

Minnesota Wetland Conservation Act

Potential Implementation of Stakeholder Priorities

10-24-14 DRAFT

This document provides some potential implementation language and/or initiatives regarding the top 5 priorities as identified by stakeholders. It is not intended to be a comprehensive proposal for statute and rule changes, but rather an initial attempt at describing the changes necessary to implement these 5 priority concepts - for discussion purposes.

1) Alternative Options for Compensatory Mitigation within NE Minnesota Watersheds

Recommendations and Discussion Topics

- Allow replacement credit for “alternative” resource restoration, protection, and improvement actions, including:
 - 1) Expanded Use of Preservation
 - 2) Restoration and/or Protection of Riparian Corridors and Streams
 - 3) Stabilization of Natural Hydrology
 - 4) Peatland Hydrology Restoration
 - 5) Approved Watershed Plan Implementation Projects
- Limit non-wetland alternative actions to the northeast via MN Rule 8420. What should be the specific geographic extent?
 - Bank Service Areas (BSA) 1, 2, and 5
 - BSAs 1 and 2 only
 - >80% area
 - BSAs 1, 2, 5, and 6?
- Should the credit allocation for preservation be increased in certain circumstances?
- Should the watershed plan implementation projects option be implemented only via an in-lieu fee (ILF) program?

Potential Statute Changes

103G.222 REPLACEMENT OF WETLANDS.

Subdivision 1. Requirements. (a) Wetlands must not be drained or filled, wholly or partially, unless replaced or offset by restoring or creating wetland areas or actions that provide at least equal public value under a replacement plan approved as provided in section [103G.2242](#), a replacement plan under a local governmental unit's comprehensive wetland protection and management plan approved by the board under section [103G.2243](#), or, if a permit to mine is required under section [93.481](#), under a mining reclamation plan approved by the commissioner under the permit to mine.

103G.2251 STATE CONSERVATION EASEMENTS; WETLAND BANK CREDIT.

In greater than 80 percent areas, preservation of potentially threatened wetlands or upland areas essential to the function and sustainability of aquatic resources that are protected by a permanent conservation easement as defined under section 84C.01 and held by the board may be eligible for wetland replacement or mitigation credits, according to rules adopted by the board. To be eligible for credit under this section, a conservation easement must be established after May 24, 2008, and approved by the board. Wetland areas on private lands preserved under this section are not eligible for replacement or mitigation credit if the area has been protected using public conservation funds.

Potential Rule and/or Guidance “Starter Language”

- MN Rule 8420.0526, Subp. 9. Preservation. Amend to include three parts:
 - A. Wetland areas and adjacent buffer (what’s currently in rule).
 - B. (*new*) Riparian buffers adjacent to lakes and watercourses that are essential for maintaining the function and value of aquatic resources, as determined by the technical evaluation panel.
 - C. (*new*) Critical watershed areas, consisting of natural upland resources essential to maintaining important functions and sustainability of the aquatic resources in a watershed, as determined by the technical evaluation panel.
- MN Rule 8420.0526, Subp. X (*new*). Restoration of riparian buffers. In [**NE MN?**], re-establishing naturally occurring native vegetation adjacent to the following areas may receive wetland replacement credit for up to [**50% ?**] of the area restored:
 - A. designated trout streams;
 - B. impaired waters for which a TMDL has been established and restoration of the riparian buffer will address sources of impairment;
 - C. wildlife lakes designated under MN Rule Chapter XX;
 - D. aquatic management areas designated under XX; and
 - E. wild rice lakes.

The technical evaluation panel will determine the amount of credit awarded, based on the anticipated improvement of the aquatic resource. The technical evaluation panel may consult with other resource specialists in making their determination. Such areas qualifying for replacement credit must be permanently protected by a conservation easement in a format prescribed by the board and granted to and accepted by the board after approval of the replacement or banking plan application.

- MN Rule 8420.0526, Subp. X (*new*). Stream restoration. In [**NE MN?**] restoring previously altered watercourses to their original or natural dimension, pattern, and profile may be eligible for replacement credit. To receive credit, the watercourse must have been previously channelized, straightened, or otherwise altered due to human activities, including watershed modifications, such that its hydrologic and ecological functions are impaired, which may include hydrologic support for adjacent wetlands. The amount of credit is to be determined by the technical evaluation panel, using methods prescribed by the board. Wetlands restored consequent to stream restoration under this subpart may receive credit under subparts 3 (restoration of completely drained or filled wetland areas) and 4 (restoration of partially drained or filled wetland areas) as appropriate.

- MN Rule 8420.0526, Subp. 4. Restoration of partially drained or filled wetland areas. Amend and include a *new* item (C):
Restoration of both the natural hydrology regime and native, noninvasive vegetation of wetlands that have been degraded by prior drainage, filling, or a diversion alteration of the natural watershed is eligible for replacement credit as follows:
 - A. existing language,
 - B. existing language, and
 - C. (*new*) wetland areas that have been degraded due to human-induced changes in the timing, depth, and duration of inundation or saturation are eligible for replacement credit for up to ___% of the restored area. To receive credit, the alteration of the natural hydrology must be determined by the technical evaluation panel to have caused demonstrable adverse effects on wetland functions.
- Guidance for Peatland Hydrology Restoration. Replacement credit for this action is already authorized under MN Rule 8420.0526, subparts 3, 4, and 8. Guidance will be developed specific to peatland restoration, which can differ significantly from methods used to restore other types of wetlands. In particular, effective peatland restoration requires reestablishing subsurface flow throughout the peatland area to maintain the saturated conditions necessary for peat formation.
- MN Rule 8420.0526, Subp. X (*new*). Watershed Plan Implementation Projects. In [NE MN?], replacement credit may be earned for implementing projects that are identified in watershed plans approved by the board and that are intended to address ongoing impairments to water quality, water storage, groundwater recharge, stream flow, and fish, wildlife and native plant habitat associated with aquatic resources, including wetlands. Individual projects proposed for replacement credit must be approved by the board based on a recommendation from the technical evaluation panel prior to implementation. Projects implemented to comply with other federal, state, or local requirements are not eligible for replacement credit. For the purposes of this subpart, “watershed plans” include watershed management plans, county comprehensive local water management plans, soil and water conservation district comprehensive plans, One watershed One Plans that have been State approved and locally adopted or an approved total maximum daily load study (TMDL), watershed restoration and protection strategy (WRAPs) document. The amount of replacement credit earned will be determined by the technical evaluation panel, using methods established by the board.

2) Wetland Mitigation Siting

Recommendations and Discussion Topics

- Modify the siting criteria by adding a step for high priority areas.
- Provide BWSR with the authority and direction to establish high priority areas for wetland mitigation.
- Sunset the BSA 1 = BSA 2 replacement ratio criteria for high priority area implementation.
- Eliminate criteria for transportation projects, which would now follow the same watershed-based criteria as other projects, consistent with federal Clean Water Act requirements.

- Allow flexibility in the siting criteria for implementation of an ILF due to the differing nature of ILF programs.
- Clarify that a wetland bank can provide mitigation according to its service area and that BWSR can establish service area priorities, etc. to implement siting for banking.
- Eliminate ineffective language pertaining to the Northeast Minnesota Wetland Mitigation Inventory and Assessment (January 2010).
- Should the statewide replacement option be eliminated when ILF credits are available?
- What inventories and/or planning activities should be pursued to support wetland mitigation targeting and ILF implementation?

Statute Changes

103G.222 REPLACEMENT OF WETLANDS.

Subdivision 1. Requirements. (a) Wetlands must not be drained or filled, wholly or partially, unless replaced or offset by restoring or creating wetland areas or actions that provide at least equal public value under a replacement plan approved as provided in section [103G.2242](#), a replacement plan under a local governmental unit's comprehensive wetland protection and management plan approved by the board under section [103G.2243](#), or, if a permit to mine is required under section [93.481](#), under a mining reclamation plan approved by the commissioner under the permit to mine. For project-specific wetland replacement ~~completed~~ approved prior to December 31, 2016 for wetland impacts authorized or conducted under a permit to mine within the Great Lakes and Rainy River watershed basins, those basins shall be considered a single watershed for purposes of determining wetland replacement ratios. Mining reclamation plans shall apply the same principles and standards for replacing wetlands by restoration or creation of wetland areas that are applicable to mitigation plans approved as provided in section [103G.2242](#). Public value must be determined in accordance with section [103B.3355](#) or a comprehensive wetland protection and management plan established under section [103G.2243](#). Sections [103G.221](#) to [103G.2372](#) also apply to excavation in permanently and semipermanently flooded areas of types 3, 4, and 5 wetlands.

Subd. 3. Wetland replacement siting. (a) Impacted wetlands in a 50 to 80 percent area must be replaced in a 50 to 80 percent area or in a less than 50 percent area. Impacted wetlands in a less than 50 percent area must be replaced in a less than 50 percent area. ~~All w~~Wetland replacement must follow this priority order:

- (1) on site or in the same minor watershed as the impacted wetland;
- (2) in the same watershed as the impacted wetland;
- (3) in the same county or wetland bank service area as the impacted wetland;
- (4) in a high priority area for wetland mitigation designated by the board under paragraph (e);

and

(5) if in-lieu fee credits are not available, in another wetland bank service area; and
(6) statewide for public transportation projects and for an in-lieu fee program, except that wetlands impacted in less than 50 percent areas must be replaced in less than 50 percent areas, ~~and wetlands impacted in the seven-county metropolitan area must be replaced at a ratio of two to one in: (i) the affected county or, (ii) in another of the seven metropolitan counties, or (iii) in one of the major watersheds that are wholly or partially within the seven-county metropolitan area, but at least one to one must be replaced within the seven-county metropolitan area.~~

~~(b) The exception in paragraph (a), clause (5), does not apply to replacement completed using wetland banking credits established by a person who submitted a complete wetland banking application to a local government unit by April 1, 1996.~~

(b) Notwithstanding paragraph (a), items (1) through (3), the priority order for replacement by wetland banking begins at item (3) in accordance with the rules established under section 103G.2242, subdivision 1.

(c) When reasonable, practicable, and environmentally beneficial replacement opportunities are not available in siting priorities listed in paragraph (a), the applicant may seek opportunities at the next level.

(d) For the purposes of this section, "reasonable, practicable, and environmentally beneficial replacement opportunities" are defined as opportunities that:

- (1) take advantage of naturally occurring hydrogeomorphological conditions and require minimal landscape alteration;
- (2) have a high likelihood of becoming a functional wetland that will continue in perpetuity;
- (3) do not adversely affect other habitat types or ecological communities that are important in maintaining the overall biological diversity of the area; and
- (4) are available and capable of being done after taking into consideration cost, existing technology, and logistics consistent with overall project purposes.

~~(e) Applicants and local government units shall rely on board approved comprehensive inventories of replacement opportunities and watershed conditions, including the Northeast Minnesota Wetland Mitigation Inventory and Assessment (January 2010), in determining whether reasonable, practicable, and environmentally beneficial replacement opportunities are available. The board, in consultation with those listed in section 103B.101, subdivision 2, shall identify areas of the state where preservation, enhancement, restoration, and establishment of wetlands would have high public value. High priority areas for wetland mitigation shall be designated using available information relating to:~~

- ~~(1) the factors listed in section 103B.3355, paragraph (a);~~
- ~~(2) the historic loss and abundance of wetlands; and~~
- ~~(3) current applicable state and local government water management and natural resource~~

~~plans.~~

~~The board shall establish a process to designate high priority areas for wetland mitigation no later than December 31, 2016, and may annually update or revise the designation. The designated high priority areas must be noticed to local government units and are not valid until 30 days after publication in the State Register.~~

(f) Regulatory agencies, local government units, and other entities involved in wetland restoration shall collaborate to identify potential replacement opportunities within their jurisdictional areas.

(g) The board, for the purpose of implementing a board sponsored or approved in-lieu fee program may establish replacement ratios and wetland bank service area priorities to implement the siting and targeting of wetland replacement.

3) In-Lieu Fee Program

Recommendations and Discussion Topics

- Provide BWSR the necessary authority in statute to establish or approve an ILF.
- Provide adequate protection from funds being appropriated for other purposes than the ILF Program.
- Establish program as a hybrid bank/ILF with revolving loan fund.
- Need to adequately account for costs associated with long-term maintenance/stewardship.
- Program could be established and operated by BWSR, or by a non-profit.
- The program would focus on NE alternative actions and high priority areas.

Statute Changes

103G.2242 WETLAND VALUE REPLACEMENT PLANS.

Subdivision 1. Rules. (a) The board, in consultation with the commissioner, shall adopt rules governing the approval of wetland value replacement plans under this section and public waters work permits affecting public waters wetlands under section [103G.245](#). These rules must address the criteria, procedure, timing, and location of acceptable replacement of wetland values; may address the state establishment and administration of a wetland banking program for public and private projects, which may include the development of an in-lieu fee program with provisions allowing for the transfer of wetland replacement obligations to the board or a board-authorized sponsor in exchange for monetary payment to the wetland banking program for alteration of wetlands on agricultural land; the administrative, monitoring, and enforcement procedures to be used; and a procedure for the review and appeal of decisions under this section. In the case of peatlands, the replacement plan rules must consider the impact on carbon balance described in the report required by Laws 1990, chapter 587, and include the planting of trees or shrubs.

Subd. 3. Replacement completion. Replacement of wetland values must be completed prior to or concurrent with the actual draining or filling of a wetland, unless an irrevocable bank letter of credit or other security acceptable to the local government unit or the board is given to the local government unit or the board to guarantee the successful completion of the replacement. The board may establish, sponsor, or administer a wetland banking program, ~~which may include~~ and an in-lieu fee program, with provisions allowing for the transfer of wetland replacement obligations to the board or a board-authorized sponsor in exchange for a monetary payment to the wetland bank for impacts to wetlands on agricultural land, for impacts that occur in greater than 80 percent areas, ~~and~~ for public road projects, and for other impacts to wetlands as determined by the board. The board may acquire land in fee title, purchase or accept easements, enter into agreements, and purchase existing wetland replacement credits to facilitate the wetland banking and in-lieu fee programs. Lands acquired by the board in fee title may be transferred to another state agency, or sold with proceeds returning to the in-lieu fee program account. The board may establish payment amounts and hold money in an account separate from the general fund which is appropriated and used solely for establishing replacement wetlands and administering an in-lieu fee program. The board shall coordinate the establishment and operation of a wetland bank with the United States Army Corps of Engineers, the Natural Resources Conservation Service of the United States Department of Agriculture, and the commissioners of natural resources, agriculture, and the Pollution Control Agency.

Subd. 16. Stewardship. For wetland replacement associated with a wetland value replacement plan, the use of wetland bank credits, or the sale of credits from an in-lieu fee program, the board may require payment into an investment fund established and designated solely for long term stewardship. The payment shall be an amount necessary to generate sufficient interest to cover the costs associated with stewardship activities, as determined by the board. Interest from the fund is annually appropriated to the board, and may be used by the board, or the board's designee, to cover the cost of inspections, maintenance, and management of wetland replacement consistent with the conditions of the sites' long term protection mechanisms.

4) Wetland Mitigation Search Criteria

“Practicability” and “Quality”: Incorporate language contained within the “Siting of Wetland Mitigation in Northeast Minnesota” report (3-7-14) into joint agency guidance, and expand upon it where appropriate.

Inventory and Assessment: Seek funding for the ongoing assessment and scoping of *possible* wetland mitigation sites in northeast MN and priority areas to identify sites that are in-fact *available* (interested landowner, capable of being restored, able to generate credit, etc.). Incorporate previous practicability assessments, build on previous inventories, and make the information accessible to potential applicants. This effort may be incorporated into other comprehensive watershed-based inventory and assessment efforts that may obtain funding.

5) WCA and Clean Water Act Section 404 Consistency

Current and Future Initiatives

- 1) Establish a WCA “Federal Approvals” Exemption for Utilities projects regulated and approved under the federal Clean Water Act. Draft exemption language has been developed and reviewed by the BWSR Wetland Committee.
- 2) BWSR has recently established three interagency personnel agreements with the Corps to improve inter-program coordination and consistency:
 - Wetland Banking Specialist.
 - Agricultural Wetland Banking Specialist.
 - Wetland Permitting Coordinator.
- 3) Several changes to state statute and rule will provide greater consistency with 404 and may expand potential opportunities for General Permits (i.e. BWSR approval of wetland mitigation).
- 4) Explore other options for General Permits (transportation, small projects, etc.).
- 5) Explore other options for use of the WCA Federal Approvals exemption (large projects, certain activities, etc.).
- 6) The agencies will continue to implement current interagency agreements and will expand or develop additional agreements to implement future coordination efforts.