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ADMINISTRATIVE  
HEARINGS

Honorable Steve M. Mahalchick  
Administrative Law Judge  
Office of Administrative Hearings  
600 N. Robert Street  
P.O. Box 64620  
St. Paul, MN 55164-0620

Dear Judge Mahalchick,

RE: Proposed Permanent Rules relating to Wetland Conservation

I have represented the Red River Watershed Management Board (RRWMB) while participating in the wetland conservation act (WCA) rulemaking steering committee. A number of our issues and comments have been incorporated into the final draft rules. We do appreciate BWSR's thoughtful consideration of those issues. However, we do still have some outstanding issues that we feel must be addressed before final adoption of the WCA rules as proposed. Those issues are as follows:

**1. 8420.0111 DEFINITIONS**

- a. Subp. 6. Agricultural land. There is considerable agricultural land that does have conservation contracts (CRP & CCRP) that last for 10 to 15 years. These lands seem to be excluded from the definition. The provision does reference "conservation easements" which is important; however, it is just as critical to include a reference to conservation contracts as well. **We are suggesting that in the last sentence of this definition after "conservation easements" that "conservation contracts" be added.**
- b. Subp. 12. Best management practices. State approved and published practices are sited. There are a number of state agencies and federal agencies that have best management practices for various activities, some of which currently are not consistent with the other. **It would be appropriate for BWSR to approve, certify or endorse the appropriate recognized and published best management practices to ensure uniformity and consistency of application.** This does not suggest that each individual best management practice is approved but that there is endorsement of published practices that serve as a guide to preventing and minimizing the degradation of surface water and groundwater.
- c. Subp. 19. Degraded wetland. Based on the last few words of this definition "or adjacent upland manipulation" could mean that the vast majority of wetlands in the state are automatically classed as degraded. Many wetlands have adjacent agricultural activities and others have urban

development. **In order to have some consistency in the use of this definition it would be appropriate to define and give context to what is meant by adjacent upland manipulation. Better yet just delete “vegetation or adjacent upland manipulation”.**

- d. Subp. 23. Drainage system. There may already be a definition of drainage system in MS103E. It would be appropriate to ensure that there is not a conflict with other statutory drainage system definitions.
- e. Subp. 25. Fill. Does fill include utilities that are placed underground through a wetland? Utilities such as pipelines, natural gas, non perforated drainage tile that may result in a minor, short-term alteration but do meet the outcomes of the first sentence of the definition should also be mentioned in the second sentence along with power lines and bridges.
- f. Subp. 26. 50 to 80 percent; Subp. 27. & Subp. 36 It would be appropriate to have a reference to the map of the current counties within each area.

## 2. 8420.02000 DETERMINING LOCAL GOVERNMENT UNIT; DUTIES.

- a. I. This provision requires the reporting of information by the local units of government annually to BWSR. The amount of information, the format and the timing of the reporting required will impact the actual cost to the local governments. The SONAR suggests that this cost is less than \$25,000/year. This may be true for some of the local governments, however, others that have significant wetland activities under WCA could well be required to spend in excess of \$25,000/year. When there is an increase in requirements for the local governments that is not compensated by the state the local government will generally increase local fees to cover the additional costs. The SONAR seems to be deficient in the assessment of what this reporting will cost local governments individually and collectively statewide. There needs to be acknowledgement that the recent passage of the Environment and Natural Resources Omnibus budget bill has reduced the natural resources block grant program that provides the state’s funding share for implementation of these rules. In addition the state has proposed reducing the local government aids program as part of the budget balancing for the biennium. Even a minor increase in cost to local governments will be very difficult to accommodate when placed against other much higher priority programs. **It would be appropriate to defer mandatory implementation of this provision until January of 2011 to allow the state and local economic recovery to begin to be realized.**

## 3. 8420.0330 REPLACEMENT PLAN APPLICATIONS

- a. Subp. 2. Preapplication conference and site visit. The provision “recommended” that the landowner meet with the local government, however later in the provision local governments are only “encouraged” to inform landowners. It is suggested that what is good for one is also good for the other. **Recommend using the appropriate variation of**

“recommended” in both places or use the appropriate variation of “encouraged” in both places.

4. **8420.0335 CONTRACTOR’S NOTIFICATION RESPONSIBILITY**

- a. B. (1). This provision clearly applies to activities where a replacement plan is required and those where a replacement plan is not required. **However, this provision should not apply to exemptions under WCA since those activities are not subject to the law.** It would be appropriate to clarify this provision. It may be more appropriate to encourage that the contractor obtain the notification for exempt activities to protect their best interests.

5. **8420.0420 EXEMPTION STANDARDS.**

- a. Subp. 1. Scope. D. This provision gives discretion to the local government regarding the recording of notices of the restrictions in this provision. **We support this discretion.**
- b. Subp. 2. Agricultural activities.
  - i. G. This provision is in conflict with the purpose, intent, and language of the law in WCA. This provision requires that the activities not only meet the requirements of this chapter (the WCA rules) but also 103A.202 and 103B.3355 as well as obtaining approval of the various state agencies sited. **As long as an activity meets the minimum standards of this rule there should not be any other requirement to be met.** One could interpret from this provision that even exemptions are no longer exemptions. If no change is made to this provision, at a minimum, there should be timeframe and appropriate due process within which the board must complete the interagency requirements of this provision.
- c. Subp. 4. Federal approvals. The concerns here are the same as sited in the previous provision. If activities meet the provisions of this chapter that is all that should be required. **The additional approval of the various state agencies should not be required for those activities that are already exempt under this chapter or meet the alteration and replacement standards under this chapter.** This provision also puts in place a process that is an alternative to the formal rule making process and does not provide an opportunity for due process and public involvement. **At a minimum, the board should be required to follow a more open and transparent process involving stakeholders and provide opportunity for a formal hearing before the board.**

6. **8420.0522 REPLACEMENT STANDARDS**

- a. Subp. 3 Replacement ratios
  - i. B. **There should be map that is referenced showing the bank service areas.**
  - ii. E. A good provision that provides some appropriate flexibility in the replacement ratios based on a comprehensive inventory of

replacement opportunities. These could be developed by major watershed as part of updates to existing comprehensive water management plans. **This is a good provision.**

iii. Subp. 4 In-kind wetland replacement.

1. A & C. These provisions provide flexibility acknowledging that some wetlands are degraded or in some areas of the state wetlands are totally gone and it is necessary to do replacement with wetlands that have greater or important function and value to the watershed and the ecosystem of the area rather than just in-kind.

b. Subp. 6. Required upland buffers.

i. C. The provision provides flexibility for the local unit of government to vary the buffer widths when it is not practical or feasible to accomplish minimum buffer width. Not all situations are equal and this flexibility is appropriate to address site constraints and limitations.

c. Subp. 9. Financial assurance.

i. A. This provision provides flexibility for the local unit of government to waive the financial assurance. This is particularly appropriate when the applicant is another local government that will clearly be accountable and responsible for ensuring the successful replacement.

7. **8420. 0526 ACTIONS ELIGIBLE FOR CREDIT.** There is a general concern relating to the inconsistency in the credit value allowed under the various provisions. You can clearly see the inconsistencies when you lay out examples of each.

a. Subp. 2. Upland buffer areas.

i. A., B., & C. These provisions provide flexibility to the local government and technical panel to give greater credit for buffers when the buffer enhances the wetland functions and values and the sustainability of the wetland. Good provisions.

b. Subp. 3 Restoration of completely drained or filled wetland areas. This provision provides up to 100% replacement credit for restoration. This is appropriate since the wetland is totally drained or filled and will be restored to a functional wetland again. **Supported.**

c. Subp. 4. Restoration of partially drained or filled wetland areas.

i. A. This allows for up to 100% of a restored basin to be credited if the restored wetland has been in set-a-side program for 20 years.

**This is supported.**

ii. B. Provides that a substantially degraded wetland may only receive up to 50% credit when restored. This seems to be inconsistent with A. when you consider that this wetland could be 90% drained and only receive 50% credit upon restoration. In A you already have a lesser restoration and you get up to 100% credit. **Item B should be more related to the proportion of the total wetland that is**

**restored.** This limitation also seems to be inconsistent with Subp. 5. A & B.

d. Subp 5. Vegetative restoration of farmed wetlands.

- i. A. The credit under this provision should be higher than 50% when the entire function and value of the wetland are restored. Although the area may not have been drained it was farmed the majority of the time and in areas of the state where 90% of the wetlands have been lost it makes sense that the function and value is far greater than in other areas of the state. This provision only provides 50% for the restoring 100% of the functionality of the wetland. **This provision should provide, at a minimum, up to 90% credit.**
- ii. B. There may be some justification for the special application to these service areas. However, there's greater justification to apply this to a greater area than just these service areas. **Provide up to 90% in the areas with less than 50% and between 50% - 80% of presettlement wetlands remaining.** This would acknowledge the significant loss of wetlands in these watershed and ecoregions and provide greater incentive for restoration. Quality wetland restorations are far more significant where few wetlands exist. Also there should be a map of the bank service areas.
- iii. C. This provision limits the bounce on a restored wetland to a maximum of 24 inches for the 10 year critical storm event. This limitation is frequently less than what occurs in natural conditions depending on the watershed setting and other physical characteristics of the wetland outlet. Therefore, this limitation for all situations is not justified or practical, flexibility is needed. **Recommend that the 24 inch bounce for the 10 year critical storm event be a general standard while providing flexibility based on the watershed and watershed setting to exceed this standard with the approval of the TEP or under the approved comprehensive wetland plan.**

8. **8420.0705 ESTABLISHING WETLAND BANK SITE.**

- a. Subp.5. Conservation and access easements. This provision provides for an access easement in favor of the board. It is not clear in this provision that this is NOT a public access for the general public. It should be clearly stated in this provision. **Consider amending the provisions as follows at the end of the provision: "The access easement is an access for inspection and monitoring and is NOT a public access for the general public."**

9. **8420.0810 REPLACEMENT WETLAND MONITORING.**

- a. Subp. 3 Duration of Monitoring. This provision seems a bit overly burdensome with the requirement for 5 years of monitoring. Historically the monitoring has been for 3 years not five and there does not seem to be any justification in the SONAR to support increasing the monitoring

automatically to 5 years. In the majority of instances the full function of the wetland restoration will be a reality in 3 years and often less than 3 years depending on the climate conditions and other factors. It would be more appropriate to maintain the current 3 years of monitoring and then if based on monitoring reporting and inspections additional years are required the monitoring can be extended. This would be more efficient and less costly process, by reducing administration and unnecessary monitoring contracts by the applicant. **Recommend that in A. “five” be deleted and “three” inserted and in B. “fifth” be deleted and “third” inserted.**

**10. 8420.0830 LOCAL COMPREHENSIVE WETLAND PROTECTION AND MANAGEMENT PLANS.** We support the language providing regulatory flexibility through the local comprehensive wetland protection and management plan process. The state has great diversity in the landscape and one size does not fit all when attempting to manage wetlands and other water resources. This section provides for a watershed approach that can be tailored to the unique wetland resource issues and concerns of that watershed resulting in more efficient management of the wetland resources.

**11. 8420.0900 ENFORCEMENT PROCEDURES.**

- a. C. The provision refers to exemptions requiring a written application. This is inappropriate as these activities are exempt and there should not be an attempt to regulate these activities through, what appears to be a ‘back door’ regulation. Since the enforcement authority is already required to consult with the local government to determine compliance BEFORE issuing a notice of potential violation there should be no justification for issuance of a notice of potential violation on an exempt activity. **The reference to “exemption” should be deleted throughout this provision.**
- b. D. Since the enforcement authority must consult with the local unit of government to determine whether the landowner is in compliance there should be no situations where an exemption should trigger a cease & desist order or a notice of potential violation. Exempt activities are not regulated by the WCA. **Therefore “exemption” should be deleted from the provision. It is an unauthorized regulation of exemptions.**
- c. E. Exemption again appears in this provision. Similar to provisions C and D above, exemptions are not regulated by the WCA. In addition the enforcement authority is required to consult with the local government before issuance of a notice of potential violation therefore there should be no situations where an exemption should receive any enforcement action. **Delete “exemption” from this provision.**

**12. 8420.0905 APPEALS.**

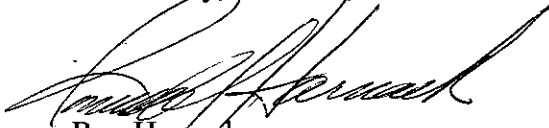
- a. Subp 4. F. This provision does not clearly give a timeframe for the local government to make a decision on a remand from the board or the

executive director. It could be assumed that the timeframe of MS 15.99 applies; however, it is not very clear. **A definite timeframe is needed to ensure uniformity and consistency as well as certainty for individuals.**

During my testimony at the hearing on Tuesday at the PCA Board room there was BWSR staff reference to their attempt to achieve as much consistency with the Corps of Engineers 404 as possible in these rule revisions. However, determining consistency with the 404 process is very difficult as there are frequently no specific standards guiding the 404 decision making. Often times the decision is based on less than generally accepted scientific standards and more on one person's personal perspective on what the best standard is for the particular situation. Therefore, consistency with COE 404 program is not always possible due to the lack of federal specificity in federal guidelines and continuing changing standard. Establishing certainty in the WCA rule revisions can hopefully help bring the 404 guidelines in the St. Paul District COE into greater conformance with the broadly accepted standards of WCA resulting in significant regulatory efficiency for wetlands.

Thank you for your thoughtful consideration of these issues and concerns. If you have any questions please do not hesitate to contact me.

Yours truly,



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