

January 24, 2025

Board of Water and Soil Resources  
520 Lafayette Rd  
St Paul, MN, 55155

VIA E-MAIL



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.<sup>1</sup> 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).<sup>2</sup>

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[.]”<sup>3</sup> And, for farmed wetlands and farmed wetland pastures, the drainage activity exemptions only apply if the areas have not been

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<sup>1</sup> Minn. Stat. § 103G.2241, subd. 1 (2024).

<sup>2</sup> *Id.* (referring to NRCS’ regulations in 7 C.F.R 12).

<sup>3</sup> 7 C.F.R. 12.33(b).

abandoned.<sup>4</sup> 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.”<sup>5</sup> 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.”<sup>6</sup> 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.

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<sup>4</sup> 7 C.F.R. 12.33(d).

<sup>5</sup> 7 C.F.R. 12.33(c).

<sup>6</sup> 7 C.F.R. 12.33(d)

Such provisions would mirror other federal regulations as well.<sup>7</sup> 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.”<sup>8</sup> 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.*”<sup>9</sup>

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.<sup>10</sup> 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

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<sup>7</sup> Notably, one of the stated purposes of this rule revision is to “increase consistency with federal wetland regulations.”

<sup>8</sup> 40 C.F.R. § 120.2(b)(2).

<sup>9</sup> 40 C.F.R. § 232.3(c)(1)(ii)(B) (emphasis added).

<sup>10</sup> 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.”<sup>11</sup>

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.<sup>12</sup> 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

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<sup>11</sup> Minn. Stat. 103G.222 subd. 1.

<sup>12</sup> 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.<sup>13</sup> 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.<sup>14</sup> 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

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<sup>13</sup> Minn. Stat. § 103G.222, subd. 1.

<sup>14</sup> 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.<sup>15</sup>

**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

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<sup>15</sup> 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.<sup>16</sup>

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.<sup>17</sup>

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<sup>16</sup> Minnesota Climate Action Framework. <https://climate.state.mn.us/sites/climate-action/files/Climate%20Action%20Framework.pdf>.

<sup>17</sup> 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.<sup>18</sup> 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.<sup>19</sup>

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<sup>18</sup> 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.

<sup>19</sup> 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,

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