

Board of Water and Soil Resources

Proposed Permanent Rules Relating to Wetland Conservation

Errata to the March 25, 2009 Statement of Need and Reasonableness

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*General Change:* Change “current rule” wherever it appears to “exempt rule”.

*Page 5 - STATUTORY AUTHORITY.*

BWSR has authority to develop rules under Minn. Stat. 103B.101, 103B.3355, and 103G.2242. The specific authority for this rulemaking is provided in Laws of Minnesota 2007, Article 1, Chapter 57, Section 166. ~~Also, BWSR has authority to develop rules governing wetland conservation under Minn. Stat. 103G.2242.~~

*Page 23 – 8420.0255 LOCAL GOVERNMENT UNIT APPLICATION AND DECISION PROCEDURES*

Subpart 5. **Notice of Decision.** Language has been added to allow BWSR to establish minimum information requirements as they relate to decision notices mailed by LGUs. This will reduce the number of decision notices with insufficient information and will benefit the applicant and other members of the TEP by requiring the LGU to be specific as to what decision was actually made. The inclusion of information of the appeal period of the decision has been added to conformance with statutory amendments made in 2007, and relocated to this subpart from the current 8420.0220, subpart 2C.

*Page 29 - 8420.0405 BOUNDARY OR TYPE.*

Subpart 2. **Wetland type.** This subpart is relocated from the current 8420.0510 and 8420.0549.

*Page 31 – Change **Item C** to **Item D** under 8420.0420 EXEMPTION STANDARDS, subpart 1.*

*Page 31 - 8420.0420 EXEMPTION STANDARDS, subpart 2. Agricultural Activities.*

Subpart 2. **Agricultural activities.** No substantive changes are proposed to ~~items A or B.~~ Changes are intended to ensure consistency with statutory amendments made in 2007, clarify intent and implementation. The deletion of the landowner affidavit has been replaced by other applicable documentation to acknowledge that there may be information in addition to the landowner’s affidavit that can be used as evidence for this exemption.

*Page 32 - 8420.0420 EXEMPTION STANDARDS.*

Subpart 3. **Drainage.** The drainage exemption subpart has been re-organized to include a drainage maintenance or repair section and a drainage enhancement section. Modifications to this subpart are primarily related to ensuring consistency with statutory amendments made in 2007, reorganization of the subpart and clarification of current language. Two exceptions are the

addition of a new **item C** which requires stabilization of dredged spoil resulting from exempted actions and relocation of former item H regarding land use conversion language to the scope of exemption standards part referenced above.

*Page 32 - 8420.0420 EXEMPTION STANDARDS.*

Subpart 4. **Federal approvals.** ~~No substantive changes are made to the federal approvals exemption; however, language~~ Language was added to clarify intent and implementation of the exemption and improve conformance with ~~statute~~ statutory amendments made in 2007.

*Page 32 - 8420.0420 EXEMPTION STANDARDS.*

Subpart 5. **Restored Wetlands.** ~~No substantive changes are made to the restored wetlands exemption; however, language~~ Language was added to ensure conformance with statutory amendments made in 2007, clarify intent and implementation of the exemption. The deletion of affidavit has been replaced by other applicable documentation to acknowledge that there may be information in addition to an affidavit that can be used as evidence for this exemption.

*Page 32 - 8420.0420 EXEMPTION STANDARDS.*

Subpart 6. **Utilities; public works.** As discussed in the no-loss part, portions of the utilities exemption that did not result in permanent wetland impact were relocated to No-Loss Criteria (8420.0415). Other changes to this exemption ensure conformance with statutory amendments made in 2007, ~~were limited to clarification of and clarify~~ intent and implementation ~~and do not include substantive changes to current rule.~~ The new language referring to expansion of sewage treatment systems is intended to ensure the exemption is used for repair or updating, and not to increase capacity.

*Page 33 - 8420.0420 EXEMPTION STANDARDS.*

Subpart 8. **De minimis.** Changes to the de minimis exemption were limited to ensuring conformance with statutory amendments made in 2007, clarification of implementation by reorganizing the exemption into greater than 80% areas, 50 to 80% areas, and less than 50% percent areas, and including all potential de minimis amounts for each area within each category. The edits reorganize current rule language and are intended to make it easier to determine the applicable de minimis amount for a given project without adding or removing any WCA jurisdiction.

*Page 35 - 8420.0522 REPLACEMENT STANDARDS.*

This part was relocated here from the current 8420.0103 and renamed. This part has been drafted to provide increased consistency with requirements of the U.S. Army Corps of Engineers, which is a key purpose of this rulemaking. As is discussed earlier in this SONAR, BWSR and the Corps signed a Wetland Mitigation Memorandum of Understanding in May 2007, many of the provisions of this MOU have been incorporated into this proposed rule.

Page 35/36 - 8420.0522 REPLACEMENT STANDARDS.

Subpart 3. **Replacement ratios.** The 2002 permanent rule does not provide applicants with incentives to ensure that key wetland functions and values are addressed in replacement plans. These replacement ratios make no adjustment for impacts in relation to how replacement plans address the three key parameters of in-place, in-time, and in-kind. LGU decision-making processes are intended to ensure these criteria are addressed; however, the lack of a connection between these criteria and regulatory outcomes reduces the likelihood that these criteria will be strictly applied with the associated lack of assurance that wetland function and value are adequately replaced.

The exempt rule includes a complicated table that includes 16 different replacement ratios based on whether or not the replacement plan address one, two, or none of these criteria. This table places the responsibility on applicants to demonstrate that their proposal complies with these criteria, and increases replacement requirements when they do not. This rule meets the intent of WCA (replacement of wetland functions and value), but is overly complicated, difficult for applicants to understand, and leads to the unintended consequences of unnecessary amounts of replacement wetlands.

The proposed rule corrects these defects by providing incentives for applicants to achieve wetland function and value goals, while reducing the regulatory burden and increasing applicant understanding and compliance. The determination of replacement ratios described in this subpart incorporates language from current 8420.0549, subparts 4a, 4b, and 4c. In addition, language from the 2002 permanent rule parts 8420.0546, 8420.0549, subparts 3 and 4 are incorporated. Consistent with input from stakeholders and BWSR staff, the process to determine replacement ratios has been simplified as compared to the current rule. Rather than beginning at a base ratio of 1:1 or 2:1 and increasing the ratio based on penalties, the proposed language begins at a ratio of 1.5:1 or 2.5:1 and provides incentives to lower the ratio. This does not change the minimum or maximum replacement ratios in the current rule or 2002 permanent rule but, rather, provides an incentive-based system for achieving replacement in a way that is easier for applicants to understand.

The current rule utilizes three criteria to determine the ultimate replacement ratio, with a .25:1 penalty for non-compliance with each. Those three criteria are “in-advance, in-place, and in-kind.” Current part 8420.0548, subpart 4a defines in-advance. For purposes of determining replacement ratios, a reduction in the ratio for in-advance can only be achieved in the proposed rule when that replacement consists of wetland bank credits. For project-specific replacement, a reduction in the replacement ratio is not granted for in-advance since the standard was rarely used by applicants and difficult to administer and enforce by LGUs. This allows for substantial simplification of the process for determining replacement ratios and the tables that summarize it. Current part 8420.0548, subpart 4b defines in-place. That language has been deleted and relocated to this subpart by adding the watershed and bank service area concepts into **item A**, and by relocating the current 8420.0549, subpart 4b, items A and B. These organizational changes help to clarify and simplify the rule.

For purposes of determining replacement ratios, the in-kind criteria will only apply to project-specific replacement. Tracking replacement wetland credits and transactions within the state wetland bank by plant community type has resulted in substantial complications for applicants in finding appropriate replacement, for bank owners in selling credits, for LGUs in implementing WCA, and for BWSR in administering the bank. Removal of the in-kind criteria from consideration when banking credits are used as replacement will significantly simplify the process, remove a disincentive to use wetland bank credits to provide required replacement, and remove a disincentive for individuals who may become wetland bankers in the future. The intent of the in-kind criteria is to achieve functional replacement and, thus, replacement of lost public value, particularly for difficult to replace wetlands when those wetlands are impacted. However, the .25:1 replacement ratio increase is not sufficient to incent establishment of difficult to replace wetlands, and other options are needed to achieve the in-kind intent.

For wetland banking, that intent will be achieved through a greater emphasis on wetland planning, upfront site selection, connectivity with other resources, and other concepts consistent with a watershed approach to wetland replacement as described elsewhere in the rule. These other concepts include a reduced amount of credit allowed for created wetlands (see the Actions Eligible for Credit part-8420.0526). Reduced credit for created wetlands, combined with a greater emphasis on replacement within the watershed or bank service area, will create an incentive for wetland restorations in watersheds, which are nearly always in-kind from a watershed perspective. Additionally, wetland planning efforts will now be required to identify, prioritize, and pursue functionally beneficial replacement sites within watersheds (see the Comprehensive Wetland Protection and Management Plan part, 8420.0830). BWSR will also, to the extent practicable utilize the road replacement program to target replacement wetlands of types and locations that have been disproportionately lost in the affected watershed and/or are difficult to replace, that would provide the greatest functional benefit, and that are consistent with a watershed approach to wetland replacement. Targeting these replacement wetlands will not only result in the desired replacement through the road replacement program, but also in private banking as unsuccessful applicants often choose to pursue their projects outside of the road program. The proposed changes to in-kind will significantly simplify the process for determining replacement ratios, making it easier for applicants to understand and for LGUs to implement. Those changes, combined with changes in other parts of the rule, will also better achieve the intent of the in-kind provision. In-kind criteria are discussed in greater detail under subpart 4 below.

The current rule prescribes a .25:1 penalty for non-compliance with each of the three replacement criteria as described above. The proposed language provides for substantial simplification by allowing a .5:1 reduction for meeting two of the criteria (in-place and in-advance for replacement via banking, and in-place and in-kind for project-specific replacement). This proposed language also provides greater incentive for watershed-based replacement (within the major watershed or bank service area) which is consistent with the watershed approach of the federal mitigation rule and current science.

*Page 37 - 8420.0522 REPLACEMENT STANDARDS.*

Subpart 4. **In-Kind wetland replacement.** 8420.0549, subpart 3 of the 2002 permanent rule defines replacement as in-kind if it of the same type as the impacted wetland, or in the same county or watershed as the impacted wetland. 8420.0548, subpart 4c and 8420.0549, subpart 3 of the current rule defines replacement as in-kind when it is the same type as the impacted wetland, with type referring to the plant community.

*Page 38 - 8420.0522 REPLACEMENT STANDARDS.*

Subpart 7. **Siting of replacement.** The siting requirements contained in this subpart conform to statutory amendments made in 2007 and are relocated from the current 8420.0543 and reorganized for clarity.

*Page 39 - 8420.0522 REPLACEMENT STANDARDS.*

Subpart 8. **Timing of Replacement.** The requirements contained in **items A and C** were relocated from the current ~~8420.0540~~ 8420.0542 and reworded for clarity.

*Page 61 - 8420.0905 APPEALS.*

Subpart 1. **Appeals of replacement and restoration orders to the board.** This subpart was relocated from the current 8420.0290, subpart 3c as it addresses appeal procedures and is more appropriately located under this subpart. One change is to clarify that appeals of replacement and restoration orders are made to BWSR. In addition, the rule is modified to allow the extension of the timeframe to appeal if mutually agreed to by the landowner, the LGU, and the enforcement authority. The ability to extend the timeframe has been inserted to allow more time when all parties involved agree there is the potential to develop a solution that may prevent the appeal. Avoiding appeals will reduce costs incurred by BWSR, the LGU, the enforcement authority, and the landowner, and can result in the wetland being replaced or restored in a shorter timeframe. The reference to a \$200 filing fee was removed to prevent confusion, as the actual specific filing fee will be determined by BWSR, not to exceed the statutory limit of \$1,000, as provided in statutory amendments made in 2007.

Subpart 2. **Appeal of local government unit staff decisions.** This subpart was relocated from the current 8420.0200, subpart 2. Language was added to ensure conformance with statutory amendments made in 2007 and to clarify that the appeal is not effective until mailing of the petition and submittal of any fees required by the LGU. This will inform landowners of this requirement up-front and reduce misunderstandings. A sentence was also added, consistent with other appeals procedures found in this part, to clarify that filing fees are not required for appeals by state agencies or members of the TEP.