

May 5, 2009

Steven Mihalchick
Administrative Law Judge
Office of Administrative Hearings
100 Washington Avenue South, Suite 1700
Minneapolis, MN 55401



Re: Board of Water and Soil Resources Proposed Wetland Rule Changes

Dear Judge Mihalchick:

We represent the Builders Association of Minnesota (“BAM”) in relation to the Board of Water and Soil Resources (“BWSR”) proposed Wetland Conservation Act (“WCA”) rule amendments (“Proposed Rules”). This letter addresses three (3) specific areas where modification to the Proposed Rules is necessary in order to protect property-owner rights, future development options, and housing affordability.

Background

The WCA rulemaking process began in the fall of 2007 as a result of legislative changes to statutory wetland regulations. BWSR held a series of stakeholder meetings to discuss the rulemaking process and issues. BWSR formed both a Permanent Rule Advisory Committee and a Technical Advisory Committee, which began meeting in January 2008. BAM was an active participant in these meetings, as was the Builders Association of the Twin Cities (“BATC”). BAM and BATC expressed concerns throughout the process regarding the following aspects of the Proposed Rules:

1. Increased upland buffer widths for replacement wetlands;
2. Deferred application of the 60-day rule to wetland delineations; and
3. The required monitoring period for replacement wetlands.

We appreciate the willingness of BWSR to meet with BAM and listen to its concerns. The majority of the Proposed Rules will help achieve the goal of moving toward no net-loss of wetlands in the state as well as improving the process for state and local governments and applicants. However, the Proposed Rules addressed in this letter, as written, fail to achieve their stated purpose, lack scientific support and are unreasonable. They are not rationally related to the objectives sought by BWSR, are arbitrary and capricious, and therefore should be rejected.



Upland Buffer Widths

BWSR proposes a significant increase in buffer widths for replacement wetlands, which not only lacks a scientific basis, making it arbitrary and capricious, but constitutes an unlawful taking of private property. The Proposed Rules require:

For replacement wetlands less than two acres in size, the buffer must be a minimum average width of 25 feet. For all other replacement wetlands, the buffer must be a minimum width of 25 feet and an average width of 50 feet.

Proposed Rule, § 8420.0522, Subp.6.

In its Statement of Need and Reasonableness (“SONAR”), BWSR establishes the rationale for the proposed change by stating that “[o]ne of the goals of this rulemaking is to improve the quality of replacement wetlands, thus better meeting the statutory requirement to replace the public value lost to wetland impacts.” *SONAR*, pg 38 (March 25, 2009). BWSR goes on to state that “requiring buffers is possibly the single most effective step that can be taken to improve the quality of replacement wetlands.” *Id.* While buffers are a critical component of proper wetland replacement, BWSR has a responsibility to limit its regulations to what is necessary to accomplish its stated objective. There is no documentation that proves that the mandated buffer increase in replacement wetlands is necessary. In fact, BWSR provides evidence of its own lack of clarity in proposing this change.

BWSR argues for the increased buffer widths out of a desire for convenience in implementation rather than sound science. This approach will not achieve the WCA’s ultimate goal of a “no net-loss approach.” BWSR argues:

The minimum width of the buffer necessary to provide and protect a desired function varies from one function to another and is dependent on various landscape and site conditions. However, requiring variable buffer widths based on the particular functions and site conditions would not be implementable, would result in inconsistent application, and would be onerous to applicants and LGUs. As such, a 25 foot minimum/50 foot average width was chosen as a reasonable width to improve wetland function and sustainability without being overly burdensome to comply with.

SONAR, page 38 (March 25, 2009).

This language makes it clear that the required buffer necessary to protect a replacement wetland varies depending upon its function, location, site conditions, and numerous other factors. BWSR has completely failed to undertake an analysis of the above factors, establishing instead an arbitrary buffer width that cannot be defended.

There are "five major wetland functions that warrant attention in evaluating wetland restoration and creation: hydrological functions, water-quality functions, support of vegetation, support of habitat for fauna, and soil functions." Compensating for Wetland Losses under the Clean Water Act, pg. 27, *National Academy of Sciences (2001)*. Of the seven (7) recommendations for mitigation measures for wetland structure and function proposed by the National Academy of Sciences, increasing buffer widths does not make the list. However, the committee recommends that "[m]itigation projects should be planned with and measured by a broader set of wetland functions than are currently employed." Compensating for Wetland Losses under the Clean Water Act, pg. 45, *National Academy of Sciences (2001)*. In addition, "[a]s a legal matter, the mitigation requirement should establish a measurable outcome, called a performance standard, of a mitigation project." *Id.* at 15.

In support of its comments, BAM has submitted to BWSR the results of a study completed by Westwood Professional Services which found that "[m]ost reductions in volume, total solids, and total phosphorus occurred within the first 5' [of the buffer]." Case Study #6: Assessing Vegetated Buffers Using Synthetic Residential Buffers, S.M. Stai, Submitted to the Journal of Soil and Water Conservation, April 4, 2008 (attached as exhibit A). Reductions that occurred after the first 5' of the buffer were relatively minor, and "[a]ll runoff volume was infiltrated or retained within 20' in most cases, even on 50% slopes, and sometimes within 10'." *Id.* The results of the Westwood study support a finding that buffer widths of 10 – 20 feet are sufficient and effective for the reduction of runoff volume and the levels of total solids and total phosphorous that characterize residential stormwater runoff in the Twin Cities Metropolitan Area. *Id.*

BAM recognizes that choosing a variable-width buffer or a multi-zoned buffer would create a more complicated system that accounts for additional site variables, but it is clear that fixed-width buffer requirements do not necessarily provide for better water quality protection. Proper siting within the landscape is critical to a wetland's long-term sustainability. Shape may also influence the effectiveness of the wetland for pollutant removal. For functions such as water quality and nutrient retention, edge interface with stream or upland is probably more important than area." Compensating for Wetland Losses under the Clean Water Act, pgs. 37, 54. *National Academy of Sciences (2001)*.

BWSR's Proposed Rules relating to replacement buffers fail to take into account the multiple factors required for replacement success, and no performance standards are established that will assist in the determination of the buffer's ultimate success. There is no way to tie the required buffer to a specific result, and sufficient evidence is not provided to support the conclusion that the required additional buffer strikes a reasonable balance between the public good and individual property rights.

In addition to the lack of scientific evidence that the proposed increase in buffer width is necessary to effectuate the goals of state statute and BWSR's direction, as drafted, the Proposed Rules are impossible to carry out effectively. Inconsistent application of a rule to similarly situated persons is evidence that a decision is arbitrary and capricious. See Vann v. Nat'l Rural Elec. Co-op Ass'n Ret. & Sec. Program, 978 F.Supp. 1025, 1043 (M.D. Ala. 1997). See also United States v. Chromalloy Am. Corp., 158 F. Supp. 3d 345, 353 (5th Circ. 1998) (noting that

the dictionary defines “arbitrary” as “based on random or convenient selection or choice rather than by reason or nature” and “capricious” as “marked by variation or irregularity; lacking a predictable pattern or law.”) Allowing an “averaging” of buffer width inherently creates winners and losers. Some property owners may be impacted by much wider than 50’ buffers in order to provide for portions of the buffer that are well under 50’. Allowing for an average buffer width also reflects a lack of concrete understanding by BWSR of what buffer width is actually needed to protect the wetland.

“Where an economic regulation is involved, due process requires that legislative enactments not be arbitrary or capricious; or, stated differently, that they be a reasonable means to a permissive objective.” *Contos v. Herbst*, 278 N.W.2d 732, 741 (Minn. 1979), appeal dismissed, 62 L.Ed.2d 17 (1979). The proposed increase in mandatory buffer widths must be rejected because it is not proportional to the impacts of property development, and is an impermissible taking of private property. See U.S. Const. Amend. XIV § 1; Minn. Const. art. I § 13. For BWSR to justify an exaction without compensation, there must be a sufficient nexus between some public problem caused by the proposed development and the exaction that is designed to alleviate the problem. See *Nollan v. California Coastal Comm’n*, 488 U.S. 825, 837 (1987). Additionally, BWSR has the burden of showing the specific impacts of development and to establish that the proposed exactions are proportional to the impacts. See *Dolan v. City of Tigard*, 512 U.S. 374,391 (1994).

BWSR fails to tie its proposed buffer widths to any documentation proving that scientific merit rather than political acceptability was used to establish its guidelines. Current Rules provide for local discretion in determining buffer requirements. There is no basis to adopt an ineffective state-wide rule when local authority already exists to take site and geographically-specific factors into account to determine the appropriate buffer. This approach is appropriate based on the scientific evidence. BWSR argues that utilizing site or type-specific buffer widths is an inconvenience, yet it is preferable to the arbitrary and unreasonable loss of development rights across the state, amounting to potentially millions of dollars in losses.

Local Government Application – 60-day Rule

The Proposed Rules relating to Minnesota Statute §15.99, subdivision 2, if adopted, will dramatically impact development and individual property rights in Minnesota. *Proposed Rules, §8420.0255, subp. 2*. The Proposed Rules allow local governmental units the authority to deem an application incomplete if it is received outside of the growing season and requires field verification within the growing season. *SONAR, page 22* (March 25, 2009). BWSR states that “the ability to use seasonal constraints to determine an application incomplete is not open ended, but must provide a date when the application is considered to be complete, which cannot be later than the average start of the growing season.” *Id.*

There is no rational basis for this change. Current law, which was amended in 2007, provides that “[a]n agency response, including an approval with conditions, meets the 60-day time limit if the agency can document that the response was sent within 60 days of receipt of the written request.” Minn. Stat. §15.99, subd. 3(c) (2008). This change in law codified industry practice, where local governments deem an application complete, process the application and grant

approval with a condition that requires a subsequent wetland delineation when conditions permit, but before any land disturbance activities occur.

The existing process allows time-sensitive approvals and review to occur within the 60-day framework, while protecting the rules and regulations established in the WCA. It also allows for an accurate wetland delineation to take place and provides that if an applicant fails to satisfy the condition, a local government may rescind or revoke its approval. Minn. Stat. §15.99, subd. 3(c) (2008). Under the existing process, project plans can be implemented once the delineation is completed. Any changes needed based on the delineation can be incorporated into the plans quickly, as there is typically an impact to only a small portion of the overall project. No permits are issued until such a change is made.

There is no risk to the environment or to the WCA under current state law that justifies BWSR's suggested change to the 60-day rule. In fact, adoption of the Proposed Rules would lead to additional costs for property owners and developers with no demonstrable benefit to the environment. It would significantly threaten projects, given the limited construction season in Minnesota. A project could face a long delay and be subject to extensive carrying costs, which will impact the developer, the land owner, and any future buyers.

In addition, small development companies may be ground to an abrupt halt during the period when a delineation cannot be completed. If there are no approvals moving through the process, planning, design and engineering will necessarily be put on hold. This will mean that planning and approvals will occur during the construction season, which may lead to projects being held an additional year due to seasonal constraints. Ultimately, many projects may simply fail to move forward.

It is impossible for BWSR to articulate a policy rationale that supports this change. If the change were necessary to accomplish the articulated goals of the WCA, the language would not be permissive; local governments would be required to deem an application incomplete. An agency decision is arbitrary or capricious where "its determination represents its will and not its judgment." *Markwardt v. State Water Resources Bd.*, 254 N.W. 2d 371, 374 (Minn. 1977). The costs associated with this proposed change and the impact on development in this state outweighs any potential benefit that BWSR could articulate. This proposed change is clearly based on some internal agency will rather than sound policy judgment and should be rejected or amended to reflect consistency with state law.

Wetland Monitoring

The recommended changes in the Proposed Rules would modify and expand the current monitoring requirements under the WCA. *Proposed Rules, § 8420.0810, subp. 3*. The Proposed Rules expand the minimum monitoring length to five (5) growing seasons, with flexibility to allow the LGU and the technical evaluation panel ("TEP") to decrease that monitoring time to three (3) growing seasons if at the end of that time the replacement is deemed successful.

BAM has suggested to BWSR that it would be more appropriate to require a minimum monitoring period of three (3) growing seasons, with the ability for the LGU and TEP to increase

the monitoring period to five (5) growing seasons if a determination is made that such review is necessary. Ultimately, this would protect both the LGU and the property owner, creating a fair and affordable process without diminishing the intent of the Proposed Rules.

If this change is not made, it will create an additional hardship on applicants, and it is unlikely that the required monitoring period will be diminished in many circumstances. There are no standards included within the Proposed Rules that will allow a property owner to determine whether the replacement wetland should be deemed "successful." The LGU and TEP are not required to make any findings or document a rationale for requiring a full five (5) growing seasons of monitoring. This will lead to inconsistency in the application of the Proposed Rules and confusion for property owners. Inconsistent application of a rule to similarly situated persons is evidence that a decision is arbitrary and capricious. *See Vann v. Nat'l Rural Elec. Co-op Ass'n Ret. & Sec. Program*, 978 F.Supp. 1025, 1043 (M.D. Ala. 1997). BAM would request that the Proposed Rules be modified to allow for increased monitoring beyond three (3) growing seasons only where a determination is made by the LGU and TEP that it is necessary.

Conclusion

Based on the foregoing analysis of the WCA Proposed Rules, there are three (3) areas where modifications should be made or amendments should be stricken.

1. Current buffer requirements for replacement wetlands are sufficient and no increased buffer widths should be required. There is no scientific evidence that show that the changes proposed by BWSR will improve the effectiveness of replacement wetlands, and such a change will result in the taking of private property. Finally, current rules allow for flexibility in buffer widths where a site specific analysis shows a need for increased buffer widths.
2. The Proposed Rules relating to the determination of application completeness made by a local government will unnecessarily delay project applications and add an enormous cost to property owners, developers, and home buyers. There is no benefit to the environment or the WCA through the adoption of this proposed change. Current practice and state law allow for approvals with conditions, satisfying seasonal delineation concerns while processing applications in a timely manner.
3. Monitoring requirements for replacement wetlands should be consistent. Allowing for increased monitoring time after a minimum of three (3) growing will provide for local control and a site-specific analysis. The Proposed Rules will lead to confusion and inconsistency in application.

We thank you for your consideration in this matter.

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May 5, 2009

Page 7

Sincerely,



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