



## **SVOBODA ECOLOGICAL RESOURCES**

*Providing the Sharper Edge in Natural Resources & Environmental Consulting*

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ADMINISTRATIVE  
HEARINGS

May 5, 2009

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

**Re: Proposed Amendment to Rules Relating to Wetland conservation: MN Rules Chapter 8420**

Dear Judge Mihalchick:

Due to a constrained business schedule and prior commitments, I am not able to attend any of the Public Hearings scheduled by BWSR regarding the above proposed amendment to MN Rules Chapter 8420.

I have attached, however, my comments to this letter of introduction establishing my qualifications in the matter of wetland science.

### Education Summary

BS Degree Wildlife Management, 1966 – University of Minnesota

MS Degree Recreation and Resources Management, 1987 – University of Minnesota

### Professional Certifications

Certified Wildlife Biologist – The Wildlife Society

Professional Wetland Scientist – Society of Wetland Scientists

### Professional Positions

Junior Scientist – Ruffed Grouse Research, University of Minnesota

Wildlife Biologist – Minnesota Department of Transportation

Wildlife/Parks Planner – Minnesota Department of Natural Resources

Statewide Resource Manager – Division of Parks and Recreation, MnDNR

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25580 Nelsine Drive, Suite 100 • Shorewood, MN 55331  
(952) 471-1100 (Office) • (952) 471-0007 (fax)

Wildlife Biologist – BRW (now URS, Minneapolis)  
Wetlands Specialist\_ Barr Engineering  
Wetlands Section Manager - Braun InterTec  
Founder and President, Principal Ecologist – Svoboda Ecological Resources

#### Professional Memberships

The Wildlife Society (Member since 1963)  
Society of Wetland Scientists (Member since 1991)  
Natural Areas Association  
Wetland Delineators Association (Now Wetland Professionals Association)  
Founder, Charter Member, and first President

#### Conferences and Training

Conducted early training in wetland delineation in 1994 -95; trained over 50 delineators  
Svoboda Ecological Resources hosted 1 regional and two national conferences on the art of  
wetland delineation and wetland rules  
Served as a trainer for 3 EPA sponsored workshops for industry managers in Chicago, Atlanta  
and Houston

Throughout my entire career, I have dedicated my efforts to the practice of sound field science in the natural resources and have endeavored to train my employees in like fashion. Many of my employees have risen to positions of prominence within both the public and private sector including positions within BWSR.

Since my first involvement with wetlands while studying ruffed grouse under the leadership of the world's most renowned ruffed grouse expert, I developed an aptitude for accuracy in the profession of natural resources study and research. That attitude has carried through to the way our company conducts its wetland and natural resources business.

Over the course of my 40+ year professional career, either my employees or I have delineated or inventoried well over 15,000 wetlands located in eleven states. We have authored 100's of wetland delineation reports; prepared wetland permit applications under the Clean Water Act and the Wetland Conservation Act for over 200 projects and have monitored wetland replacements since the early 1990s.

I have been called upon to provide expert witness testimony in land valuation matters pertaining to wetlands, alleged wetland violations and encroachments and for agricultural program compliance.

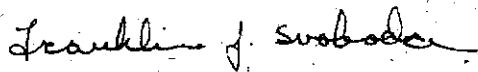
I offer my comments based on experience and expertise as a scientist, an experienced practitioner, as a consultant to both developers and the agricultural industry and as an individual who has had to interpret the application of the Rules in many different settings and as applied by many different individuals. Although the printed word remains the same, the interpretation and application vastly

differs from one location to the next. It is my hope that the final version of the Rules is sufficiently clear to convey legislative intent and to eliminate personal preference and choice.

It is my hope that the final rules that are to be adopted work toward furthering the opportunity to utilize the landscape for business opportunities and community gain while at the same time offering avenues for restoring wetland plant communities to a higher functional and quality level utilizing the restoration tools that are now accepted and available. It is to that end that my comments are offered.

Sincerely,

**Svoboda Ecological Resources**



Franklin J. Svoboda, *CWB, PWS*  
President, Principal Ecologist

Cc Dave Weirens, BWSR  
Lés Lemm, BWSR  
Leonard Binstock, ADMC

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Comments on Proposed Amendments to BWSR Minnesota Rules Chapter 8420  
Submitted by: Franklin J. Svoboda, Svoboda Ecological Resources  
25580 Nelsine Drive  
Shorewood, MN 55331

Thank you for the opportunity to present our concerns relating to the ***“Proposed Permanent Rules Relating to Wetland Conservation.”*** In reviewing the proposed changes we have three separate primary topical areas that we would like to provide comments on: Local Government Unit’s, Exemption and Enforcement.

**Issue 1: Local Government Unit Staff Authority.**

Context: Local Governmental Unit (LGU) assigns staff to review wetland exemptions and wetland alteration permits. It is the responsibility of staff, working with other advisory members of the Technical Evaluation panel (TEP) to review the data and the merits of the application, field review the site and provide comments to the applicant regarding the proposed project. In the past, the breadth of LGU staff authority was limited by the language of the Rule to decisions pertaining to exemptions, no loss, wetland boundary and type, replacement plan and wetland banking determinations. The new proposed language appears to expand the scope of LGU staff authority to the extent that all wetland decisions including final approval of permits could rest with the staff. Routine actions of a technical nature should continue at the staff level but final policy decisions should continue to remain the purview of the elected decision-making bodies that are accountable to the voters.

**From Proposed Rule changes Page 24, 8420.0200**

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 latitude to empower total decision making authority with staff; specifically on issues where the decision making authority should remain with the elected body. 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 to the original language in this section 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.**

## **Issue 2: LGU Permit Application 60-Day Rule**

Context: Field review of wetland delineation is dependent on suitable conditions whereby vegetation can be observed and identified, soil profile can be determined by probing and water levels can be measured in an open borehole. In Minnesota, these conditions are constrained seasonally by frozen ground, snow cover, and vegetation that has been frozen or has become senescent. Some LGUs have established seasonal field constraints whereas others allow wetland delineations to be reviewed as long as the ground is not frozen, snow has not obscured the vegetation and the vegetation is identifiable. The proposed change allows LGU staff to put an application on hold and not allowing any other decisions or reviews to occur until such time that staff determines suitable field conditions have returned. Furthermore, the 1987 Federal wetland delineation manual allows the use of offsite methods to determine wetland boundaries.

The latitude requested by this proposed Rule change could result in a scenario where, during a drought, for example, staff could determine that seasonal conditions prevent normal hydrology and therefore an application is placed on hold. An application should be allowed to proceed along all other lines of planning and development review and the delineation results should be determined to be “pending” rather than the application being determined to be incomplete. An LGU may request an extension to the 60-day Rule if an applicant agrees. Delineation determinations can be made as late as mid-November and as early as mid-March, so the 60-day Rule with one extension should cover most circumstances.

### **A.**

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 permanently 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 15 business 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.

Therefore it is our recommendation that Subp. 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.*

### Issue 3: Comments on an LGU Decision

Context: The LGU decision pertaining to wetlands is based on sound technical information presented through the review of the field conditions and project requirements by the TEP. Typically, the TEP also meets with the applicant and the applicant's consultants to review the design aspects of the project. Comments received from outside parties should be made in the context of public hearings associated with the project in front of a planning commission, and/or the elected body vested with the responsibility of approving or denying the project.

#### B.

31.13 Subp. 4. Decision. The local government unit's decision must be based on the  
31.14 standards and procedures required by this chapter and on the technical evaluation panel's  
31.15 findings and recommendation, when provided. The local government unit must consider  
31.16 and include in its record of decision the technical evaluation panel's recommendation,  
31.17 when provided, to approve, modify, or deny the application. The local government  
31.18 unit must also consider any comments received from those required to receive notice.  
31.19 The local government unit's decision must be made in compliance with the time period  
31.20 prescribed by Minnesota Statutes, section 15.99, which, on the effective date of this part,  
31.21 generally requires a decision in 60 days. The local government unit may make on-site  
31.22 exemption and no-loss decisions if the decisions are noticed according to subpart 5 and  
31.23 project details are provided sufficient to document eligibility. The local government  
31.24 unit's decision is valid for three years or as otherwise specified in the local government  
32.1 unit's decision. The local government unit may extend its decision 32.1 with the concurrence  
32.2 of the technical evaluation panel.

#### Argument

The local government unit should be required to consider the technical panel's recommendations. Any decision should be based on the findings of the technical panel and the opinions of other experts.

Therefore we would recommend amending subpoint 4 by striking the following sentence:

*The local government unit must also consider any comments received from those required to receive notice.*

### Issue 4: No-loss Determination

Context: Under the original intent of the Wetland Conservation Act, exemptions and no-loss determinations were to be made in good faith by the project proposer where activities of minor or no consequence were to be allowed. Such activities varied in size depending on the remaining extent of wetlands in any given county. The purpose of "self-certification": was to minimize cost to property owners and reduce workload of local staff and elected officials. Inclusion of the following proposed language adds unnecessary cost to a landowner and unnecessarily increases workload for local staff. Wetland delineations typically take several to many hours to complete, as do functional assessments. Some LGUs require an entire property to be delineated even if only a driveway is being put in or a new or replacement structure is being built on a property. Often no wetlands are even involved in the proposed project yet a complete delineation is required.

C.

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.

**Issue 5: Erosion Control Measures**

Context: Agricultural practices typically involve periods where the landscape is in a fallow condition between crop harvest and replanting. During this time, the soil lies exposed but surface erosion is contained and controlled by remaining crop residue as required under agriculture program provisions. Language in this section should be added that agricultural land is exempt from this provision since it is regulated under Food Security Act provisions.

D.

**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

An exemption should be added for agricultural activities and drainage that meet the requirements of 8420.0420 Subp. 2 or 3.

**Issue 6: Federal Farm Program Exemption**

Context: The Food Security Act of 1985 and subsequent revisions require implementation of practices that reduce soil erosion and are designed to protect water quality. Research is on-going that continues to look for new measures that are complementary to agricultural practices and yet achieve water quality improvement. The Rule requires the four listed state agencies to meet and establish an agreed upon set of standards. These agencies have not met nor set a timetable for meeting. The proposed change would establish a timetable for that meeting.

E.

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.**

#### **Issue 7: Federal Approvals Under the Clean Water Act and Rivers and Harbors Act**

Context: Activities authorized under the above listed federal statutes are to be exempt from permitting under the Wetland Conservation Act. Such exemption only applies if the four state agencies listed in Subp.4 below meet to establish minimum standards. Such a meeting has not been scheduled nor held. See also above Issue 6.

#### **F.**

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.**