

**STATE OF MINNESOTA  
BOARD OF WATER AND SOIL RESOURCES**

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*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.<sup>1</sup> 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changes to the Wetland Conservation Act (“WCA”); (2) “clarify requirements and procedures, update and modernize outdated rule provisions, improve wetland mitigation outcomes, and increase consistency with federal wetland regulations”; and (3) and other changes that will improve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.”<sup>2</sup> 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”),<sup>3</sup> 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.<sup>4</sup> 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.<sup>5</sup> These agencies concluded that the geographic scope of federal wetland protections under the CWA was significantly narrowed.

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<sup>1</sup> Minnesota State Register, Monday July 8, 2024. Volume 49, no. 2. [https://mn.gov/admin/assets/SR49\\_02\\_tcm36-631015.pdf](https://mn.gov/admin/assets/SR49_02_tcm36-631015.pdf).

<sup>2</sup> *Id.*

<sup>3</sup> Permits for dredged or fill material, 33 U.S.C.A. § 1344 (West 2024).

<sup>4</sup> Program ineligibility, 16 U.S.C.A. § 3821 (West 2018).

<sup>5</sup> 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.<sup>6</sup> 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.”<sup>7</sup> 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).”<sup>8</sup> 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.”<sup>9</sup> 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).”<sup>10</sup> Because WCA regulatory authority will now apply to all

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<sup>6</sup> 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>.

<sup>7</sup> Minn. Stat. § 103G.005 subd. 19(c).

<sup>8</sup> *Id.*

<sup>9</sup> Corps of Engineers Wetlands Delineation Manual, United States Army Corps of Engineers (January 1987).

<sup>10</sup> BWSR, 2024 Wetland Conservation Act Statute Changes, June 18, 2024. <https://bwsr.state.mn.us/sites/default/files/2024-06/2024%20Statute%20Change%20Summary%2006-18-24.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.”<sup>11</sup> 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.<sup>12</sup> 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,<sup>13</sup> but it is the responsibility of

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<sup>11</sup> 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>.

<sup>12</sup> 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>.

<sup>13</sup> 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..."<sup>14</sup> 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.<sup>15</sup> 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.<sup>16</sup> 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.<sup>17</sup> 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.<sup>18</sup> 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

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<sup>14</sup> *Barthel v. U.S. Dept. of Agric.* 181 F.3d 934, 939 (8th Cir. 1999).

<sup>15</sup> NRCS, Maintenance Exemption Fact Sheet, n.d.

<sup>16</sup> 103G.2241 subd. 2(a).

<sup>17</sup> 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).

<sup>18</sup> 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.<sup>19</sup>

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.<sup>20</sup>

The publicly available evaluation data illustrate broad overall trends but do not specify which types of exemptions were approved.<sup>21</sup> 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*."<sup>22</sup> In other

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<sup>19</sup> Minnesota Drainage Work Group Presentation, July 11, 2024.

<sup>20</sup> 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](https://bwsr.state.mn.us/sites/default/files/2024-07/2016-2022%20WCA%20Data%20Graphs_0.pdf).

<sup>21</sup> 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>.

<sup>22</sup> 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.”<sup>23</sup> 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.<sup>24</sup> 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.”<sup>25</sup> 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.<sup>26</sup> The PCC exclusion and the abandonment criteria were maintained in January 2023, when the Corps and EPA issued a new WOTUS rule.<sup>27</sup> 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.<sup>28</sup> 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

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<sup>23</sup> *Id.*

<sup>24</sup> Revised Definition of “Waters of the United States”, 58 Fed. Reg. 45008 (Aug. 25, 1993).

<sup>25</sup> Revised Definition of “Waters of the United States”, 58 Fed. Reg. 45034(V)(G) (Aug. 25, 1993).

<sup>26</sup> Clean Water Rule: Definition of “Waters of the United States”, 80 Fed. Reg. 37054 (June 29, 2015).

<sup>27</sup> Revised Definition of “Waters of the United States”, 88 Fed. Reg. 3004 (Jan. 18, 2023).

<sup>28</sup> 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.<sup>29</sup> 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.<sup>30</sup>

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.”<sup>31</sup> 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.”<sup>32</sup> 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.<sup>33</sup> 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.<sup>34</sup> 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.

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<sup>29</sup> 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).

<sup>30</sup> USDA Office of Inspector General, *NRCS: Wetland Conservation Provisions in the Prairie Pothole Region*, Audit Report 10601-003-31 (Jan. 2017).

<sup>31</sup> 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).

<sup>32</sup> U.S. Gen. Accounting Office, <https://www.gao.gov/products/gao-21-241>, (May 2024).

<sup>33</sup> BWSR 2007 Annual Report, <https://www.lrl.mn.gov/docs/2008/mandated/080949.pdf> & <https://www.revisor.mn.gov/statutes/cite/103B.101/versions>.

<sup>34</sup> 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.”<sup>35</sup> 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.<sup>36</sup> 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.<sup>37</sup> 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.<sup>38</sup> 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).”<sup>39</sup> 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*

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<sup>35</sup> Minn. Stat. 103G.2242 subd. 1.

<sup>36</sup> Minn. R. 8420.0515 subd. 2-4.

<sup>37</sup> Minnesota Pollution Control Agency, Index of biological integrity <https://www.pca.state.mn.us/air-water-land-climate/index-of-biological-integrity>.

<sup>38</sup> BWSR, Peatlands – A Restorable, Carbon-Rich Resource <https://bwsr.state.mn.us/node/9861>.

<sup>39</sup> 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.<sup>40</sup> 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.<sup>41</sup> AFS reported that headwater streams sustain aquifers and supply clean water for “more than one-third of the U.S. population.”<sup>42</sup> 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.”<sup>43</sup> 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.”<sup>44</sup> 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

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<sup>40</sup> Brinkerhoff, Craig B. et al. “Ephemeral stream water contributions to United States drainage networks.” *Science* 384 (2024): 1476-1482.

<sup>41</sup> 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.

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

<sup>43</sup> *Id.* at 74.

<sup>44</sup> *Id.* at 76.

creation. U.S. Army Corps of Engineers procedures for compensatory mitigation should inform future rule development for headwaters streams in Minnesota.<sup>45</sup>

### 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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<sup>45</sup> 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>.