

Judge Mihalchick and BWSR staff, thank you for the opportunity to discuss our concerns relating to the “Proposed Permanent Rules Relating to Wetland Conservation.” Ellingson Companies is a family owned construction company specializing in agricultural drainage, small community sewer systems and a variety of trenchless technologies. The Wetland Conservation Act is important to all Minnesotans and Ellingson Companies and Minnesota’s farmers have always been leaders in protecting our land and water.

In reviewing the proposed rule changes we have three main issues we would like to provide comment on: Local Government Units, Application Procedures and Exemptions.

In my testimony you will note the exact copy from the “Proposed Permanent Rules Relating to Wetland Conservation” with emphasis added to the specific areas to which I am referring when necessary to provide clarification.

1: Local Government Units

A. 8420.0200 - DETERMINING LOCAL GOVERNMENT UNIT; DUTIES – Subpart 2

24.9 ~~B. C.~~ The local government unit may, through resolution, rule, or ordinance,
24.10 ~~place the decision~~ decision-making ~~authority for exemption, no loss, wetland boundary~~
24.11 ~~and type, replacement plan, and wetland banking determinations with local government~~
24.12 ~~unit staff according to procedures it establishes. For final determinations~~ decisions ~~made~~
24.13 ~~by staff, the local government unit must establish a local appeal process that includes a~~
24.14 ~~an evidentiary~~ public hearing ~~before appointed or elected officials. The determination of~~
24.15 ~~staff becomes final if not appealed to the local government unit within 30 days after the~~
24.16 ~~date on which the decision is mailed to those required to receive notice of the decision.~~
24.17 ~~Notwithstanding the time frames of Minnesota Statutes, section 15.99, or any other law to~~
24.18 ~~the contrary, the local government unit must make a ruling within 30 days from the date of~~
24.19 ~~the filing of the appeal, unless the appellant and local government unit mutually agree, in~~
24.20 ~~writing, to an extension of time beyond the 30 days. Appeal of a final determination made~~
24.21 ~~by staff may be made by the landowner, by any of those required to receive notice of the~~
24.22 ~~decision, or by 100 residents of the county in which a majority of the wetland is located.~~

Argument:

It is our view that the proposed rule changes would allow local government units too much leeway to empower total decision making authority with staff; specifically on issues where the decision making authority should remain with the board. Adding a level of bureaucracy to the process would be costly, time consuming and would add an unnecessary level of separation between the local government unit and the people that they serve.

Our recommendation would be to revert this section back to the original language as follows:

The local government unit may place the decision authority for exemption, no loss, wetland boundary and type, replacement plan, and wetland banking determinations with local government unit staff according to the procedures it establishes. For final determinations made by staff, the local government unit must establish a local appeal process that includes a public hearing before appointed or elected officials.

B. 8420.0255 - LOCAL GOVERNMENT UNIT APPLICATION AND DECISION PROCEDURES – Subpart 2

30.5 Subp. 2. Determination of complete application. If, within 15 business days of
30.6 receipt of an application, the local government unit finds that an application is incomplete,
30.7 the local government unit must notify the applicant and list in writing what items or

30.8 information is missing. Parts 8420.0305 to 8420.0330 must be the basis for determining a
30.9 complete application. **The local government unit may determine an application incomplete**
30.10 **when seasonal constraints prevent on-site review and verification of the application,**
30.11 **provided the notification to the applicant includes a date, no later than the average start**
30.12 **to the growing season, when the application will be considered complete.** When an
30.13 application contains a previously approved wetland boundary for which the approval
30.14 remains valid, the wetland boundary may not serve as the basis for determining an
30.15 application incomplete.

Argument

The proposed rule changes would allow a local government unit and their staff the ability to unnecessarily delay projects through use of the vague concept of “seasonal constraint” preventing on-site review. A determination of these applications should be able to be performed within 60 days of receipt of an application with or without an on-site review. Many high quality resources are available to local government units and their staff, including aerial photographs and farming history that should allow for verification of the application at any time of the year regardless of seasonal constraints. Punishing the applicant because of circumstances beyond their control is unfair and unnecessary.

Local government units should not be allowed to delay a project, or determine the application incomplete because a field has been planted or is currently growing crops. It should be made explicitly clear that a planted field or growing crops do not rise to the level of “seasonal constraint” that would “prevent on-site review.”

Therefore it is our recommendation that Subpart 2: Determination of complete application, be amended by removing the following lines.

The local government unit may determine an application incomplete when seasonal constraints prevent on-site review and verification of the application, provided the notification to the applicant includes a date, no later than the average start to the growing season, when the application will be considered complete.

2: Application Procedures

A. 8420.0315 - NO LOSS APPLICATIONS – Point B

34.16 B. The landowner applying for a no-loss is responsible for submitting the proof
34.17 necessary to show qualification for the claim. **The local government unit may require that**
34.18 **a wetland delineation report or functional assessment be submitted if the local government**
34.19 **unit determines that the report or assessment is necessary to make a decision on the**
34.20 **no-loss application.** This part also applies to applications requesting a decision on whether
34.21 an activity or wetland falls within the scope of this chapter.

Argument

The landowner is already REQUIRED to submit proof of qualification for the No-Loss claim. After the landowner submits this proof, to require any additional reports or assessments adds an unnecessary burden onto the landowner.

Therefore, it is our recommendation to strike the following sentence:

The local government unit may require that a wetland delineation report or functional assessment be submitted if the local government unit determines that the report or assessment is necessary to make a decision on the no-loss application.

3: Exemptions

Overall on exemptions it is important to note, as Mr. Harnack from the Red River Watershed Management Board referenced in the Tuesday, May 5, 2009 afternoon session, exempt items are exempt. No requirements should be, or can be, added to receive these exemptions.

A. 8420.0410 - NO-LOSS AND EXEMPTION CONDITIONS

43.10 A person conducting an activity in a wetland under no-loss in part 8420.0415 or an
43.11 exemption in part 8420.0420 must ensure that:

43.12 A. appropriate erosion control measures are taken to prevent sedimentation
43.13 of the wetland or of any receiving waters;

43.14 B. the activity does not block fish activity in a watercourse, except when
43.15 done purposely to prevent movement of undesirable fish species in accordance with a
43.16 recommendation from the commissioner; and

43.17 C. the activity is conducted in compliance with all other applicable federal,
43.18 state, and local requirements, including best management practices according to the
43.19 documents referenced in part 8420.0112, items L, M, and N, and water resource protection
43.20 requirements established under Minnesota Statutes, chapter 103H.

Argument

Erosion control is already an important part of all farming practices and adding additional requirements to control or eliminate erosion is unnecessary and could become burdensome to Minnesota farmers. It is our recommendation that a complete exemption should be given for agricultural activities and drainage that meet the requirements of 8420.0420 Subp. 2 or 3.

A. 8420.0420 – EXEMPTION STANDARDS – Subpart 1, Point G

48.21 G. impacts resulting from agricultural activities that are subject to federal farm
48.22 program restrictions that meet minimum state standards under this chapter and Minnesota
48.23 Statutes, sections 103A.202 and 103B.3355, and that have been approved by the board,
48.24 the commissioners of natural resources and agriculture, and the **Pollution Control Agency.**

48.25 An exemption under this item is not valid until such approval is obtained. If approved,
48.26 the conditions and standards shall be noticed by the board to local government units
and published in the State Register. The conditions and standards 49.1 take effect 30 days
49.2 after publication and remain in effect unless superseded by subsequent statute, rule, or
49.3 notice in the State Register. Upon taking effect, this exemption only applies to impacts on
49.4 agricultural land annually enrolled in the federal Farm Program that are not beyond what is:

Argument

It is important that these agencies meet in a timely manner to discuss and vote on approval of these exemptions. Therefore, we would like to add the following sentence, following Pollution Control Agency in “G.” **The above referenced agencies must meet within 90 days after enactment of these rules.**

A. 8420.0420 – EXEMPTION STANDARDS – Subpart 4

52.3 Subp. 4. **Federal approvals.** A replacement plan is not required for impacts
52.4 authorized under section 404 of the federal Clean Water Act, United States Code, title
52.5 33, section 1344, or section 10 of the Rivers and Harbors Act of 1899, United States
52.6 Code, title 33, section 403, and regulations that meet minimum state standards under this
52.7 chapter and that have been approved by the board, the Department of Agriculture, the
52.8 Department of Natural Resources, and the **Pollution Control Agency.** This exemption is
52.9 not valid until such approval is obtained. If approved, the conditions and standards shall

52.10 be noticed by the board to local government units and published in the State Register. The 52.11 exemption takes effect 30 days after publication and remains in effect unless superseded 52.12 by subsequent statute, rule, or notice in the State Register.

Argument

It is important that these agencies meet in a timely manner to discuss and vote on approval of these exemptions. Therefore, we would like to add the following sentence, following Pollution Control Agency in "G." **The above referenced agencies must meet within 90 days after enactment of these rules.**

These rule changes are vitally important for all Minnesotans. It is important for our State to maintain leadership in clean water and soil, but we should not do so by imposing inappropriate and unnecessary rules onto Minnesota's farmers and businesses.

If you have any questions about my written testimony, or if you should need any clarification, please feel free to contact me at 888.527.2294 or by email at mschnell@ellingsondrainage.com.

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