there is public concern around the inadequate enforcement of WCA violations in Minnesota, as documented in a May 2023 *Star Tribune* article about a violation in Lyon County for which no APO was issued.[19]

[18] Minn. Bd. of Water & Soil Res., *2007 Annual Report*, https://www.lrl.mn.gov/docs/2008/mandated/080949.pdf. This "new authority" is codified at Minn. Stat. § 103B.101, subd. 12.

[19] Jennifer Bjorhus, *Farmers' Trench Digging Raises Concerns About Wetlands Protection in Minnesota*, Minn. Star Tribune, May 8, 2023, https://www.startribune.com/marshall-lyon-county-farm-wetlands-marsh-deer-minnesota-soil-hunt-violation-dnr-river-restoration/600273209.

We understand that BWSR has an APO plan for WCA. But this guidance document demonstrates BWSR's reluctance to wield this power and the need for this guidance plan to be updated. For example, the plan states that BWSR's APO power would only have been used nine times for 1,246 violations between 2005 and 2006. While we appreciate BWSR's careful approach to using this power, we believe the Legislature granted BWSR this authority to pursue wrongdoers so that Minnesota does not lose wetlands in careless and wonton ways. Reserving APO authority for use only in the most extreme circumstances demonstrates a public forgiveness to careless and unnecessary wetland destruction.

Commenters request BWSR delineate in rule how and when it will use APO power. We believe that it would be appropriate, for example, for BWSR to wield enforcement authority when special considerations have been violated, since these are statewide concerns that expand beyond the scope of the LGU. BWSR's APO Plan for the Minnesota Buffer Law provides a useful precedent for this exercise, as it articulates when BWSR has authority to enforce compliance versus LGUs. Given the lack of BWSR using its enforcement authority and increasing concerns about faltering wetland protections, this rulemaking provides a ripe moment to delineate when BWSR will wield the APO power given by the Legislature in 2007.

Finally, BWSR should steer clear from amorphous terms like "promptly." The rules should use a clear deadline – 30 days from receipt of the cease and desist, for example – rather than ambiguous language like "promptly."

Respectfully submitted,

/s/ Carly Griffith

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From: EnviroEase MN
To: MN_BWSR_WCA_RuleMaking
Subject: questions regarding proposed WCA rules
Date: Wednesday, November 20, 2024 9:48:39 AM
Attachments: image.png

Hi.
Please clarify what "relocation of a drainage system" means in Part 8420.0420, Sub 2 (3) below:

(3) Impacts to wetlands resulting from the relocation of a drainage system are not exempt under the maintenance provision in item A unless those wetlands are labeled farmed wetland, farmed wetland pasture, or wetland on a valid, final certified wetland determination and the impacts to those wetlands constitutes NRCS authorized maintenance.

And, can you tell me roughly when the BSA boundaries may change in 2025?

Thanks,
Mark Gamm

18 December 2024

Les Lemm, Wetlands Section Manager
Minnesota Board of Water and Soil Resources
520 Lafayette Road North
St. Paul, MN 55155

Dear Les,

Thank you for the opportunity to review and comment on the proposed rulemaking regarding the Wetland Conservation Act (MR 8420).

My comments are based on the November 12, 2024 draft version of the Wetland Conservation Act (WCA) rule from https://bwsr.state.mn.us/sites/default/files/2024-11/WCA%20Rule%20Amendments%2011-12-24%20Preliminary%20Draft.pdf.

Citation	Comment	Page
MR 8420	Is there an ability for the Army Corps of Engineers to delegate wetland authority to BWSR (similar to EPA's delegation of Clean Water Act permitting to MPCA) so Minnesota wetland regulation is not tied to the ebb and flow of federal WOTUS definitions?	-
MR 8420	Throughout the rule, Cowardin is removed as a tool for characterizing wetlands and it is replaced by Hydrogeomorphic Method (HGM). Training on the HGM method must be provided by BWSR as soon as possible so wetland professionals are ready to implement the new provisions of rule.	-
8420.0111	Add a definition of "replacement credit."	16
8420.0255	Subp. 4 C: New language specifies the period can be lengthened, but not shortened. Could an LGU stipulate the period for a boundary and type decision be shorter (e.g., 3 years)?	32
8420.0420	The Utilities exemptions (Subd. 6) are essential for public utilities to get work done and places an undue burden on public utilities if the exemptions do not apply to all wetlands (1).	50
8420.0420	The definition of WOTUS is always changing. It is likely fewer wetlands will be eligible for this exemption in the future, which will be problematic for public utilities.	50
8420.0420	The "or" currently at the end of Subp. 6 A (1) (b) is essential and should remain.	50
8420.0420	The language from statute (103G.2241 subd 6 (2)) is missing from the proposed rule. This would place an undue burden on public utilities (e.g., MS4s).	50
8420.0420	The addition of the second sentence of Subp. 6 A (2) is different from statute (103G.2241 Subd. 6 (3)). This would unnecessarily burden public utilities.	50
8420.0522	Support changes related to removing "upland" from buffer designations. I worked on a wetland bank where a buffer comprised of wetland made good sense for the resource. Glad to see credit can be given in such cases.	66
8420.0522	Recommend reaching out specifically to current bank owners, providing resources to educate them about the proposed changes in Subp. 7B and their implications, as well as inviting them to comment on the proposed rule revisions.	66
8420.0526	Recommend adding "or banking credit" (Subp. 1A). Banking credit is defined in 8420.0111, but currently "replacement credit" is not. If they are different, include both where applicable.	76
8420.0526	Under Subp. 2A, is it possible to have a low value wetland adjacent to the high value wetland adjacent to a replacement wetland? If so, "upland" should be removed from the 3rd sentence.	76
8420.0526	Support the addition of Subp. 2B (1) and (2).	77

8420.0526	Under Subp. 2C, the increase in credit to 50% should be for any buffer areas "restored, established or preserved," not only restored buffers.	77
8420.0526	Under Subp. 2C (2), remove the word "restored." This subpart does not apply exclusively to restored wetlands.	77
8420.0526	Under Subp. 4A (1) is confusing. It seems there is something missing after the first comma.	78
8420.0526	Add language to provide an option for areas to be uncultivated due to leaving the area fallow at the request of the TEP to determine if a natural seed bank suitable for wetland restoration exists. (Suggest adding it after "grasses or legumes")	78
8420.0705	Is BWSR is going to be drafting a bank-specific timeline/deadlines? Or are these the final ones? If they will be drafting separate deadlines through another process, a less specific process should be included here.	89
8420.0705	B (2): The NOA form includes all necessary people. Do they need to be called out in the first sentence?	90
8420.0705	B (2): This specifies a NOA comment period of 60 days. The TEP has 90 days to provide findings. Under this language, if a TEP member waits for the TEP to convene and/or issue findings and finds they dissent, it appears they would lose their opportunity to comment. A TEP member should be able to still comment after the 60 day period if they dissent and would like their comments to be considered in the final decision.	90
8420.0705	B (2): Typically, the TEP needs to convene and issue findings in the same timeframe as the NOA comment period. The issue resolves if the comment period of 60 days (from the 2nd sentence) is changed to 90 days.	90
8420.0705	B (4): Change to "The applicant and the local government unit may agree **in writing** to further extend the decision timeline beyond the initial 60-day extension."	90
8420.0705	B (7): Change to "A notice of decision must be sent within ten days **of a decision on the banking plan application**, on a form provided by the board."	90
8420.0705	BWSR is requested to develop and post guidance and examples of the banking timeline process. Include multiple scenarios from actual examples, at least a few of which involved substantive revisions to the banking plan.	91
8420.0800	One use of "certifies" was removed from this part, but several others (e.g, title, Subp. 1, Subp. 3 title, last sentence of Subp. 3) remain. Support the removal of "certification" language. The language should be consistent.	101
8420.0810	It seems the verbiage in Subp. 4 A should be changed from "construction certification" since the verbiage is changed in 8420.0800, Subp. 3.	103
8420.0900	In most cases, proposed the current rule revisions are less prescriptive than what currently exists. This is proposing something more prescriptive. Is it warranted? Or will it unnecessarily restrict the ability to be flexible?	115

Please contact me if you have questions or need additional information.

Thank you,

Lori Haak, Water Resources Coordinator
lhaak@edenprairie.org

December 18, 2024

Mr. Lewis Brockette
Wetlands Policy Coordinator
MN Board of Water & Soil Resources
Lewis.Brockette@state.mn.us
bwsr.wcarulemaking@state.mn.us

Dear Mr. Brockette:

The Valley Branch Watershed District (VBWD) is the Local Government Unit responsible for administering the Minnesota Wetland Conservation Act (WCA) throughout the VBWD. This letter provides feedback in response to the preliminary draft WCA rule.

- 8420.0100 **Purpose**. Please provide a reference for determination of wetland quality and biological diversity, and values identified in A.- D. of this subpart.
- 8420.0111 **Definitions**.
  - Subpart. 26. **Fill**. – Please consider adding fences or fencing to the description of what fill does not include. This is a common question from applicants and would be helpful to provide clarification. Suggested edit highlighted in red as follows: Fill does not include posts and pilings for linear projects such as bridges, elevated walkways, fences, or powerline structures, or structures traditionally built on pilings such as docks and boathouses.
  - Subpart. 51. **Permanently and semipermanently flooded area of a wetland**.
    - Please consider switching "aquatic" and "terrestrial" around to read: …commonly the point where the natural vegetation changes from predominantly terrestrial to predominantly aquatic.
    - Note that the terms terrestrial and aquatic are also used in the definition of a wetland (Subpart. 72). Further clarification of the definition for permanently and semipermanently flooded would be helpful, such as a dominance of obligate vegetation species, since terrestrial and aquatic are very generalized terms and are being used to define two different boundaries.

        - Please consider also using the Cowardin descriptions based on the persistence of surface water. Permanently Flooded- Water covers the substrate throughout the year in all years. Semipermanently Flooded- Surface water persists throughout the growing season in most years. When surface water is absent, the water table is usually at or very near the land surface.

    - Subpart 52. **Plant community**. Changing the definition of Plant community from the Eggers & Reed community types to the DNR Native Plant Community (NPC) Classification omits plant communities that are not native. The reason for the change shows that the DNR NPC classification system is more complete. We would identify the DNR NPC classification as more specific and detailed: however, it only classifies native plant communities. Therefore, non-native plant communities will not be included in the definition of Plant community under Subpart 52. Also, are theses WCA changes consistent with the USACE policies? Will the USACE continue to use Eggers & Reed?

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- 8420.0420 **Exemption standards**.

    - Subpart 4 **Federal approvals**. Please consider updating this subpart with information in the guidance and policy documents referencing that the steps to validate this exemption have been completed.
Wetland_WCA_Federal_Approvals_Exemption_for_Utilities.pdf and Memorandum

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- 8420.0522 Subpart 4. **Replacement ratios**. Will impacts to non-public water deepwater habitat have the same replacement requirements as wetland impacts? How will that be tracked for replacement credits? Will HGM classifications be used, or will deepwater have its own category?

- 8420.0522 Subpart 7. **Siting of replacement**.

  - C. (2) Removal of the statement: “The cost of replacement credits alone is not sufficient reason to conclude that reasonable, practicable, or environmentally beneficial replacement opportunities are not available.”

    - Note that the VBWD and many metro LGUs have their own replacement siting sequencing that prioritizes local replacement, including opportunities for project-specific replacement.

  - The Bank Service Area (BSA) map is proposed to be removed. The reason for the change is due to online availability of better and more current information. However, knowing that BWSR is planning to make some changes to the BSA boundaries, we request that BWSR provide details of the proposed revised BSA map to LGUs for planning purposes during this rulemaking process. For example, the southern portion of BSA 6 is proposed to change to BSA 7, which affects all of VBWD.

- 8420.0526 **Actions eligible for credit**.
    - Subpart 2 C. This appears to provide a higher amount of credit for upland buffer vegetation restoration for protection of rare natural communities than the current typical percentages for ENRV crediting to establish native vegetation in a wetland to protect a rare natural community. If this proposed 50% crediting for upland buffer is allowed, then we would suggest increasing the current percentages for ENRV crediting to match. For example, ENRV crediting for establishment of native vegetation within wetland areas that protect rare natural communities is often only 12.5% to 25%. It doesn't make sense to provide higher wetland crediting in upland areas than in wetland areas for the same credit actions.
    - Please consider adding actions for wetland restoration in coordination with stream bank mitigation.
- 8420.0528 Subpart. 3. **Design considerations**. C. measures should be taken to manage hydrologic bounce such that the wetlands' function, value, and sustainability are maintained. The reason for the change is listed as replacing outdated guidance with an implementable standard. What is the implementable standard? VBWD rules include hydrology guidelines that were developed from the outdated guidance document. Will new standards be developed by BWSR?
- 8420.0810 Subpart 4 **Timing and duration of monitoring**. The way this is written assumes that five growing seasons is sufficient for restoration. Note that some monitoring plans are planned for more than five growing seasons to achieve restoration goals. Especially if the site includes restoration of forested wetland communities which typically require longer timeframes. Monitoring may also be planned to occur every other year for communities that take longer to establish. We would recommend referring to the approved monitoring plan, similar to the way Subpart. 5 was re-written for monitoring reports.
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- 8420.0705 **Establishing a wetland bank site**. Subpart 3 **Application procedures**. Should there be a statement added to these timelines to document that Section 15.99 statute timelines are not applicable to this section?

Thank you for offering an opportunity to comment on the draft WCA rule. Please contact us if you have any questions or need clarification on these comments.

Sincerely,

John P. Hanson, PE
District Engineer
Barr Engineering Co.
Engineers for the VBWD

Karen Wold
Senior Environmental Scientist
Barr Engineering Co.
Engineers for the VBWD

c: VBWD Board of Managers
Ken Powell, BWSR
Ben Meyer, BWSR
Jay Riggs, WCD
Jan Voit, Minnesota Watersheds

Embedded Secure Document

The file *https://bwsr.state.mn.us/sites/default/files/2025-02/EIP%20Comments%2012-16-24.pdf* is a secure document that has been embedded in this document. Double click the pushpin to view.

December 19, 2024

Mr. Lewis Brockette
Wetlands Policy Coordinator
MN Board of Water & Soil Resources
Lewis.Brockette@state.mn.us
bwsr.wcarulemaking@state.mn.us

Re: Comments on Preliminary Draft WCA Rule

Dear Mr. Brockette:

On behalf of the Bassett Creek Watershed Management Commission (BCWMC), we appreciate the opportunity to provide comments on the preliminary draft Minnesota Wetland Conservation Act (WCA) Rule. The BCWMC is the Local Government Unit responsible for administering the WCA for the City of Medicine Lake and the portions of the cities of Robbinsdale and St. Louis Park that are within the Bassett Creek watershed. In our role as Engineer for the BCWMC, Barr Engineering Co. assists them in administering the WCA. This letter provides our comments in response to the preliminary draft WCA rule.

- 8420.0100 **Purpose**. Please provide a reference for determination of wetland quality and biological diversity, and values identified in A.- D. of this subpart.
    - 8420.0111 Definitions.Subpart. 26. **Fill**. – Please consider adding fences or fencing to the description of what fill does not include. This is a common question from applicants and would be helpful to provide clarification. Suggested edit highlighted in red as follows: Fill does not include posts and pilings for linear projects such as bridges, elevated walkways, fences, or powerline structures, or structures traditionally built on pilings such as docks and boathouses.
    - Subpart. 51. **Permanently and semipermanently flooded area of a wetland**.
        - Please consider switching “aquatic” and “terrestrial” around to read: …commonly the point where the natural vegetation changes from predominantly terrestrial to predominantly aquatic.
        - Note that the terms terrestrial and aquatic are also used in the definition of a wetland (Subpart. 72). Further clarification of the definition for permanently and semipermanently flooded would be helpful, such as a dominance of obligate vegetation species, since terrestrial and aquatic are very generalized terms and are being used to define two different boundaries.

        - Please consider also using the Cowardin descriptions based on the persistence of surface water. Permanently Flooded- Water covers the substrate throughout the year in all years. Semipermanently Flooded- Surface water persists throughout the growing season in most years. When surface water is absent, the water table is usually at or very near the land surface.
    - Subpart 52. **Plant community**. Changing the definition of Plant community from the Eggers & Reed community types to the DNR Native Plant Community (NPC) Classification omits plant communities that are not native. The reason for the change shows that the DNR NPC classification system is more complete. We would identify the DNR NPC classification as more specific and detailed: however, it only classifies native plant communities. Therefore, non-native plant communities will not be included in the definition of Plant community under Subpart 52. Also, are theses WCA changes consistent with the USACE policies? Will the USACE continue to use Eggers & Reed?
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- 8420.0420 **Exemption standards**.
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    - C. (2) Currently the rule is proposing to remove this statement: "The cost of replacement credits alone is not sufficient reason to conclude that reasonable, practicable, or environmentally beneficial replacement opportunities are not available."
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    - Please consider adding actions for wetland restoration in coordination with stream bank mitigation.
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for more than five growing seasons to achieve restoration goals. Especially if the site includes restoration of forested wetland communities which typically require longer timeframes. Monitoring may also be planned to occur every other year for communities that take longer to establish. We would recommend referring to the approved monitoring plan, similar to the way Subpart. 5 was re-written for monitoring reports.

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- 8420.0705 **Establishing a wetland bank site**. Subpart 3 **Application procedures**. Should there be a statement added to these timelines to document that Section 15.99 statute timelines are not applicable to this section?

Thank you for offering an opportunity to comment on the draft WCA rule. Please contact me (kchandler@barr.com) and Karen Wold (kwold@barr.com) if you have any questions or need clarification on these comments.

Sincerely,

Karen L. Chandler

Karen Chandler, P.E.
Barr Engineering Co.
Engineers for the Bassett Creek Watershed Management Commission (BCWMC)

c: Catherine Cesnik, BCWMC Chair
Laura Jester, BCWMC Administrator
Karen Wold, Barr Engineering Co.
Ken Powell, MN Board of Water & Soil Resources
Jan Voit, Minnesota Watersheds
Jed Chesnut, MN Board of Water & Soil Resources
Stacey Lijewski, Hennepin County

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December 20, 2024

Mr. Lewis Brockette
Wetlands Policy Coordinator
MN Board of Water & Soil Resources
Lewis.Brockette@state.mn.us
bwsr.wcarulemaking@state.mn.us

Dear Mr. Brockette:

The Nine Mile Creek Watershed District (NMCWD) is the Local Government Unit responsible for administering the Minnesota Wetland Conservation Act (WCA) for NMCWD. This letter provides feedback in response to the preliminary draft WCA rule:

- 8420.0100 **Purpose**. Please provide a reference for determination of wetland quality and biological diversity, and values identified in A.- D. of this subpart.
- 8420.0111 Definitions.
  - Subpart. 26. **Fill**. – Please consider adding fences or fencing to the description of what fill does not include. This is a common question from applicants and would be helpful to provide clarification. Suggested edit highlighted in red as follows: Fill does not include posts and pilings for linear projects such as bridges, elevated walkways, fences, or powerline structures, or structures traditionally built on pilings such as docks and boathouses.
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Thank you for offering an opportunity to comment on the draft WCA rule. Please contact us if you have any questions or need clarification on these comments.

Sincerely,

Erica Sniegowski

Erica Sniegowski
Administrator

Cc: Zach Stafslien, Janna Kieffer, Karen Wold

From: Schlorf, Becky
To: MN_BWSR_WCA_RuleMaking
Subject: Comment
Date: Monday, December 23, 2024 11:13:46 AM
Attachments: image001.png

I apologize for this not getting in by 12/20 and hope this can still be considered. Stearns County Environmental Services Department would like to see this item E added here:

Subp. 38. **Local government unit.** "Local government unit" means:

A. outside of the seven-county metropolitan area, a city council, county board of commissioners, or soil and water conservation district or their delegate;

B. in the seven-county metropolitan area, a city council, town board under Minnesota Statutes section 368.01, watershed management organization as defined under Minnesota Statutes, section 103B.205, subdivision 13, or soil and water conservation district or their delegate; ~~and~~

C. in those cases where an activity or replacement will occur on state land, the agency with administrative responsibility for the land; and

D. for wetland banking projects established solely for replacing wetland impacts under a permit to mine under Minnesota Statutes section 93.481, the commissioner.

E. For wetland banking approvals and monitoring, the local government unit may delegate their authority to the Board as specified in a Memorandum of Understanding.

Becky

Rebecca Schlorf | Environmental Services Supervisor

becky.schlorf@stearnscountymn.gov | (320) 656-3613 | 800-450-0852
www.stearnscountymn.gov
ENVIRONMENTAL SERVICES DEPARTMENT
STEARNS COUNTY SERVICE CENTER
3301 COUNTY RD 138
WAITE PARK MN 56387

Mission: Provide exceptional services to assure a safe, healthy, vibrant county for all
Values: Professional, Approachable, Responsive, Collaborative, Fair & Equitable

NATURION

Where Planet Meets Progress

December 20, 2024

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

Minnesota Board of Water and Soil Resources,

Thank you for the opportunity to comment on the preliminary draft of the Minnesota Wetland Conservation Act Rulemaking and we appreciate the work already completed to create this draft. As a mitigation banking company, we intend to continue to work with BWSR to provide mitigation solutions for project developers within Minnesota. We are supportive of BWSR's efforts for early public input and look forward to continuing to participate in the rulemaking process.

We understand that one of BWSR's goals with these edits is to align Minnesota's wetland program with the US Army Corps of Engineers (USACE) permitting program under Section 404 of the Clean Water Act. We agree that consistency with USACE is important to provide clarity and to streamline the application process for both mitigation banks and impactors.

Timing of Replacement

In 8420.0522 Subpart 8(B)(1) the proposed revision notes that replacement is considered in advance if approved wetland bank or in-lieu fee replacement credits are withdrawn before the impact. This language should be revised to be clearly consistent with the federal preference hierarchy in the 2008 Mitigation Rule at 33 CFR 230.93(b)(2) through (b)(6). As outlined in the 2008 Rule, because a mitigation bank must be approved before credits can begin to be used to offset wetland impacts, mitigation banks minimize temporal loss and are truly in advance of an impact. This is especially true in Minnesota, as mitigation banks do not receive an initial credit release until after the bank is fully constructed. In contrast, in-lieu fee replacement credits, where a payment is made to the board or board-approved sponsor, can be sold in advance of identifying or implementing a restoration project.

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Any edits to Timing of Replacement at 8420.0522 Subpart 8, should reflect that approved and released mitigation bank credits are preferred to in-lieu fee credits as they are truly advance replacement. In-lieu fee credits, while purchased prior to an impact, do not minimize temporal loss as the restoration project has not yet been identified or begun at the time the impact occurs. These suggested changes are also consistent with the Minnesota statutory updates at 103G.2242 Subdivision 3(a)(2) and 3(b), which provide authorization for replacement to occur after the impact when using an in-lieu fee program, but do not inherently put in-lieu fee replacement that takes place after the wetland impacts on equal footing with mitigation bank credits.

In-Lieu Fee Program

A definition of an in-lieu fee program is introduced in 8420.0111 Subpart 35(a), to incorporate statutory changes. We recognize the need to reflect changes in the statute, and the potential role for an in-lieu fee program, and encourage BWSR to develop policy or guidance on how an established in-lieu fee program will operate consistent with the Federal Mitigation Rule requirements at 33 CFR 332.8, as required in the Statute at 103G.2242 Subdivision 1(a).

Bank Service Area Revisions

We support the revision of the Bank Service Areas (BSAs) to focus on the BSA watershed-based boundaries and eliminate the consideration of pre-settlement wetlands. We understand that under current practice USACE St. Paul District generally prefers mitigation remain within in the same 8-digit Hydrologic Unit Code, which is a subset of the larger BSA. We suggest that the revised BSAs be aligned with the preferences of the USACE to provide clarity and efficiency for permittees in identifying mitigation banks that can service their need, as well as to provide clarity for the mitigation banking community.

Bank Service Area Grandfathering

8420.0522 Subpart 4G and Subpart 7F we understand to be intended to allow banks that are approved as of the date of the final Wetland Conservation Act rulemaking to have a primary service area that encompasses both the primary service area at the time the bank was approved, and the primary service area the bank would be assigned under the new final rule BSAs. We support this grandfathering, and suggest BWSR explore ways to clarify that the intent is for these grandfathered banks to be able to utilize as a primary service area both the historical, approved service area *and* the new, revised BSA.

We also suggest this grandfathering provision be expanded to apply to mitigation banks that have begun the permitting process with an application that has been deemed complete and assigned an application number, as of the date of the final Wetland Conservation Act rulemaking. Bank development can be a lengthy process, and investment decisions made when

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initiating permitting for a bank are based on the bank service areas in place at the time permitting began. Changes to the BSAs from this rulemaking could materially change the economics of a bank already in the permitting process, making this grandfathering appropriate.

Replacement Ratios

BWSR has also made updates to the replacement ratio chart shown in 8420.0522 Subpart 4(A)(3). We understand these changes are intended to provide clarity, and suggest that in the table labeled Minimum Replacement Ratios: Banking, the Location of impact categories should align with the pre-settlement wetland category assigned to the new BSAs: <80% or >80%. Specifically, we suggest that the entry for <50% area should be re-labeled as <80%, as the 2.5:1 or 2:1 minimum replacement ratios would apply to all <80% pre-settlement areas.

Monitoring Plans and Conservation Easements

We agree with the edits to the rulemaking language that remove the specificity regarding monitoring plans and conservation easements. We agree with BWSR's assessment that having less specificity in regulation is more practical and will allow for better, site-specific decision-making, while preserving high standards and consistency with USACE requirements.

In describing the changes to the conservation easement language, BWSR notes that the amendment will increase the Board's flexibility to provide adequate long-term protection. We encourage the Board to develop model easement language for circumstances where the banking plan applicant desires retaining responsibility for the project's performance, rather than the land owner. In working with landowners, Naturion – as the banking plan applicant – retains responsibility for project performance during the monitoring period, and if needed will enter into a relationship with a long-term steward and provide an endowment to fund any long-term stewardship activities. This relationship with landowners allows Naturion to develop and maintain high-quality sites in circumstances where landowners are supportive of restoration work on their property, but are uncomfortable with being responsible for restoration and performance, which relies on expertise and/or financial resources they do not have.

Do not hesitate to reach out if you have any questions regarding these comments. I can be reached at jenny@mitigationholdings.com or at 734.272.6939.

Thank you for the opportunity to comment,

Jenny Thomas

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(618) 281-2232 | NATURION.COM

From: Mark Lindhorst
To: Powell, Ken (BWSR)
Subject: RE: WCA Program Update 11-12-2024
Date: Tuesday, November 12, 2024 1:07:33 PM
Attachments: Screenshot 2024-11-12 130640.png

Ken,

I am so frustrated that the statute changes establishing BWSR as the lead for wetland banks has been removed from the proposed Rule. The amount of responsibility being put on LGU's specifically in counties with requests for large wetland banks is unacceptable. St. Louis County has been advocating for this to be done since the 2015 statute changes.

From: Powell, Ken (BWSR) <ken.powell@state.mn.us>
Sent: Tuesday, November 12, 2024 12:26 PM
To: Powell, Ken (BWSR) <ken.powell@state.mn.us>
Subject: WCA Program Update 11-12-2024

This email was sent to WCA LGU and SWCD Contacts. Please pass on to others as warranted. Let me know if you are no longer a WCA LGU/SWCD contact or otherwise not involved in WCA so I can remove you from the contact list.

Wetland Conservation Act (WCA) Program Update – Preliminary Draft WCA Rule posted

Date: 11/12/2024

A preliminary Draft WCA Rule has been posted on the BWSR Wetlands rulemaking page. This preliminary draft is being made available to enable early review and comment by the public prior to initiation of the formal rulemaking process. If you wish to provide feedback in response to this preliminary draft, please submit it to bwsr.wcarulemaking@state.mn.us by December 20, 2024. More information is available on the rulemaking webpage.

Ken Powell
Wetland Conservation Act Operations Supervisor
MN Board of Water & Soil Resources

Ken.powell@state.mn.us

December 20, 2024

Les Lemm
Wetlands Section Manager
MN Board of Water and Soil Resources
les.lemm@state.mn.us

Lewis Brockette
Wetlands Policy Coordinator
MN Board of Water and Soil Resources
Lewis.Brockette@state.mn.us

Sent via email to bwsr.wcarulemaking@state.mn.us, les.lemm@state.mn.us, and Lewis.Brockette@state.mn.us

Washington County Comments on Preliminary Draft WCA Rule Posted on BWSR Website

Thank you for including Washington County in the preliminary draft Wetland Conservation Act rule changes. The Washington County Public Works and Public Health and Environment Departments have the following comments on the Preliminary Draft Rules dated 11/12/2024.

1. Sec. 75. Minnesota Statutes 2022, section 103G.005, subdivision 14d, is proposed to be amended to remove the word "sole" in "sole purpose". We are supportive of this change as it clarifies that the restriction applies even when the gaining of additional exemptions was not the sole purpose for splitting a project into components or phases.

2. Sec. 76. Minnesota Statutes 2022, section 103G.005, subdivision 17b, proposes changes to add an option under the definition of wetland type to use the HGM classification system. This is a positive change that has potential to make impact and replacement easier to manage.

3. Sec. 77. Minnesota Statutes 2023 Supplement, section 103G.005, subdivision 19, is proposed to be amended to add deep water habitats to the wetland definition but excludes protected waters (PWI). We support this change from the context of potential future 404 assumption. Some of these areas are currently regulated by the 404 program. We suggest providing rules clarifying that deepwater habitat impacts are categorized the same as adjacent wetlands and to clarify impacts to deepwater habitat as fill and excavation only. Water level changes should also not be identified as adverse impacts.

4. Sec. 80. Minnesota Statutes 2022, section 103G.2241, subdivision 2, is amended to remove the drainage exemptions for Type 1 wetlands or up to 5 acres of Type 2 or 6 wetlands in the benefitting area of public drainage systems and removes the exemption for draining of Type 1, 2, 6, and 7 for repairs of legal drainage systems. The 25-year rule would apply to all wetlands and deepwater habitats. The proposed rule also eliminates exemptions for repairs of private drainage systems. We are not supportive of this rule change. Managing ditch systems is a critical function of a Public Works Department critical to reducing potential flooding to private properties. This revision is adverse to drainage authorities ability to manage legal ditch systems. It adds significant costs to ditch system management. The language is poorly worded i.e. "wetlands

that have existed". There is no technical method to document and map wetland boundaries in the past, i.e. 24 years ago vs 26 years ago.

Thank you, the County looks forward to working with the BWSR on these updated rules.

Sincerely,

Kevin Peterson, PE
Washington County Design Engineer

Cc (email only):

Wayne Sandberg, Public Works Director/County Engineer
Frank Ticknor, Deputy Director Public Works
Cory Slagle, Assistant County Engineer
David Brummel, Director of Washington County Public Health & Environment
Stephanie Souter, Senior Program Manager Washington County Public Health & Environment

Exhibit 4 — Tribal Consultation and Coordination

Wetland Conservation Act Rulemaking — Minnesota Rules, Chapter 8420   Revisor's ID Number: RD-4356

Last updated 6/16/2026

Position Abbreviations (BWSR Staff)

ED = Executive Director   AD-P&P = Assistant Director for Programs and Policy   AD-RO = Assistant Director for Regional Operations   GC = General Counsel   TL = Tribal Liaison   WSM = Wetlands Section Manager   WCA-OS = WCA Operations Supervisor   WPC = Wetlands Policy Coordinator

Date	Type	Audience	BWSR Staff	Purpose
03/12/2026	Agency Report	Minnesota Indian Affairs Council - Executive Board, MIAC staff	TL	Provided a general update on WCA rulemaking.
02/19/2026	Email	Environmental/Natural Resources directors, managers, and staff for each of the 11 Tribal Nations and the Intertribal Consortiums	TL	Distributed an update on ongoing rulemaking efforts.
02/12/2026	Consultation (In-Person)	Prairie Island Indian Community Tribal Government leadership and staff	ED, TL	During formal consultation, reviewed and discussed the agency's WCA rulemaking effort and the preliminary draft WCA rule.
11/19/2025	Agency Report	Minnesota Indian Affairs Council - Executive Board, MIAC staff	TL	Provided a general update on WCA rulemaking.
11/04/2025	Consultation (In-Person)	Grand Portage Band of Lake Superior Chippewa Leadership and staff	ED, TL	During formal consultation, reviewed and discussed the agency's WCA rulemaking effort and the preliminary draft WCA rule.
11/03/2025	Consultation (In-Person)	Fond du Lac Band of Lake Superior Chippewa Leadership and staff	ED, AD-P&P, AD-RO, TL	During formal consultation, reviewed and discussed the agency's WCA rulemaking effort and the preliminary draft WCA rule.
07/28/2025	Agency Report	Minnesota Indian Affairs Council - Executive Board, MIAC staff	ED, TL	Agency report to the Minnesota Indian Affairs Council. Information included an update on agency WCA rulemaking andavailability of 2nd preliminary draft WCA rule.
07/18/2025	Email	Environmental/Natural Resources directors, managers, and staff for each of the 11 Tribal Nations and the Intertribal Consortiums	TL	Provided a general update on WCA rulemaking.

07/09/2025	Coordination (Virtual)	Environmental/Natural Resources directors, managers, and staff for each of the 11 Tribal Nations and the Intertribal Consortiums	TL, AD-P&P, WSM, GC	Listening session to review and discuss the preliminary draft WCA rule language.
07/01/2025	Coordination (Virtual)	Environmental/Natural Resources directors, managers, and staff for each of the 11 Tribal Nations and the Intertribal Consortiums	WSM, WCA-OS, AD-P&P, GC, TL	Listening session to review and discuss the preliminary draft WCA rule language.
06/26/2025	Consultation (In-Person)	Mille Lacs Band of Ojibwe Tribal Government Leadership and staff	ED, TL	During formal consultation, reviewed and discussed the agency's WCA rulemaking effort and the preliminary draft WCA rule.
06/24/2025	Coordination (Virtual)	Tribal Nation & Intertribal Consortium Environmental/Natural Resources directors and staff	TL	Shared information on rulemaking, inlcuding preliminary draft language availability and agency efforts to seek Tribal consultation and engagement.
06/09/2025	Coordination (Virtual)	White Earth Band of the Minnesota Chippewa Tribal staff	TL, AD-P&P, WSM, GC	During formal consultation, reviewed and discussed the agency's WCA rulemaking effort and the preliminary draft WCA rule.
06/05/2025	Coordination (In Person)	Minnesota Indian Affairs Council - Executive Board, MIAC staff	TL	Discussed WCA rulemaking, including the availability of the second preliminary draft WCA rule and coordination of Tribal engagement meetings.
06/03/2025	Email	Environmental/Natural Resources directors, managers, and staff for each of the 11 Tribal Nations and the Intertribal Consortiums	TL	Provided an update on ongoing rulemaking efforts.
05/19/2025	Agency Report	Minnesota Indian Affairs Council - Executive Board, MIAC staff	ED, TL	Provided a report on WCA rulemaking, including availability of the second preliminary draft WCA rule and coordination of Tribal engagement meetings.
05/15/2025	Coordination (Virtual)	Minnesota Tribal Environmental Committee	TL	Shared information on rulemaking, inlcuding preliminary draft language availability and agency efforts to seek Tribal consultation and engagement.
04/25/2025	Website	Preliminary Draft Rule #2 Posted	NA	Preliminary Draft Rule language, incorporating changes since the 11/12/24 Preliminary Draft
04/21/2025	Consultation (In-Person)	Red Lake Band of Chippewa Indians Leadership and staff	ED, TL	During formal consultation, reviewed and discussed the agency's WCA rulemaking effort and the preliminary draft WCA rule.

04/17/2025	Coordination (Virtual)	Minnesota Tribal Environmental Committee	TL	Shared information on rulemaking, inlcuding preliminary draft language availability and agency efforts to seek Tribal consultation and engagement.
04/15/2025	Email	Environmental/Natural Resources directors, managers, and staff for each of the 11 Tribal Nations and the Intertribal Consortiums	TL	Provided a general update on agency WCA rulemaking efforts.
03/18/2025	Coordination (Virtual)	Environmental/Natural Resources directors, managers, and staff for each of the 11 Tribal Nations and the Intertribal Consortiums	WSM, WCA-OS, WPC, TL, AD-P&P, GC	Reviewed preliminary draft rule langage and solicited and received feedback.
03/13/2025	Coordination (Hybrid)	Environmental/Natural Resources directors, managers, and staff for each of the 11 Tribal Nations and the Intertribal Consortiums	WSM, WCA-OS, WPC, TL, AD-P&P, GC	Reviewed preliminary draft rule langage and solicited and received feedback.
02/24/2025	Consultation (In-Person)	Leech Lake Band of Ojibwe Tribal leadership and staff	ED, TL	During formal consultation, reviewed and discussed the agency's WCA rulemaking effort and the preliminary draft WCA rule.
02/07/2025	Consultation (In-Person)	Fond du Lac Band of Lake Superior Chippewa Leadership and staff	ED, TL	During formal consultation, reviewed and discussed the agency's WCA rulemaking effort and the preliminary draft WCA rule.
02/02/2025	Website	Preliminary Draft Rule #2 Posted	NA	Posted the second version of the preliminary draft rule language, which incorporated changes since the 11/12/2024 Preliminary Draft
01/24/2025	Coordination (Virtual)	Prairie Island Indian Community Tribal leadership and staff	WSM, WPC, TL	During formal consultation, reviewed and discussed the agency's WCA rulemaking effort and the preliminary draft WCA rule.
01/23/2025	Consultation (Virtual)	Shakopee Mdewakanton Sioux Community Tribal leadership and staff.	ED, AD-P&P, TL	During formal consultation, reviewed and discussed the agency's WCA rulemaking effort and the preliminary draft WCA rule.
01/16/2025	Coordination (Virtual)	Minnesota Tribal Environmental Committee	TL	Shared information on rulemaking, inlcuding preliminary draft language availability and agency efforts to seek Tribal consultation and engagement.
01/16/2025	Email	Environmental/Natural Resources directors, managers, and staff for each of the 11 Tribal Nations and the Intertribal Consortiums	TL	Shared information on rulemaking, inlcuding preliminary draft language availability and agency efforts to seek Tribal consultation and engagement.

01/10/2025	Email	Environmental/Natural Resources directors, managers, and staff for each of the 11 Tribal Nations and the Intertribal Consortiums	TL	Distributed a memorandum that provided background on the rulemaking effort and preliminary draft WCA rule language, and identified specific sections of the draft WCA rule that may be of Tribal interest.
01/09/2025	Coordination (In Person)	Minnesota Indian Affairs Council - Executive Board, MIAC staff	ED, TL	Provided a general overview and Q&A for WCA rulemaking.
01/06/2025	Coordination (Virtual)	Tribal Webinar & Listening Session	AD-P&P, WSM, TL, WSM	Provided a general overview and Q&A for WCA rulemaking.
01/03/2025	Consultation (In-Person)	White Earth Band of the Minnesota Chippewa Tribe leadership and staff	ED, TL	During formal consultation, reviewed and discussed the agency's WCA rulemaking effort and the preliminary draft WCA rule.
12/20/2024	Agency Report	Minnesota Indian Affairs Council - Executive Board, MIAC staff	ED, TL	Report provided information on WCA rulemaking and meeting/coordination opportunities.
12/16/2024	Coordination (Virtual)	Tribal Webinar & Listening Session	AD-P&P, WSM	Provided a general overview of WCA rulemaking and rulemaking topics and responded to questions.
12/13/2024	Coordination (Virtual)	Minnesota Tribal Environmental Committee	TL, AD-P&P	Presented general rulemaking information, including scope, opportunities for comment, and timeframe.
11/19/2024	Consultation (In-Person)	Prairie Island Indian Community Tribal leadership	ED, TL	During formal consultation, reviewed and discussed the agency's WCA rulemaking effort and the preliminary draft WCA rule.
11/14/2024	Email	Environmental/Natural Resources directors, managers, and staff for each of the 11 Tribal Nations and the Intertribal Consortiums	TL	General agency update distributed to each Tribal Nation & 1854 Treaty Authority. Information was shared on agency WCA rulemaking, preliminary draft availability, agency efforts to seek Tribal consultation and engagement, and LGU listening sessions.
11/12/2024	Website	Preliminary Draft Rule Posted	NA	Posted preliminary draft rule language.
11/06/2024	Email, Agency Report	Minnesota Indian Affairs Council - Executive Board, MIAC staff	ED, TL	Provided a report that included information regarding agency WCA rulemaking, LGU listening session information, and agency Tribal consultation invitation.
10/04/2024	Coordination (Virtual)	Minnesota Tribal Environmental Committee	TL	Staff provided an update on rulemaking and Tribal consultation and engagement.
07/29/2024	Email	Environmental/Natural Resources directors, managers, and staff for each of the 11 Tribal Nations and the Intertribal Consortiums	TL	Agency update distributed to each Tribal Nation & 1854 Treaty Authority. Information shared included updated regarding agency WCA rulemaking, including a summary of legislative changes and the notice published in the state register.

05/01/2024	Presentation	Minnesota Indian Affairs Council - Executive Board, MIAC staff	ED, TL	Provided information on WCA rulemaking and the proposed rulemaking schedule.
04/05/2024	Coordination (Virtual)	Minnesota Tribal Environmental Committee	TL	Presented general rulemaking information, including scope, schedule, opportunities for comment, and timeframe.
04/05/2024	Email	Environmental/Natural Resources directors, managers, and staff for each of the 11 Tribal Nations and the Intertribal Consortiums	TL	Provided an update on agency WCA rulemaking, its purpose, and sign-up for notification and updates.
03/19/2024	Coordination (Virtual)	Environmental/Natural Resources directors, managers, and staff for each of the 11 Tribal Nations and the Intertribal Consortiums	WSM, TL	Web meeting for Tribal Governments & 1854 Treaty Authority to introduce agency staff and share information about the agency's wetlands work, including rulemaking.
03/18/2024	Consultation (In-Person)	Grand Portage Band of Lake Superior Chippewa leadership and staff	ED, TL	During formal consultation, reviewed and discussed the agency's WCA rulemaking effort and the preliminary draft WCA rule.
02/26/2024	Email	Environmental/Natural Resources directors, managers, and staff for each of the 11 Tribal Nations and the Intertribal Consortiums	TL	Agency update distributed to each Tribal Nation & 1854 Treaty Authority; information shared included updated regarding agency WCA rulemaking timeline
02/22/2024	Coordination (In Person)	Minnesota Tribal Environmental Committee	TL	Staff shared an agency update, which included an updated on the WCA rulemaking effort and timeline.
02/14/2024	Email	Environmental/Natural Resources directors, managers, and staff for each of the 11 Tribal Nations and the Intertribal Consortiums	TL	Agency update distributed to each Tribal Nation & 1854 Treaty Authority; information shared on agency WCA rulemaking - preliminary draft available, agency efforts to seek Tribal consultation and engagement
02/13/2024	Coordination (In Person)	Minnesota Tribal Environmental Committee	TL	Presented general rulemaking information, including scope, opportunities for comment, and timeframe.
1/25/2024, 1/26/2024, 1/29/2024, 1/31/2024, 2/1/2024	Email	Environmental/Natural Resources directors, managers, and staff for each of the 11 Tribal Nations and the Intertribal Consortiums	TL	Agency update on rulemaking distributed to each Tribal Nation & 1854 Treaty Authority.
09/22/2023	Coordination (In Person)	Minnesota Tribal Environmental Committee	AD-P&P	Presented general rulemaking information, including scope, opportunities for comment, and timeframe.

02/15/2023	Coordination (In Person)	Minnesota Tribal Environmental Committee	AD-P&P, WPC	Presented general rulemaking information, including scope, opportunities for comment, and timeframe.
04/14/2022	Coordination (Virtual)	Minnesota Tribal Environmental Committee	WPC, WSM	Presented general rulemaking information, including scope, opportunities for comment, and timeframe.

Exhibit 5.

Background and Justification: Hydrogeomorphic Wetland Classification System for Wetland Type Determination.

The Hydrogeomorphic (HGM) system classifies wetlands according to three core factors: landscape position, water source, and hydrodynamics (inflow, outflow, flow-through, etc.). These factors are the primary drivers of wetland function and represent the closest approximation to "first principles" of wetland science. Wetlands within a given HGM class share similar structure and function to a greater degree than wetlands grouped under classification systems based on inherently variable outward characteristics, such as plant species composition and abundance. HGM classes also offer the practical advantage of being generally "static" in that they do not change over time, and a single wetland typically falls within a single class rather than requiring multiple classifications.

The HGM approach has received broad institutional support. The U.S. Army Corps of Engineers and the Environmental Protection Agency, the primary federal wetland and water resource regulatory authorities, have endorsed HGM for wetland classification and functional assessment, and numerous HGM guidebooks have been developed nationwide, including two specific to Minnesota. Both regulatory and non-regulatory entities have adopted the HGM system as a tool for studying, evaluating, and classifying wetlands. HGM has also been integrated into the Cowardin classification system, which is the long-established national standard for wetland inventory and management.

In contrast, Circular 39, the primary wetland classification system currently used in Minnesota, is a source of administrative inefficiency and is inconsistent with the generally accepted science on wetland functional surrogates. The specific deficiencies of a plant community-based wetland typing system include:

- Plant communities are poor wetland functional surrogates;
- Plant communities reflect only current wetland conditions and do not account for historical wetland conditions and functions; and
- Using plant community types to track wetland impacts and replacement credits increases regulatory complexity and inconsistency with little to no improvement in mitigation outcomes. Plant community development in restored wetlands cannot be predicted with precision, plant community mapping lacks the necessary accuracy, and individual wetlands typically contain multiple plant community types, producing numerous credit and impact categories within a single replacement or banking plan.

There is a sound scientific basis for replacing plant communities with HGM-based functional surrogates for wetland impact and replacement tracking. The National Academy of Sciences report on compensating for wetland losses (2001) concludes that, while vegetation is easily measured, it is a poor indicator of wetland function (page 113). The report further emphasizes the importance of promoting naturally variable hydrology representative of comparable wetlands in the same landscape setting, and states that, where direct (in-kind) replacement is desired, candidate mitigation sites should share the same basic hydrological attributes as the impacted site (page 125). These conclusions directly support the use of an HGM-based system for functional, in-kind mitigation.

Plant communities are not static; they change over time. Many of the plant communities observed across Minnesota today reflect disturbed or "unnatural" conditions in and around the wetland. A watershed approach to functional restoration requires consideration of historical or "natural" wetland conditions, as restoring those conditions is often the most effective means of achieving watershed goals. Relying on plant community type as the functional surrogate for matching impact type to replacement type disregards this important consideration. Moreover, temporal changes in plant communities can result in credits that are "in-kind" with the impact at the time of withdrawal but "out-of-kind" in subsequent years due to natural vegetation change, including succession.

The use of plant community types for tracking impacts and replacement credits also introduces significant practical difficulties. Plant community mapping lacks precision, the development of plant communities in restored wetlands cannot be accurately predicted, and tracking replacement credits for multiple plant community types across multiple wetlands within a single replacement or bank site creates substantial administrative complexity with no commensurate improvement in mitigation outcomes.

Even within individual wetlands, plant community types as defined by species composition and structure exhibit considerable variability and overlap. For example, shrub carr frequently intermixes with wet meadow, sedge meadow, and shallow marsh species, making type boundaries difficult to distinguish. Although mapping conventions can be developed to address this variability, plant communities and species composition can shift from year to year, creating consistency and accuracy problems for regulatory projects that extend over multiple years. Maintaining consistency across a regulatory program is further complicated when multiple agency and local government unit staff are each responsible for making numerous, highly specific determinations regarding plant community type and boundary delineation.

Even with substantial restoration experience, improved science, and detailed engineering, considerable uncertainty remains regarding the precise size and location of plant community types that will establish in a restored wetland once hydrologic impairments are corrected. This uncertainty creates complexity and inconsistency in the release and use of wetland bank credits. Wetland impacts are typically characterized by size and plant community type (e.g., "0.5 acres of shallow marsh impact," "1.2 acres of fresh wet meadow impact"), and replacement credits are similarly categorized by type (e.g., "3.5 shrub carr credits," "1.7 sedge meadow credits"). Because a single replacement site commonly contains multiple wetlands, each with multiple associated plant community credit types, the resulting credit allocations and release schedules are often highly complex.

This complexity is compounded when plant communities do not develop as predicted, necessitating detailed ledger adjustments and corrections. A change in area for a single plant community credit type in the credit release schedule would likely require adjustments to every value in the table, an outcome that is probable at each credit release event after the initial release (at minimum three times over the life of a bank plan). If such changes affect previously released credit types, those prior releases must also be revised. The situation becomes still more complex when previously released credits have already been applied to replace impacts and the revised plant community type areas result in an "overdraw" of one or more credit types.

Under the current system, regulatory staff and applicants' consultants devote a disproportionate amount of time to balancing and rebalancing these ledger adjustments throughout the life of a wetland bank.

The United States Fish and Wildlife Service (USFWS) uses the Cowardin system for its National Wetland Inventory (NWI) mapping. Recognizing that the Cowardin system lacked a means to incorporate abiotic properties important to wetland functional evaluation, the USFWS incorporated additional HGM-based descriptors into the NWI in 2014. Dichotomous keys have since been developed to determine landscape position, landform, and water flow path using NWI data, bridging the gap between the Cowardin and HGM classification systems. Although imperfect, these keys enable identification of HGM classes for specific wetlands and other aquatic resources based on relatively straightforward and observable characteristics.

Exhibit 6

"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. <u>These rules must address the criteria, procedure, timing, and location of acceptable replacement of wetland values</u> 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.

Exhibit 7. Federal and State Wetland Bank Review Process Comparison

	Federal CWA 404 Process		**Proposed State WCA Process**	
Phase	**Event**	**# of Days**	**Event**	**# of Days**
Phase 1	Optional *Draft Prospectus* review	30	Optional *Pre-Application* review	N/A
Phase II	Public Notice of *Prospectus* review[1]	30	*Prospectus* review and TEP findings[2]	90
	30-day public comment period for *Prospectus* review	30		
	Corps Initial Evaluation Letter of *Prospectus* to applicant	30		
Phase III	30-day IRT comment period on *Draft Instrument*[3]	30	*Bank Plan Application* public comment period[2]	60
	Corps discusses comments with IRT & seeks to resolve issues regarding *Draft Instrument*	60	TEP findings on *Bank Plan Application* to LGU	30
Phase IV	Corps notifies IRT of intent to approve/not approve *Final Instrument*	30	Bank Plan Application Decision[4]	50
	Final Instrument approved/not approved or dispute resolution process initiated	15		

[1]Corps must notify applicant of completeness within 30 days of receipt.

[2]LGU has up to 15 business days to distribute submittal/notice or notify applicant that it is incomplete.

[3]Corps must notify applicant of completeness within 30 days of receipt, comment period begins 5 days after distribution of draft instrument.

[4]LGU must distribute notice of decision within 10 days of decision. The decision may be appealed within 30 days of the date the notice of decision is sent.