

8420.0111 DEFINITIONS

Subp. 2. **Account or wetland bank account.** "Account" or "wetland bank account" means a record of wetland banking debits and credits established by an account holder within the state wetland banking system.

Commented [RC1]: LAM Comment 2
Recognizing that there were no suggested changes to this subpart, consider addressing if the 'account' or 'wetland bank account' is closed once all of the credits are used.

Subp. 11a. **Bank Service Area or Wetland Bank Service Area.** "Bank Service Area" or "Wetland Bank Service Area" means a geographic area wherein replacement wetlands, including banking credits, can provide preferred replacement for wetland impacts incurred in the same area according to part 8420.0522. Bank Service Areas are established by the board in consultation with the U.S. Army Corps of Engineers, published in the State Register, and publicly available on the board's website. The bank service areas take effect 30 days after publication and remain in effect unless superseded by subsequent statute, state administrative rule, or notice in the State Register. The board will consider watershed boundaries, ecological characteristics, land use, wetland quality, historic wetland abundance and loss, restoration opportunities, geographic size, and the economic viability of wetland banks when defining bank service areas.

Commented [RC2]: LAM Comment 3
Clarify if the BSA's would need to be published in the State Register, if this subpart is added. That clarification may not need to be included in the rule language but would be good to understand next steps with regard to BSA areas.

Subp. 16a. **Credit or replacement credit.** "Credit" or "replacement credit" means a unit of measure representing the accrual and attainment of aquatic functions at a replacement site. Credit can be project specific, banking, or in-lieu fee.

Commented [RC3]: LAM Comment 4
Consider adding a definition of "surplus wetland credits" for mining projects per MN Statute 103G.222, subd. 1(a).

Subp. 23a. **Electronic transmission.** "Electronic transmission" has the meaning given under Minnesota Statutes, section 103G.005.

Commented [RC4]: LAM Comment 5-6
*Consider citing to section 103G.005, subd. 9d.
Last part of last part of sentence "Note: The section of statute... from subd. 10f to 9b to 9d..." is not clear. Revise for clarity.*

Subp. 35a. **In-lieu fee program.** "In-lieu fee program" means a program in which the wetland replacement requirements of this chapter are satisfied through payment of money to the board or a board-approved sponsor to develop replacement credits.

Subp. 52. **Plant community.** "Plant community" means a wetland plant community classified according to Minnesota's Native Plant Community Classification, Version 2.0, Minnesota Department of Natural Resources (2005) including updates and amendments

Commented [RC5]: LAM Comment 7
Consider providing definition for "banked wetland" or use other defined language.

Subp. 61. **Responsible party.** "Responsible party" means an individual, business, legal partnership, or other organization causing draining, excavation, or filling of wetlands on the property of another, with or without the landowner's permission or approval.

Commented [SJ(6)]: Minnesota Department of Natural Resources. 2005. Minnesota's native plant community classification. Version 2.0. Ecological Land Classification Program, Minnesota County Biological Survey, and Natural Heritage and Nongame Research Program.

Subp. 72. **Wetlands, a wetland, the wetland, or wetland area.**

Commented [RC7]: LAM Comment 8
Who is responsible party for indirect impacts (i.e., should this include a responsible party for indirect impacts)?

...

D. Notwithstanding item A, "wetlands", "a wetland", "the wetland", and "wetland area" includes deepwater aquatic habitats that are not public waters or public waters wetlands. For purposes of this item, "deepwater aquatic habitats" has the meaning given in Corps of Engineers Wetlands Delineation Manual, United States Army Corps of Engineers (January 1987).

Commented [RC8]: LAM Comment 9
Additional language states "Notwithstanding item A..." It seems that deepwater does not meet item B either. Consider revising (i.e., "Notwithstanding items A and B").

Subp. 75. **Wetland type or type.** "Wetland type" or "type" means a wetland type classified according to Wetlands of the United States (1956 and 1971 editions), as summarized in this subpart A Hydrogeomorphic Classification for Wetlands, United States Army Corps of Engineers (August 1993), including updates, supplementary guidance, and replacements, if any, as determined by the board. Classification of Wetlands and Deepwater Habitats of the United States (2013) is a separate, parallel wetland

typing system that may be used to characterize components of a wetland. Both documents are incorporated by reference under part 8420.0112,

Subp. XX Natural heritage data -

8420.0112 INCORPORATION BY REFERENCE.

8420.0200 DETERMINING LOCAL GOVERNMENT UNIT; DUTIES.

Subpart 1. **Determining local government unit.** The local government unit responsible for making decisions must be determined according to items A to J.

D. Notwithstanding items A to C and E 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, ~~for wetland banks established solely for replacing wetland impacts occurring under a permit to mine, for wetland banking projects established solely for replacing wetland impacts under a permit to mine under section 93.481,~~ and for projects affecting calcareous fens.

8420.0240 TECHNICAL EVALUATION PANEL PROCEDURES

Add – the TEP or LGU must consult with the Department of Natural Resources when there is the potential for a rare natural community within a project area.

8420.0515 SPECIAL CONSIDERATIONS

Subp. 3. **Rare natural communities.** 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 commissioner~~ must be denied if the local government unit determines that the proposed activities will permanently adversely affect the natural community.

A. ~~The commissioner may request and consider additional data for areas that have not been mapped or surveyed. The commissioner must consider the following when making a rare natural community determination:~~

- (1) ~~existing natural heritage data on,~~ including native plant communities in the area;
- (2) ~~the conservation, condition, and biodiversity significance status ranks of the community~~ Conservation Status Rank of the native plant community;
- (3) ~~the landscape context of the native plant community on the landscape,~~ including:
 - a. ~~the location of the community relative to surrounding native plant communities and land uses;~~
 - b. ~~the presence and abundance of other occurrences of the same community type within or near the project site;~~
 - c. ~~the rarity of the community at local, regional, and statewide scales;~~ and
 - d. ~~whether data about the affected community are current and~~

Commented [RC9]: LAM Comment 11

Review citations and revise for consistency (e.g., add years of documents, use consistent punctuation).

Commented [RC10]: LAM comments 12 and 13

Commented [SJ(11)]: Is this intended to say that the DNR is the LGU when a project affects calcareous fens?

Commented [SJ(12)]: Add to definitions?

Commented [SJ(13R12)]: If yes - "Conservation Status Rank includes the global and state conservation ranks as identified in NatureServe and MN DNR"

complete.

B. The local government unit must consider the following when determining if the proposed activities will permanently adversely affect a rare natural community:

- (1) the permanence of the adverse effect;
- (2) the size of the area affected by the impact relative to overall size of the community and the extent to which the impact will alter its character and quality;
- (3) any ongoing or anticipated future adverse effect to any portions of the community that will remain after the initial impact;
- (4) ~~proposed~~ onsite mitigation measures aimed at sustaining or enhancing the same community type; and
- (5) ~~any proposed~~ mitigation measures that ~~permanently restore comparable at-risk rare natural communities or permanently protect at-risk rare natural communities.~~ ~~To restore~~ To protect a rare natural community ~~means~~ includes to permanently protect its native community attributes, preferably in the same watershed or ecological section.

8420.0900 ENFORCEMENT PROCEDURES.

Subpart 1. **Enforcement authorities.** The commissioner, conservation officers, and other peace officers may issue cease and desist, ~~orders and~~ restoration, and/or replacement orders. The enforcement authority must serve an enforcement order in person or by certified mail to the landowner or responsible party.

Subp. 2. Cease and desist orders.

A. ~~A~~ Cease and desist orders may be issued when the enforcement authority has probable cause that an activity is being or will again be conducted that impacts a wetland:

~~(1) does not qualify for inconsistent with, a valid exemption or no loss no loss or an exemption approved by the local government unit under parts 8420.0415 and 8420.0420, or with insufficient evidence to support qualification for an exemption or no loss; and~~

~~(2) is being or will again be conducted without, or inconsistent with, prior approval of a valid replacement plan approved by a the local government unit under part 8420.0255, or involving a decision stayed by the board pursuant to part 8420.0905 or without having submitted a complete public road project notification meeting the requirements of part 8420.0544, item D.~~

B. A cease and desist order must not be issued if the landowner:

(1) has sufficient documentation of, and is complying with, a valid replacement plan, exemption, or no-loss approved by the local government unit or a completed and submitted public road project notification that has not been stayed, remanded, or reversed on appeal under part 8420.0905; ~~or~~

~~(2) has sufficient evidence to support qualification for an exemption or no loss.~~

Commented [RC14]: I'm not sure I understand what the term "inconsistent" means here. I suspect that we're trying to move away from the previous language which suggests that a CO essentially has to make a no-loss or exemption determination prior to issuing a CDO (which isn't the sequencing contemplated by the rule). However, I'm not sure what qualifies as being "inconsistent" with the rule criteria in 8420.0415 or 8420.0420. For example, is it possible that something could meet the criteria of those rules but still be "inconsistent"?

Commented [RC15]: Strike everything highlighted in yellow. I cannot tell from the proposed language what is needed before a CO can issue a CDO. Our officers shouldn't be in the position of determining whether an impact is "inconsistent" with the no loss, replacement plan, or exemption criteria-- or even whether "sufficient evidence" exists. That's the job of the LGU, which seems to be the whole point of the next step of sending it to the TEP/LGU to determine whether it should stay in place.

For reference, the corollary public water rule (6115.0255, subp 3) allows CDOs to be issued " when the enforcement authority has probable cause to believe that any activity is being or has been conducted in public waters without a valid permit from the commissioner" but "must not be issued if a landowner has documentation of a valid public waters work permit from the commissioner authorizing the work that was done or if a landowner has documentation proving that no permit is required."

It seems easiest to use the same structure here

C. ~~The enforcement authority must advise the landowner that the landowner's written application, if any, for a replacement plan, exemption, or no-loss should be made immediately to the local government unit and that any wetland that has been impacted may require restoration if the application for replacement plan, exemption, or no-loss is denied or reversed on appeal. The~~ When a cease and desist order is issued, the enforcement authority issuing a cease and desist order must promptly submit copies of the order to the soil and water conservation district, local government unit, members of the technical evaluation panel and Department of Natural Resources the commissioner.

D. Upon receipt of a cease and desist order from the enforcement authority, the local government unit must promptly determine whether the cease and desist order should remain in place and, if so, whether a restoration or replacement order is needed according to subpart 23.

~~D. If an application for a replacement plan, exemption, or no-loss approval is triggered by a cease and desist order, the local government unit must make the decision according to part 8420.0255 and the standards and application procedures applicable to the type of application.~~

E. If the ~~decision is~~ local government unit determines that the activity is exempt or qualifies as a no-loss, ~~the local government unit~~ it must request that the enforcement authority rescind the cease and desist order, pending the outcome of any appeal, and notify the ~~soil and water conservation district, the enforcement authority, technical evaluation panel~~ and the landowner.

F. If the local government unit determines that the activity does not qualify for an exemption or no-loss, the landowner's application is denied, or the landowner fails to submit an application, it must inform the soil and water conservation district and the enforcement authority of the need for a restoration or replacement order pursuant to subpart 3.

~~F. If the application is denied, the local government unit must immediately notify the soil and water conservation district, the enforcement authority, and the landowner.~~

~~G. In cases where the cease and desist order has been issued to a local government unit, the decision of exemption or no-loss must be made by the board.~~

Subp. 3. Restoration and replacement orders.

A. Upon the completion of a restoration or replacement plan in accordance with subpart 3(B)-(F), the enforcement authority must may issue a restoration order or replacement order when:

(1) the impact has already occurred ~~been completed when discovered~~ or,

(2) after the landowner or responsible party has been issued a cease and desist order ~~has been issued~~ or has been otherwise notified that the impact is a potential violation of this chapter, and the landowner does not apply for a replacement plan, exemption, or no-loss within ~~three weeks~~ 30 days;

(3) the impact is inconsistent with a valid exemption or no-loss approved by the local government unit under parts 8420.0415 and 8420.0420, or there is insufficient evidence to support qualification for an exemption or no-loss; and

(4) the impact has not been replaced in compliance with a valid replacement plan

Commented [RC16]: We mean subpart 3, correct?

Commented [RC17]: Split this out into a list

approved by the local government unit or a complete public road project notification meeting the requirements of part 8420.0544, item D has not been submitted;

(2) the local government unit approves the application but it is reversed on appeal; or

(3) the local government unit denies the application.

B. Promptly upon being informed by the enforcement authority or the local government unit of the need, a soil and water conservation district staff person must inspect the site and prepare a plan in consultation with the local government unit and the enforcement authority for restoring technical evaluation panel to restore the site to its prealtered condition. The plan must include:

(1) specific actions and standards necessary to restore the wetland and satisfy the order;

(2) restoration methods and approaches such as construction and re-vegetation techniques;

(3) the date by which the landowner or responsible party must submit a complete replacement plan, exemption, or no-loss application, if any, to the local government unit in lieu of restoring the wetland, which must be at least 30 days from the date the order is served; and

(4) the date by which the landowner or responsible party must restore the wetland according to the plan and satisfy the order. The complexity of restoring the wetland, any seasonal constraints associated with required restoration actions, and the availability of required resources may be considered when specifying a date for restoration completion.

C. The soil and water conservation district may request assistance from the local government unit or technical evaluation panel in inspecting the site and preparing the plan. If the soil and water conservation district determines that a conflict of interest may exist, it may request that another member of the technical evaluation panel develop the plan.

D. Restoration must be ordered unless the soil and water conservation district, in consultation with the technical evaluation panel, concludes that restoration is not possible or prudent.

E. When a replacement order is required, the plan developed by the soil and water conservation district, in consultation with the technical evaluation panel, must specify the replacement actions to be completed. The order may provide more than one option for replacement and may require a combination of restoration and replacement.

F. Upon completion, ~~the~~ the soil and water conservation district must incorporate its plan into a restoration or replacement order and send it to the enforcement authority for service in person or by certified mail to the landowner or responsible party.

G. If a complete application is not submitted within the time period specified in the restoration order, the landowner or responsible party must restore the wetland as specified in the order unless the local government unit and the enforcement authority agree to allow an extension or the restoration order is stayed under appeal to allow for the submittal of, or a decision on, a complete application.

H. A restoration order is completed when the soil and water conservation district has determined that the landowner or responsible party has satisfied the requirements of the restoration plan

Commented [RC18]: Do we need to clarify that a restoration order or replacement order will not be issued without a "plan" contemplated in subpart 3(B) below? This seems important for timing, because the landowner's replacement/exemption/no loss application date is specified in the "plan" and has to be at least 30 days from service of the order

Commented [RC19]: I'd again strike these.

Why are we including these in restoration orders? I don't see this requirement in the current language of 8420.0900, subp. 3? Will every RO now have findings that the impact is not inconsistent with exemption or no-loss criteria?

and has issued a certificate of satisfactory restoration.

I. A certificate of satisfactory restoration or replacement may be issued with conditions, such as requirements for wetland vegetation, weed control, inspections, monitoring, or hydrology. Failure to comply with such conditions may result in the issuance of a subsequent restoration or replacement order.

Subp. 4. Contents of the orders.

A. Each cease and desist, restoration, ~~and-or~~ replacement order must state that any violation of the order is a misdemeanor.

B. Each cease and desist order must advise the landowner or responsible party that an application for a replacement plan, exemption, or no-loss should be made promptly to the local government unit and that any wetland that has been impacted may require restoration if the application for replacement plan, exemption, or no-loss is denied or reversed on appeal.

C. A restoration order must incorporate the soil and water conservation district plan to restore the wetland, including the ~~specify~~ dates by which the landowner or responsible party must:

(1) restore the wetland according to the ~~soil and water conservation district plan and obtain a certificate of satisfactory restoration from the soil and water conservation district;~~ or

(2) submit a complete replacement plan, exemption, or no-loss application to the local government unit. ~~The order must specify that, if the landowner or responsible party does not obtain approval by the local government unit of a replacement plan, exemption, or no-loss for the wetland impacts, they must restore the wetland as ordered.~~

~~B. If an application submitted under item A, subitem (2), is denied, the landowner or responsible party must restore the wetland as specified in the order.~~

~~C. The restoration order must be rescinded if the landowner or responsible party obtains approval of an after the fact replacement plan, exemption, or no-loss from the local government unit that is not reversed on appeal.~~

~~D. A replacement order must specify a date by which the landowner or responsible party must submit a complete replacement plan application to the local government unit and a subsequent date by which the landowner or responsible party must replace the wetland according to the approved replacement plan and obtain a certificate of satisfactory replacement from the soil and water conservation district. The restoration or replacement order must specify a time period of at least 30 days for submittal of a complete application under this subpart.~~

~~E. If a complete application is not submitted within the time period specified in the restoration order, or as properly extended, the landowner or responsible party must restore the wetland as specified in the order before submitting an application under item A, subitem (2), unless the local government unit and the enforcement authority agree otherwise or unless allowed under appeal.~~

~~F. A certificate of satisfactory restoration or replacement may be issued with conditions that must be met in the future, such as for issues with wetland vegetation, weed control, inspections, monitoring, or hydrology. Failure to fully comply with any conditions that have been specified may result in the issuance of a new restoration or replacement order.~~

Subp. 5. **Applications submitted in response to Enforcement authority orders.**

~~A. If the technical evaluation panel determines that restoration will not restore all the loss caused by the impact, the order may require a combination of restoration and replacement or may require replacement rather than restoration. The order must direct the landowner or responsible party to obtain replacement plan approval from the local government unit. The order must specify that if replacement plan approval is not obtained, the landowner or responsible party must restore the wetland as ordered.~~

~~B. Each cease and desist, restoration, and replacement order must state that violation of the order is a misdemeanor.~~

~~C. If, as part of a misdemeanor proceeding, the court orders restoration or replacement, the technical evaluation panel must determine which is appropriate, and if it is restoration, the method of restoration. If the court orders replacement, the landowner or responsible party must follow the replacement plan process under subpart 6 and part 8420.0330, and the wetland replacement, construction, and monitoring requirements of this chapter.~~

A. When an application for a replacement plan, exemption, or no-loss decision is submitted to the local government unit by the landowner or responsible party in response to an enforcement order, the application must comply with the requirements of this chapter. The local government unit must make the decision on such an application according to part 8420.0255. In addition to those required to received notice, the local government unit must provide notice of the application and decision to the enforcement authority.

B. The enforcement authority must rescind the enforcement order when the landowner or responsible party has obtained approval of an after-the-fact replacement plan, exemption, or no-loss from the local government unit that is not reversed on appeal, and any required replacement is completed in accordance with the approved plan.

C. When an enforcement order has been issued to a local government unit, the decision on an exemption, no-loss, or replacement plan application must be made by the board in accordance with item A.

D. When an application submitted in response to a cease and desist order under item A or B is denied, the local government unit must immediately notify the soil and water conservation district and the enforcement authority of the need for a restoration or replacement order.

E. If an application submitted in response to a restoration order under item A or B is denied, the landowner or responsible party must restore the wetland as specified in the order.

Subp. 6. **After-the-fact replacement.** If a landowner or responsible party seeks approval of a replacement plan after the proposed project has already impacted the wetland or if an approved replacement plan has not been implemented in advance of or concurrent with the impact, the local government unit must require the landowner or responsible party to replace the impacted wetland at a ratio twice the replacement ratio otherwise required, unless the local government unit and enforcement authority concur that a lesser ratio is acceptable.

Subp. 7. **Misdemeanor.**

A. A violation of an order issued under this part is a misdemeanor and must be prosecuted by the county attorney where the wetland is located or the illegal activity occurred.

B. If, as part of a misdemeanor proceeding, the court orders restoration or replacement, the soil and water conservation district staff must determine which is required in accordance with subpart 3, item D, and if it is restoration, the method of restoration. If the court orders replacement, the landowner or responsible party must follow the replacement plan process under subpart 6 and part 8420.0330, and the wetland replacement, construction, and monitoring requirements of this chapter.

Subp. 8. Deed restriction.

A. If a landowner or responsible party fails to comply with a restoration or replacement order, the commissioner, conservation officers, or other peace officers may record the order with the county recorder or registrar of titles as a deed restriction on the property. Restoration or replacement orders may be recorded or filed in the office of the county recorder or registrar of titles, as appropriate, in the county where the real property is located by the commissioner, conservation officers, or peace officers as a deed restriction on the property that runs with the land and is binding on the owners, successors, and assigns until the conditions of the order are met or the order is rescinded. The deed restriction will remain in place until the conditions of the order are satisfied or the order is rescinded.

B. A deed restriction filed or recorded under this subpart on homesteaded property must be removed if the owner requests that it be removed and a court has found that the owner of the property is not guilty or that there has not been a violation of the restoration or replacement order. Within 30 days of receiving a valid request for removal, the enforcement authority that recorded the order must contact, in writing, the office of the county recorder or registrar of titles to have the order removed and must inform the owner of such removal within 30 days of receiving confirmation from the county recorder or registrar of titles that the order has been removed.

Reason for change: The entire part 8420.0900 has been reorganized, and language amended, to clarify enforcement roles and procedures as the previous language was poorly organized and difficult to follow. Amendments were also made to conform the rule to statutory amendments that have occurred since the current rule was adopted. The amended language contains few substantive changes outside of those related to statute and, other than improved clarity, should not materially affect the current enforcement process.

Statutory Authority: *MS s 103G.2242*

History: *34 SR 145*

Posted: *August 26, 2009*

ACTIVITIES UNDER DEPARTMENT OF NATURAL RESOURCES AUTHORITY

8420.0930 MINING.

Subpart 1. **Impacts from mining.** Wetlands must not be impacted as part of a project for which a permit to mine is required by Minnesota Statutes, section 93.481, except as approved by the

Commented [RC20]: I've changed this back to the statutory language in 103G.2372, subd 2, which allows deed restrictions to be placed immediately upon issuance of the RO, rather than waiting until the RO has been violated. Given that we're simply repeating what is already in statute, we may consider simply striking and relying on the statute

See concern from DNR ENF Capt Palmer:

In reviewing the proposal again last night and collaborating today with a division LT today who was a WREO for a decade, together we have a concern related to the proposed changes on page 118 regarding deed language. The proposed language would significantly change our enforcement process with regards to recording deed restrictions. Currently, 103G.2372 allows us to place a deed restriction on immediately when a restoration order or replacement order is issued. This proposed language would require the involved party(s) to first not comply with the RO before we could issue a deed restriction. The placement of a deed restriction is a civil action. The issuance of a RO is also a civil action, it's not criminal until violated and then it's the enforcement officer's discretion whether a citation is issued or not. Many times, enforcement officers weigh which process is going to be most beneficial to our overall goal which is the restoration/replacement of the natural resources.

The new language as proposed would create a significant change to our process and long standing practice. For example, there are situations where the landowner tries to sell the property before complying with an RO. Enforcement would no longer have the deed restriction tool because they have not failed to comply with the RO. There are many situations where the LGU attempts to obtain voluntary restoration which generally comes with a significant timeline. If that doesn't occur, they move to an RO of some form which adds additional time to the case. If we can't issue a deed restriction until the RO process is not complied with, it leaves many opportunities for the violation to be lost.

Additionally, if we issue a citation for violating an RO and the courts find the defendant not guilty, we can no longer issue a deed restriction. Due to this change a few years ago, Enforcement routinely reviews cases to see if the issuance of a deed restriction up front is more valuable to achieve restoration vs. the issuance of a citation for failure to comply with the RO. At the end of the day, once it leaves our control and moves to the courts we are at the mercy of the courts. This new language impacts our strategy with deed restrictions and Enforcement would prefer to keep the same language as found in 103G.2372.

Commented [JS21]: No further comments. The changes, as shown here are acceptable to DNR.

commissioner.

A. Impacts to wetlands that the landowner can demonstrate, to the satisfaction of the ~~local~~ ~~government unit~~ commissioner, were created by pits, stockpiles, or tailing basins, and by actions the purpose of which was not to create the wetland according to part 8420.0105, subpart 2, item D, are not regulated under this chapter.

B. The commissioner must provide notice of an application for wetland replacement under a permit to mine to the county in which the impact is proposed and the county in which the replacement site is proposed.

C. Wetland replacement plans required under this part must meet the same principles and standards for replacing wetlands contained in parts 8420.0500 to 8420.0528 and provide for construction certification and monitoring according to parts 8420.0800 and 8420.0810.

Subp. 2. **Mining operations; post-July 1, 1993.** For mining operations that are permitted and initiated after July 1, 1993:

A. mining must not be conducted without first receiving a permit to mine issued under chapter 6130 for iron ore and taconite or chapter 6132 for nonferrous metallic minerals; and

B. the mining and reclamation operating plans or annual reports submitted by the applicant as required in the permit to mine must include an approved wetland replacement plan ~~that meets the same principles and standards for replacing wetlands under parts 8420.0500 to 8420.0528 and provides for construction certification and monitoring according to parts 8420.0800 and 8420.0810.~~

Subp. 3. **Mining operations; pre-July 1, 1993.** For mining operations in existence before July 1, 1993, and operated on or after that date under a permit to mine issued under chapter 6130 for iron ore and taconite or chapter 6132 for nonferrous metallic minerals:

A. wetlands for which impacts were approved but not initiated before July 1, 1993, must not be impacted until the operating plan or annual report as required in the permit to mine includes an approved wetland replacement plan for the undisturbed wetlands. ~~The wetland replacement plan must meet the same principles and standards for replacing wetlands under parts 8420.0500 to 8420.0528 and provide for construction certification and monitoring according to parts 8420.0800 and 8420.0810;~~

B. for filling activities that were approved and initiated before July 1, 1993, placement of fill atop a stockpile, roadway, or other mining-related facility that occupies a wetland filled before July 1, 1993, is allowed to continue within the areal extent, as it existed on July 1, 1993, of the stockpile, roadway, or other mining-related facility without the requirement of a replacement plan or amendment of the permit to mine. An expansion of the areal extent of the fill in the wetland requires an approved replacement plan in the operating plan or annual report as required in the permit to mine, according to item A; and

C. for draining activities that were approved and initiated before July 1, 1993, draining of a wetland to facilitate mining, using ditches and other drainage facilities that existed on July 1, 1993, is allowed to continue without the requirement of a replacement plan or amendment of the permit to mine. Maintenance of the ditches and structures are allowed without the requirement of a replacement plan or amendment of the permit to mine, provided that as a result of the maintenance, wetlands are not drained

beyond the extent that existed as of July 1, 1993. Otherwise, the permit to mine must be amended to provide for replacement according to item A.

Subp. 4. Applicability.

A. Replacement 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. A project-specific wetland replacement plan submitted as part of a project for which a permit to mine is required and approved by the commissioner on or after July 1, 1991, may include surplus wetland credits to be allocated by the commissioner to offset future mining-related wetland impacts under any permits to mine held by the permittee, the operator, the permittee's or operator's parent, an affiliated subsidiary, or an assignee pursuant to an assignment under Minnesota Statutes, section 93.481, subdivision 5.

B. Applicable procedures are those required for permits to mine.

C. This part does not apply to peat mining as defined under Minnesota Statutes, section 93.461, that is subject to the mine permit and reclamation requirements under Minnesota Statutes, sections 93.44 to 93.51, and the rules adopted thereunder.

Reason for change: Revisions to part 8420.0930 related to the use of "surplus wetland credits" by permittees under a Permit to Mine and the requirement for DNR to provide notice to counties are added to conform the rule to statutory amendments that have occurred since the current rule was adopted. Additional organizational changes were made to reduce redundancy, and "local government unit" was replaced with "commissioner" for accuracy as the commissioner is generally not acting as an LGU as defined in WCA when regulating wetland impacts under the permit-to-mine program.

Statutory Authority: *MS s 103G.2242*

History: *34 SR 145*

Posted: *August 26, 2009*

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

Subpart 1. **Purpose.** The purpose of this part is to provide minimum standards and criteria for identifying, protecting, and managing calcareous fens as authorized by Minnesota Statutes, section 103G.223. ~~Calcareous fens, as identified by the commissioner, must not be impacted or otherwise altered or degraded, wholly or partially, by any action, unless the commissioner, under an approved management plan, decides some alteration is necessary. The exemptions under part 8420.0420 and the sequencing provisions under part 8420.0520 do not apply to calcareous fens.~~

Reason for change: The deleted language above is now addressed in Subp. 4 for applicability and clarity.

Commented [JS22]: We do not have any other language concerns related to 8420.0935

Subp. 2. **Identifying calcareous fens.** A calcareous fen is a peat-accumulating wetland dominated by distinct groundwater inflows having specific chemical characteristics. The water is characterized as circumneutral to alkaline, with high concentrations of calcium and low dissolved oxygen content. The chemistry provides an environment for specific and often rare hydrophytic plants.

Commented [JS23]: Cite DNR technical ID procedures - Technical Criteria for Identifying Calcareous Fens in Minnesota, Minnesota Department of Natural Resources (2016) including updates and amendments or add Calcareous Fens to Definitions rather than defining here?

Subp. 3. **Procedures to list calcareous fens.**

A. The commissioner must investigate wetlands to determine if the wetland is properly identified as a calcareous fen.

B. The commissioner must, by written order published in the State Register, maintain a current list of known calcareous fens in the state and their location.

C. The commissioner must provide an updated list of calcareous fens to the board for further distribution.

Subp. 4. **Impacts and Management plans.** Calcareous fens must not be impacted or otherwise altered or degraded ~~except, wholly or partially, by any action, unless the commissioner decides some alteration is necessary~~ as provided for in a calcareous fen management plan approved by the commissioner. The commissioner may allow water appropriations that result in temporary reductions in groundwater resources on a seasonal basis under an approved calcareous fen management plan. The commissioner must provide technical assistance to landowners or project sponsors in the development of management plans. The exemptions under part 8420.0420 and the sequencing provisions under part 8420.0520 do not apply to calcareous fens.

Reason for change: Two provisions from Subp. 1 are relocated here for applicability and clarity. The language addressing water appropriations is added to conform the rule to statutory amendments that have occurred since the current rule was adopted.

Subp. 5. **Restoration.** The commissioner may approve management plans to restore or ~~improve/upgrade~~ a previously damaged calcareous fen. The commissioner may order restoration or replacement of a damaged calcareous fen in accordance with Minnesota Statutes, section 103G.2372.

Reason for change: Language is added to clarify the DNR's statutory enforcement authority for unauthorized impacts to calcareous fens.

Subp. 6. **Appeals.**

A. A landowner or project proposer may challenge the commissioner's determination that a wetland is a calcareous fen or the commissioner's calcareous fen management plan by requesting a hearing. The hearing shall be conducted in the same manner as water permit hearings under Minnesota Statutes, chapter 103G.

B. The determination that a wetland is a calcareous fen may be appealed at any time within 30 days of the publication of the commissioner's designation of the calcareous fen in the State Register by requesting a hearing. For a decision under a management plan, the hearing must be requested within 30 days after the notice of the commissioner's decision was ~~mailed~~ sent to the project proposer; otherwise

the decision becomes final and may not be challenged by the project proposer.

Reason for change: A clear timeline is added for the appeal of a DNR calcareous fen designation, as the existing rule language is open-ended. “Mailed” was changed to “sent” to allow for electronic transmission in accordance with statutory amendments that have occurred since the current rule was adopted.

C. Appeal of the commissioner's decision after the hearing must be done in the manner provided for appeals from contested case decisions under Minnesota Statutes, chapter 14.

Subp. 7. **Enforcement procedures.** Enforcement procedures for calcareous fens must be conducted consistent with Minnesota Statutes, sections 103G.141 and 103G.2372, except that necessary restoration or replacement activities, if required, must be determined by the commissioner, in consultation with the local soil and water conservation district.