



# Model County Buffer Ordinance

## Buffer Law Implementation

DRAFT December 12, 2016

### 1.0 STATUTORY AUTHORIZATION AND POLICY

- 1.1 **Statutory Authorization.** This buffer ordinance is adopted pursuant to the authorization and policies contained in Minn. Stat. §103F.48 and the county planning and zoning enabling legislation in Minn. Stat. chapter 394.
- 1.2 **Policy.** It is the policy of the County to:
  - (a) Provide for riparian vegetated buffers and water quality practices to achieve the following purposes:
    - (1) Protect state water resources from erosion and runoff pollution;
    - (2) Stabilize soils, shores and banks; and
    - (3) Protect or provide riparian corridors.
  - (b) Coordinate the implementation and enforcement of the water resources riparian protection requirements of Minn. Stat. §103F.48 with the shoreland management rules and ordinances adopted under the authority of Minn. Stat. §103F.201 to 103F.227 adopted under authority of and the management of public drainage systems established under Minn. Stat. chapter 103E where applicable; and
  - (c) Provide efficient and effective direction to landowners and protection of surface water quality and related land resources.

### 2.0 DEFINITIONS AND GENERAL PROVISIONS

- 2.1 **Definitions.** Unless specifically defined below, words or phrases used in this ordinance shall be interpreted to give them the same meaning they have in common usage and to give this ordinance its most reasonable application. For the purpose of this ordinance, the words “must” and “shall” are mandatory and not permissive. All distances, unless otherwise specified, are measured horizontally.
  - 2.1.1 **“Board”** means the Board of Water and Soil Resources.
  - 2.1.2 **“Buffer”** means an area consisting of perennial vegetation, excluding invasive plants and noxious weeds.
  - 2.1.3 **“Buffer protection map”** means the buffer map established and maintained by the commissioner of natural resources published in 2017, and as subsequently amended, that is available on the department of natural resources website.
  - 2.1.4 **“Commissioner”** means the commissioner of natural resources.
  - 2.1.5 **“Cultivation farming”** mean practices that disturb root or soil structure or that impair the viability of perennial vegetation due to cutting or harvesting near the soil surface.
  - 2.1.6 **“Drainage authority”** means the public body having jurisdiction over a drainage system under Minn. Stat. chapter 103E.

2.1.7 "Public drainage system" has the meaning given in Minn. Stat. §103E.005, subdivision 12.

2.1.8 "Executive director" means the executive director of the Board of Water and Soil Resources.

2.1.9 "Local water management authority" means a watershed district, metropolitan water management organization, or County operating separately or jointly in its role as local water management authority under Minn. Stat. chapter 103B or Minn. Stat. chapter 103D.

2.1.10 "Normal water level" means the level evidenced by the long-term presence of surface water as indicated directly by hydrophytic plants or hydric soils or indirectly determined via hydrological models or analysis.

2.1.11 "Public waters" has the meaning given in Minn. Stat. §103G.005, subdivision 15. The term public waters as used in this ordinance applies to waters that are on the public waters inventory as provided in Minn. Stat. §103G.201.

2.1.12 "Shoreland management rules" means the standards and criteria for the subdivision, use, and development of the shorelands of public waters as provided in Minn. Rules parts 6120.2500 – 6120.3900.

2.2 **Severability.** If any section, clause, provision, or portion of this ordinance is adjudged unconstitutional or invalid by a court of competent jurisdiction, the remainder of this ordinance shall not be affected thereby.

### 2.3 Data sharing/management

2.3.1 The County may enter into arrangements with an SWCD, a watershed district if applicable, the Board and other parties with respect to the creation and maintenance of, and access to, data concerning buffers and alternative practices under this ordinance.

2.3.2 The County will manage all such data in accordance with the Minnesota Data Practices Act and any other applicable laws.

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## 3.0 Jurisdiction and 4.0 Buffer Requirements

*NOTE:* Proposed BWSR Policy provides options for which waters a County can elect enforcement jurisdiction over, which relate to the existing County responsibility for implementing the shoreland management rules and acting as the public drainage authority. Counties should discuss enforcement options and plans with the watershed district (if any) and SWCD prior to making a jurisdiction decision.

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## OPTION 1 – 50-Foot Average 30-Foot Minimum and 16.5-Foot Waters, excluding public ditches where the County is not the drainage authority

### 3.0 JURISDICTION

3.1 **Jurisdiction.** The provisions of this ordinance apply to all waters, excluding public ditches for which the County is not the drainage authority under Minn. Stat. chapter 103E, shown on the buffer protection map.

### 4.0 BUFFER REQUIREMENTS

4.1 **Buffer width.** Except as provided in subsection 4.5, a landowner must establish and maintain a buffer area as follows:

- (a) For waters shown on the buffer protection map requiring a fifty (50) foot average width and a thirty (30) foot minimum width buffer as measured according to subsection 4.2, unless a greater width is required in (*insert reference to Shoreland Ordinance chapter here*); and
- (b) For waters shown on the buffer protection map requiring a sixteen and a half (16.5) foot minimum width buffer as measured according to subsection 4.2, unless a greater width is required in (*insert reference to Shoreland Ordinance chapter here*).

#### 4.2 Measurement.

- (a) The measurement of the required buffer on land adjacent to a water requiring a fifty (50) foot average width and a thirty (30) foot minimum width buffer must be from the top or crown of the bank. Where there is no defined bank, measurement must be from the edge of the normal water level in accordance with Board guidance.
- (b) The measurement of the required buffer on land adjacent to a water requiring a sixteen and a half (16.5) foot minimum width buffer must be from the top or crown of bank in the same manner as for measuring the vegetated grass strip under Minn. Stat. §103E.021 in accordance with Board guidance.

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## **OPTION 2 – 50-Foot Average 30-Foot Minimum and 16.5-Foot Waters, including public ditches where the County is not the drainage authority**

### **3.0 JURISDICTION**

- 3.1 **Jurisdiction.** The provisions of this ordinance apply to all waters, including public ditches for which the County is not the drainage authority under Minn. Stat. chapter 103E, shown on the buffer protection map.

### **4.0 BUFFER REQUIREMENTS**

- 4.1 **Buffer width.** Except as provided in subsection 4.5, a landowner must establish and maintain a buffer area as follows:
  - (a) For waters shown on the buffer protection map requiring a fifty (50) foot average width and a thirty (30) foot minimum width buffer as measured according to subsection 4.2, unless a greater width is required in (*insert reference to Shoreland Ordinance chapter here*); and
  - (b) For waters shown on the buffer protection map requiring a sixteen and a half (16.5) foot minimum width buffer as measured according to subsection 4.2, unless a greater width is required in (*insert reference to Shoreland Ordinance chapter here*).

#### 4.2 Measurement.

- (a) The measurement of the required buffer on land adjacent to a water requiring a fifty (50) foot average width and a thirty (30) foot minimum width buffer must be from the top or crown of the bank. Where there is no defined bank, measurement must be from the edge of the normal water level in accordance with Board guidance.
- (b) The measurement of the required buffer on land adjacent to a water requiring a sixteen and a half (16.5) foot minimum width buffer must be from the top or crown of bank in the same manner as for measuring the vegetated grass strip under Minn. Stat. §103E.021 in accordance with Board guidance.

**4.3. Use of Buffer Area.** A buffer may not be used for cultivation farming but may be mowed, hayed, grazed or otherwise harvested, provided permanent growth of perennial vegetation is maintained, except as provided in subsections 4.4.(g) and 4.5 consistent with Board guidance.

**4.4 Exemptions.** The requirement of subsection 4.1 does not apply to land that is:

- (a) enrolled in the federal Conservation Reserve Program;
- (b) used as a public or private water access or recreational use area including stairways, landings, picnic areas, access paths, beach and watercraft access areas, provided the area in such use is in conformance with *(insert reference to Shoreland Ordinance chapter here)*;
- (c) covered by the site of a water-oriented accessory structure and any other permitted structure in conformance with *(insert reference to Shoreland Ordinance chapter here)*;
- (d) covered by a road, trail, building or other structure;
- (e) regulated by a national pollutant discharge elimination system/state disposal system (NPDES/SDS) municipal separate storm sewer system, construction or industrial permit under Minnesota Rules, chapter 7090, and the adjacent waterbody is provided riparian protection;
- (f) part of a water-inundation cropping system; or
- (g) in a temporary nonvegetated condition due to drainage tile installation and maintenance, alfalfa or other perennial crop or plant seeding, or a construction or conservation project authorized by a federal, state or local government unit.

**4.5. Alternative practices.** An owner of land that is used for cultivation farming may demonstrate compliance with subsection 4.1 by establishing and maintaining an alternative riparian water quality practice(s), or combination of structural, vegetative, and management practice(s) which provide water quality protection comparable to the water quality protection provided by a required buffer as defined in subsections 4.1 to 4.3, based on:

- (a) the Natural Resources Conservation Service Field Office Technical Guide; or
- (b) other practices adopted by the Board.

## 5.0 COMPLIANCE DETERMINATIONS

**5.1 Compliance determinations.** Compliance status will be determined on a parcel basis as identified by a unique locally defined property identification number or description and the compliance status of each bank, or edge of a water body on an individual parcel will be determined independently.

**5.2 Identification of Potential Noncompliance.** The County will initiate an action for noncompliance with section 4.0 when it:

(a) receives a notice of landowner noncompliance from the SWCD under Minn. Stat. §103F.48, subd. 7;

(b) observes apparent noncompliance; or

(c) receives a third-party complaint from a private individual or entity, or from another public agency, except that before the County initiates a noncompliance action based on (b) or (c) it will, consult with the SWCD as provided in subsection 5.3.

5.3. When the County has received a notification of potential noncompliance from the SWCD, the County and SWCD will consult to determine the appropriate course of action to confirm compliance status. This may include communication with the landowner or operator, inspection or other appropriate steps. On the basis of this coordination, the SWCD may issue a notification of noncompliance to the County. If the SWCD does not issue such a notification, the County will not pursue a compliance or enforcement action under Minnesota Statutes §103F.48 and subsection 6.2.

5.3.1 At any time during this process, the landowner may provide documentation of compliance to the SWCD. The SWCD will evaluate the documentation, or review the buffer and/or alternative practices to determine if the parcel is in compliance and issue its determination in writing to the landowner. The SWCD may issue a validation of compliance if applicable and requested by the landowner. The SWCD must send a copy of a noncompliance determination to the County and the Board.

5.4. **Notice of Noncompliance.** On receipt of an SWCD notification of noncompliance, the County will issue the landowner of record a notice of noncompliance that will:

(a) describe corrective actions to be taken;

(b) provide a practical timeline of intermediate or final dates for correction;

(c) provide a compliance standard against which it will judge the corrective action; and

(d) a statement that failure to respond to this notice will result in the assessment of financial penalties.

The County in its judgment also may name as a responsible party a tenant or other person with control over that part of the property subject to section 4.0. The County may deliver or transmit the notice of noncompliance by any means reasonably determined to reach the responsible party or parties, and will document receipt. However, a failure to document receipt will not preclude the County from demonstrating receipt or knowledge of the notice of noncompliance in an enforcement proceeding under section 6.0. The County must send a copy of the notice to the SWCD and the Board.

5.4.1 At any time during this process, the landowner or responsible party or parties may provide documentation of compliance to the County. In addition, the landowner or responsible party or parties may supply information in support of a request to modify a corrective action or the timeline for compliance. On the basis of any such submittal or at its own discretion, the County in writing may modify the corrective action or timeline for compliance, and will deliver or transmit the modified action and timeline in accordance with this section. The County should determine if the noncompliance has been fully corrected and issue its determination in writing to the landowner. The SWCD may issue a validation of compliance if requested by the landowner.

5.4.4 A notice of noncompliance is not considered a final decision subject to appeal.

## 6.0 ENFORCEMENT

*NOTE: The model ordinance provides three options for enforcement of the buffer law, which are provided below. The County will need to evaluate the enforcement mechanism it intends to use when enforcing the requirements of the buffer law.*

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### OPTION 1 – Criminal Prosecution Only

6.1 A landowner who does not comply with the notice of noncompliance issued under section 5 shall be remedied as a misdemeanor and shall be punishable as defined by law.

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### OPTION 2 – Administrative Penalty Orders Only

6.1 A landowner who does not comply with the notice of noncompliance issued under section 5 shall be remedied by the issuance of an administrative penalty order under Minn. Stat. §103B.101, subdivision 12a and Minn. Stat. §103F.48, subdivision 7 and the procedures provided in this section.

*This option also includes all provisions after and including 6.2.*

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### OPTION 3 – Both Criminal Prosecution and Administrative Penalty Orders

6.1 A landowner who does not comply with the notice of noncompliance issued under section 5 shall be remedied:

- (a) as a misdemeanor and shall be punishable as defined by law; or
- (b) by the issuance of an administrative penalty order under Minn. Stat. §103B.101, subdivision 12a and Minn. Stat. §103F.48, subd. 7 and the procedures provided in this section.

*This option also includes all provisions after and including 6.2.*

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#### 6.2. Administrative Penalty Order.

(a) Initial Violation. The penalty for a landowner that has not previously been the recipient of an administrative penalty order will be assessed on the following schedule:

- (a) \$100 per parcel per month for six (6) months (180 days) following the correction period; and
- (b) \$500 per parcel per month for after six (6) months (181 days) following the correction period.

The correction period ends eleven months after the notice of noncompliance was issued. A modification of the corrective actions and timeline for compliance will extend the correction period only as to a modification that imposes a substantial new action or significantly accelerates the completion date for an action.

(b) Repeat violation. The penalty for a landowner that has previously been the recipient of an

administrative penalty order will be assessed on the following schedule:

- (a) \$100 per parcel per day for 180 days following the correction period; and
- (b) \$500 per parcel per day for after 181 days following the correction period.

The correction period ends eleven months after the notice of noncompliance was issued. A modification of the corrective actions and timeline for compliance will extend the correction period only as to a modification that imposes a substantial new action or significantly accelerates the completion date for an action.

6.2.1. Order. The APO will state:

- i. The facts constituting a violation of the water resources riparian protection requirements;
- ii. The statute and/or ordinance that has been violated;
- iii. Prior efforts to work with the landowner to resolve the violation;
- iv. The amount of the penalty to be imposed and the date the penalty will begin to be assessed, and the date that payment of the penalty is due; and
- v. The responsible party(ies) right to appeal the order.

6.2.2 All or part of the penalty may be forgiven on the basis of diligent correction of noncompliance following issuance of the APO by the landowner or responsible party(ies).

6.2.3 A copy of the APO must be sent to the SWCD and the Board.

6.2.4 An APO that is not submitted for appeal to the executive director within 30 days of receipt by the landowner is final.

### 6.3 Administrative Penalty Order Procedures

6.3.1. Statute of limitations. According to Minn. Stat. §541.07, clause (2), the County has two years in which to commence an administrative penalty order action after the violation is discovered. The goal is to complete the action as soon as reasonably practical, recognizing that situations on which data must be gathered, field investigations must be completed and/or modeling must be performed will require adequate time to complete the work and communicate with the landowner(s) involved.

6.3.2 . Compliance verification. Once a landowner has submitted written evidence of correction of the violation, compliance must be verified. The County, in coordination with the SWCD will:

- Review and evaluate all information related to the APO to determine if the violation has been corrected;
- Verify compliance by site visit, re-inspection, examination of documentation, or other means as may be reasonable under the facts of the case; and
- Document compliance verification.

6.3.3. Right to appeal. An administrative penalty order may be appealed to the Board in accordance with Minn. Stat. 103F.48, subd. 9, and will be as provided therein.

6.3.4 Penalty due, interest assessed. Unless the violator requests an appeal of the APO within 30 days of receipt of the APO, the penalty is due and payable to the County as specified in the APO. If the violator submits written evidence within 30 days of the date specified in the APO, which may include a validation of compliance issued by the SWCD, that the violation was corrected, but the County determines it was not fully corrected, the violator has 20 days to pay the penalty after receipt of a letter of determination from the County that the violation has not been fully corrected.

Interest will accrue at the rate established pursuant to Minn. Stat 549.09 beginning on the 31<sup>st</sup> day after issuance of the order, or the 21<sup>st</sup> day after the landowner receives the letter of determination that the violation has not been fully corrected.

6.3.5 Referral for collection of penalty. All penalties and interest assessed under an APO must be paid by the violator within the specified time and made payable to the County. Any penalty or interest not received in the specified time may be collected by lawful means.

6.3.6 Reporting and documentation. Effective compliance reporting and documentation will ensure that proper enforcement action is taken, and that a record is maintained of these actions. When the County identifies a violation of the water resources riparian protection requirements, staff will follow record keeping procedures to assess and note the following to the extent known or available:

- Cause of the violation;
- Magnitude and duration of the violation;
- Whether the violation presents an actual or imminent risk to public health and safety, or the natural resources of the state;
- Past violations;
- Efforts by the SWCD, County, watershed district or the Board to assist the landowner to become compliant, including written and oral communications with the landowner; and
- Past and present corrective action efforts by the landowner.