



**Lake of the Woods County**  
**Office of Land and Water Planning**

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May 12, 2009

Administrative Law Judge Steve M. Mihalchick  
Office of Administrative Hearings  
600 North Robert Street  
P.O. Box 64620  
St. Paul MN 55164-0620

RE: Proposed Permanent Rules Relating to Wetland Conservation

Honorable Judge Mihalchick,

Please consider the following comments from Lake of the Woods County concerning the proposed Rule. They are provided in sequential order referencing the page(s), line(s), section(s), subpart(s) and item(s) from the proposed Rule.

**Page 2, Lines 2.23-2.24, 8420.0105, Subpart 2, Item B** – “Normal farming practices” means farming, silvicultural, grazing, and ranching activities such as plowing, seeding, cultivating, and harvesting for the production....

**Comment** – Switch “farming” and “ranching activities” because as written it infers that ranching activities are plowing, seeding, etc. “Ranching activities” are livestock related and not the act of actual soil disturbance.

**Page 20, Lines 20.1-20.8, 8420.0117, Subpart 2, Item A** – A local government unit may request the board to reclassify a county or major watershed wholly or partly within its jurisdiction on the basis of its percentage of presettlement wetlands remaining. After receipt of satisfactory documentation from the local government, the board must change the classification of a county or major watershed. If requested by the local government unit, the board must assist in developing the documentation. Within 30 days of its action to approve a change of wetland classifications, the board must publish a notice of the change in the Environmental Quality Board Monitor.

**Comment** – The propose language changes are necessary to clarify who can request a reclassification.

- EQUAL OPPORTUNITY EMPLOYER -

**Pages 30-31, Lines 30.16-31.12, 8420.0255, Subpart 3** – Under current Rule, the Local Government Unit (LGU) decisions on exemptions can be made without noticing the application or providing anyone an opportunity for comments. Although mandatory noticing is not in the proposed draft Rule, specific comments on this section are as follows.

**Comment** – There should not be a mandatory requirement to notice exemptions. The decision to notice exempt activities should be left up to the LGU. Numerous factors weigh into the decision such as:

- 1) This requirement would increase LGU workload.
- 2) Difficult to enforce because in other areas of the Wetland Conservation Act (WCA), it states that it is optional to apply to the LGU for approval. Also, the LGU may make on-site decisions on whether a specific project meets an exemption.
- 3) Would require a statute change to implement this requirement and additional changes in the current Rule.

**Pages 34-35, Lines 34.22-35.7, 8420.0320** – A landowner may apply to the LGU for an exemption decision for a specific activity they are intending to conduct. Also, an exemption may apply whether or not the LGU has made an exemption decision. If the landowner requests an exemption decision, then the LGU must make one. Although the requirement for a landowner to apply to the LGU and receive approval of an exemption prior to commencing the activity is not in the proposed draft Rule, specific comments on this section are as follows.

**Comment** – There should not be a mandatory requirement for a landowner to apply and receive approval prior to commencing an exempt activity. Numerous factors weigh into the decision such as:

- 1) This requirement would increase LGU workload.
- 2) This requirement would be difficult to enforce as it would not carry a penalty for non-compliance.
- 3) This requirement may be less effective in rural or agricultural areas.
- 4) This requirement would not be cost efficient.
- 5) This requirement is contrary to the original intent of the WCA.
- 6) This requirement would require a statute change to implement since currently exempt activities would then require a permit.
- 7) Most landowners would not be aware of this requirement.
- 8) Most landowners would not be aware that they are in a wetland area.

**Page 67, Lines 67.18-67.19, 8420.0522, Subpart 1** – Wetland replacement must replace the public value of wetlands lost as a result of an impact.

**Comment** – Would encourage the BWSR to work with LGU's in determining the public value of wetlands within their jurisdiction. This information would be of great use in determining if the public value is adequately replaced. The difficulty that is occurring is when the impact site and the replacement site are located in different locations of the state. How does one ensure that the replacement site adequately replaces the public value of the proposed impact site?

**Pages 70-71, Lines 70.19-71.4, 8420.0522, Subpart 4** – In-kind wetland replacement refers to replacement of the functions lost to an impact.

**Comment** – Eliminate the in-kind requirement tie to replacement ratios. The overarching requirement of replacement is that the replacement wetland must replace the public value of the impacted wetland. The in-kind replacement requirement (wetland type for type) is based on the assumption that replacing type for type results in better replacement of wetland functions that were lost to the impact, thus better replaces the lost public value. However, this also assumes that currently existing wetlands are the most valuable. We know that many wetlands have been degraded and/or are of a different type than what existed pre-settlement, and we know that the public may place more or less value on different types of wetlands based on the functions they perform. Replacement of a different type may, and often does, do a better job of replacing lost public value. The tie to replacement ratios can also make it confusing to landowners and difficult for LGUs to administer and enforce.

Additional incentives to eliminate the in-kind requirement are as follows:

- 1) It gives flexibility to the LGU and the Technical Evaluation Panel (TEP) to make appropriate function and value decisions within a science-based decision framework.
- 2) Is consistent with the spirit and intent of the WCA.
- 3) Utilized current scientific knowledge and the use of adopted wetland plant community type system.
- 4) Simplifies replacement ratios.
- 5) Provides a strong incentive to conduct in-kind replacement when appropriate and achieves the overall purpose of replacement.

**Pages 76-77, Lines 76.14-77.9, 8420.0526, Subpart 2** – Upland buffer areas.

**Comment** – In the northern part of the state, upland buffer of a replacement site may not always be an option. If the goal of the WCA is to achieve a replacement wetland that is of high value and self sustaining, a buffer of some type is warranted to achieve this goal. The title and language within this subpart should be changed to reflect that existing wetlands adjacent to a replacement wetland are allowed to be utilized as credit.

**Pages 77-78, Lines 77.10-80.26, 8420.0526, Subparts 3-9** – These subparts identify certain actions that are eligible for replacement credits and establish the amounts of credits that action is eligible for.

**Comments** – There should be opportunity to achieve 100 percent credit for all actions that are eligible for credit except for preservation or wetland creation. With the push towards utilizing wetland banks as replacement, the total amount of credits that a landowner is eligible for should be maximized.

The amount of credits that a wetland creation is eligible for should be reduced to at least 50 percent. It is well know that wetland creation is the most difficult and often results in a wetland with low function and public value.

### **Final Comments**

The Wetland Conservation Act (WCA) went into effect on January 1, 1992, and has been the subject of frequent change and debate since then. The discussion over wetland regulations, wildlife habitat and water quality issues have again focused attention on the WCA and how its regulatory program protects wetlands. Throughout the rulemaking process, the following items were taken under consideration:

- Consistent with the purpose of the WCA
- Simplification
- Ability to implement
- Clarification
- Tangible results
- Improve accountability
- LGU workload
- Limit unintended consequences
- Balance public costs and benefits
- Stakeholder support

While some of the above items were taken under consideration and addressed, additional efforts will have to made via statute changes in order further promote wetland conservation within the State of Minnesota. We appreciate the opportunity to voice our opinions on the proposed Rules.

Sincerely,



Josh Stromlund

cc: Dave Weirens, BWSR  
Les Lemm, BWSR