Mr. Dave Weirens
Land and Water Section Manager
Minnesota Board of Water and Soil Resources
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Dear Mr. Weirens:

Thank you for the opportunity to comment on the Board of Water and Soil Resources (BWSR) October 24, 2014 "Potential Implementation of Stakeholder Priorities" document. This document addresses potential amendments to the Minnesota Wetland Conservation Act (WCA). The preliminary views of the Minnesota Center for Environmental Advocacy, Audubon Minnesota, the Minnesota Division Izaak Walton League of America, and Minnesota Conservation Federation are attached to this cover letter for your review. As we were only given five business days to review these proposals, we would like to make it clear that our comments our preliminary views on draft language or proposals.

Although our groups have been participating in the WCA stakeholder meetings the last few months, it is our opinion that there is no consensus on any of the proposed priorities in these meetings. The dot voting exercise completed in the September meeting did highlight BWSR's identified stakeholders' top priorities. However, it did not clarify the perspective of that priority for each stakeholder group. For example, some stakeholders may have voted for "In-lieu Fee Program" but have widely different perspectives on how such a program would be implemented (e.g. in priority areas, watershed-based, run by the state or a qualified third party sponsor). That exercise also did not represent the priorities of those affected and interested groups who were not invited to participate in the stakeholder process.

As we have stated previously, we agree that current wetland conservation and mitigation efforts in northeastern (NE) Minnesota are not working. Thousands of acres of high-quality wetlands are threatened by current and proposed projects and the mitigation proposals identified to date will not replace the functional wetland values that will be lost. However, we are not convinced that sufficient efforts have been made to avoid or minimize these impacts, nor are we convinced that there are few if any valuable mitigation opportunities left in NE Minnesota. In our view, the goal of this stakeholder process should be to preserve the functional values of wetlands within the impacted watershed. We would also like to emphasize our opinion that early and rigorous review of replacement plans, consistent application of WCA (regardless of the applicant) and a dedication by the state, federal agencies and local government to say "no" to poorly designed or sited wetland projects is the best defense against wetland replacement that does not replace the functional values of the destroyed wetlands.

Our groups welcome continuing dialogue about how best to evaluate and, if appropriate, implement proposed changes to WCA. If you have questions on our comments please contact any of the people listed below.

Sincerely,

Scott Strand
The Minnesota Center for Environmental Advocacy

Matt Anderson
Audubon Minnesota

Gary Botzek
MN Conservation Federation

Barry Drazkowski
Minnesota Division Izaak Walton League of America

The Minnesota Center for Environmental Advocacy, Audubon Minnesota, the Minnesota Division Izaak Walton League of America, and Minnesota Conservation Federation's Comments on the 10/24/14 "Potential Implementation of Stakeholder Priorities" document

1) **Alternative Options for Compensatory Mitigation within NE Minnesota Watersheds**
   a. We strongly believe that non-wetland alternative actions should be limited to BSA 1[1]. While there are obstacles to traditional wetland mitigation opportunities in the remainder of the state, restoration opportunities are more abundant and a need for additional mitigation opportunities has not been identified or studied. Further, the NE Mitigation Siting Report (2014) identified these alternative mitigation proposals specifically for the NE which "is somewhat constrained because this region has experienced less drainage compared to other portions of the State" (page 7 of the Interagency Report) compared to opportunities for wetland restoration statewide.
   b. 103G.222 REPLACEMENT OF WETLANDS
      i. It is not clear what "offset" means. Would like to see a definition of that word at next stakeholder meeting.
      ii. It is not clear what actions are being referred to in this phrase: "…or actions that provide." Would like those actions to be referenced in statute (e.g. stream restoration and riparian restoration[2]) and limited to BSA 1[3].
      iii. Recommend the following wording to improve clarity: "(a) Wetlands must not be drained or filled, wholly or partially, unless replaced by restoring or creating wetland areas. Within BSA 1, in addition to restoration and creation of wetland areas, wetland replacement may also consist of the replacement of wetland functions through alternative replacement actions, as identified in section ____. All wetland replacement, whether restoration, creation, or alternative replacement actions, must provide replacement of equal public value under a replacement plan approved as provided in section 103G.2242…[continue existing language]."
   c. 103G.2251 STATE CONSERVATION EASEMENTS; WETLAND BANK CREDIT
      Recommend the following wording to make it clear that preservation crediting should only apply to wetlands and upland areas under demonstrable threat: "In greater than 80 percent areas, preservation of wetlands and upland areas which are essential to the function and sustainability of aquatic resources that are protected by a permanent

[1] With the exception of preservation of wetlands under demonstrable threat which is appropriate for the greater than 80% area. Restoration of partially drained or filled wetlands and peatland hydrology restoration should continue to be a creditable action statewide.
[2] We do not believe that the crediting of projects identified in Board approved watershed plans would provide appropriate compensation for the loss of wetland plant communities. We are not supportive of that as an alternative mitigation option for BSA 1 or any other BSA.
[3] Stabilization of natural hydrology and peatland hydrology restoration not included as they are existing statewide restoration options that would only be further defined or expanded. Preservation is also already allowed in the greater than 80% area.

conservation easement …. [Continue existing language then add:]. Upland preservation must not exceed 10% of replacement crediting of a project's replacement plan. "

d. MN Rule 8420.0526, Subp, 9 Preservation.
    i. This action should be limited to BSAs 1 and 2.
    ii. We would expect that the same standards for demonstrating demonstrable threat currently required by MN Rule 8420.0526 Subp. 8 and Subp. 9 would continue for wetland preservation in greater than 80% areas and would also apply to upland preservation in greater than 80% areas (including riparian buffer and critical watershed area preservation). We would not support lowering the standard of demonstrable threat or the "high probability the wetland [or high quality upland] will be degraded or impacted."
    iii. Recommend the rewording for additional clarity to: "C. Critical Watershed Areas, consisting of natural upland resources essential to the sustainability and maintenance of important public value as defined under Minn. Stat. § 103A.201 subd. 2(b), and as further determined by the technical evaluation panel."
    iv. All upland preservation eligible for crediting, including riparian bugger and critical watershed area, should be immediately adjacent to an aquatic resource. Preferably the upland areas would be adjacent to high quality wetlands of the same wetland plant community as the wetlands being lost.
    v. We strongly believe there should be a limit on the percentage of preservation that could be approved as a part of a replacement plan. We recommend that no greater than 50% of the credits approved replacement plan consist of wetland or upland preservation (with the remaining credits coming from other actions eligible for credit). Of that 50%, only 10% of preservation crediting should come from upland preservation.
    vi. Consistent with existing rule, preservation should not be credited at a higher ratio than 12.5 percent of the wetland or upland areas.

e. MN Rule 8420.0526, Subp, ___ .Restoration of riparian buffers.
    i. This action should be limited to BSA 1.
    ii. Right now the way this rule addition is worded only the re-establishment of naturally occurring native vegetation is allowed. Re-establishment does not necessarily equate restoration and there may be additional earth moving activities that would improve the functionality of riparian buffers that would be excluded. For example, the installation of root wads for bank stabilization and fish habitat, re-grading of the riparian buffer to reduce stream entrenchment or remove a dam, or re-grading of a riparian lake buffer to reestablish historic elevation and promote the establishment of a native plant community.
    iii. It is not clear how much of a riparian buffer could be restored for credit. Crediting the restoration of vegetation of an area up to 300 meters from the aquatic resource in question would be appropriate. Further, the term "riparian

buffer" is not defined and should be to improve understanding of the statute's goals.

iv. Will the area of vegetation reestablishment be put under a conservation easement? This is would be a necessity in our opinion. Without exception, the following activities should be excluded from the restored buffer: land disturbing activities, impervious surfaces (with the exception of existing roads and trails), logging roads, mining, septic tank drain fields, agricultural fields, waste disposal sites, application of pesticides and fertilizer (except as necessary for buffer restoration), and livestock.

v. Currently, establishment of upland native, noninvasive vegetation is credited up to 25% of the area restored. Establishment of native, noninvasive vegetation in wetlands is credited up to 50% of the area restored. Riparian buffer restoration should not be credited at a higher ratio than wetland vegetation enhancement (unless the riparian area is a wetland).

vi. Aquatic management areas (AMA) are riparian buffers already; would credit be given for the restoration of the buffer abutting the AMA buffer or the restoration of the AMA itself? AMAs are already protected areas which have been acquired by the DNR. Crediting of the restoration of an already protected vegetative community should begin at a higher ratio. For that reason, we would recommend a maximum 4:1 crediting ratio for AMA areas.

vii. Wild rice lakes are also not defined in rule. Some lakes that have wild rice stands are huge with only a small percentage capable for wild rice germination. Would restoration of riparian buffer vegetation anywhere on the lake be granted credit? What about other wild rice producing rivers, streams or oxbow lakes? We also believe that the consideration of waters that have historically produced wild rice should be eligible for credit, if the restoration of the riparian buffer would assist in the reestablishment of a wild rice plant community.

f. MN Rule 8420.0526, Subp, ___ . Stream restoration.

i. This action should be limited to BSA 1.

ii. The wording of this rule addition would limit the crediting of stream restoration projects that restore watercourses to their original or natural dimension, pattern and profile. Although this is the goal of true restoration projects, in reality, many stream "restoration" projects only address one or two of those aspects of a stream. While we are not in favor of opening the door to the crediting of projects that only addresses water transport in the channel, opening the door to a wider variety of stream "restoration" projects may be in order. Rather than referring to pattern, profile and dimension the rule could address restoring the hydrologic, hydraulic, geomorphic, physicochemical and biological functions of a stream.

g. MN Rule 8420.0526, Subp, ___ . Watershed Plan Implementation Projects.

i. We do not have enough information on the type of watershed plans or the projects that would be eligible for crediting to comment in more detail about

this alternative replacement option. We are extremely doubtful that the implementation of projects identified in a watershed plan would serve as appropriate replacement for the loss of wetlands in any BSA. If alternative mitigation options are discussed as legislative changes to WCA this session, we would recommend that watershed plan implementation projects not be included as one of those options.

ii. If this proposal is moves forward against our recommendation, we strongly believe that watershed plan implementation project crediting be limited only to BSA 1 and that all watershed plans must be approved by the Board.

2) Wetland Mitigation Siting

a. Without exception, available in-watershed replacement actions should always be prioritized over out-of-watershed mitigation replacement.

b. We strongly support reverting back to the separation of BSAs 1 & 2 for the purpose of determining in-watershed crediting for two reasons. First, combining the BSAs is not supportive of a watershed approach and is not consistent with either the WCA or 2008 Federal Mitigation Rule. Second, rather than improving the siting of wetland mitigation in the NE, the combination of BSAs 1 & 2 resulted in applicants finding cheap, low-restoration potential sites in BSA 2 at the detriment of watershed needs within BSA 1.

c. We are generally supportive of a 4th sequence option for siting of wetland mitigation.

d. We are not supportive of any higher sequence option for priority areas or for a "NE-specific" sequence. We are also not supportive of removing the out-of-watershed penalty for using high priority areas (unless additional IN-watershed projects are also a part of the mitigation proposal).

e. In light of the expanded suite of replacement options that could be available for BSA 1, we would expect the agencies to be working on potential crediting scenarios, identifying example projects and on reaching out to non-profits like The Nature Conservancy or Ducks Unlimited that could implement these types of alternative projects in BSA 1. It is not enough to offer priority areas or alternative mitigation options without clear guidance.

f. It is not clear what "offset" means. Would like to see a definition of that word at next stakeholder meeting.

g. We recommend that following wording for the separation of BSAs 1 and 2 (recommended changes are underlined):
"For project-specific wetland replacement ~~completed~~ under review by DNR at least 6 months prior to December 31, 2015 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."

h. Recommend the following wording changes to the siting sequence proposed:
"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."

An in-lieu fee program, if established, should be watershed based (bank-service area based). There is no need for calling out a specific mitigation mechanism within the siting criteria.

i. We recommend the following criteria to be used when designating high priority areas (changes from 10/24 BWSR proposal underlined): 1) the factors listed in section 103B.3355, paragraph (a); (2) the historic loss and abundance of wetlands; (3) current applicable state and local government water management, water quality and natural resource plans; (4) projected future losses of difficult to replace or unique wetland plant communities; and (5) current applicable studies that used a watershed approach to identify watershed needs.
j. Again, we are not supportive of replacement ratios for priority areas that do not follow current rules. Replacement within a priority area, outside of the impacted watershed, should not be credited at a ratio below 1.5:1.
k. Priority areas should be established for each bank service area in the state.
l. If priority areas are utilized to provide replacement for out-of-watershed wetland impacts, we recommend that applicants are required to demonstrate efforts to identify in-watershed actions eligible for credit within the impacted BSA. When actions eligible for credit are available, they should be required by the LGU.

3) In-Lieu Fee Program

a. We oppose granting BWSR statutory authority to develop an in-lieu fee program without meaningful minimum standards written into the statute. At a minimum, we would like the statute to clarify that any in-lieu fee program must be developed in conformity with the federal Mitigation Rule. For example, the statute could require rulemaking for the development of a statewide, bank-service area based, in-lieu fee (ILF) program following the description of an in-lieu fee program defined by 33 CFR § 332. The legislation should also require in-lieu fee projects to follow the same standards as other wetland replacement projects as described in Minnesota Rules Part 8420.0522.
b. We continue to believe that the in-lieu fee program must be adopted through the full rulemaking process.
c. The description of the "stewardship" fund in Subd. 16 is too vague to ensure that sufficient funds will be available for any long-term maintenance and monitoring at any given site. If a single site requires more funds than predicted for monitoring and maintenance, for instance, will BWSR be authorized to draw against the entire fund at

the expense of other sites? Also, will the purchaser of the credits be responsible for unforeseen costs at the site?

d. The statute specifies that other agencies, such as Army Corps and PCA, would be consulted on a wetland bank, but not for establishment of an ILF program. The statute should identify the appropriate agencies for consultation on an ILF program.
e. The statute language must clearly allow for an in-lieu fee program to be developed by an authorized sponsor.

4) Wetland Mitigation Search Criteria

a. Funding should not only be sought for an ongoing assessment and siting of possible wetland mitigation opportunities but also for alternative mitigation actions <u>WITHIN BSA 1</u>. Further, this study should not be limited to "the inventory and assessment" of projects but also should focus on watershed needs, historic loss of wetlands and aquatic resources, and projected future losses of wetland and aquatic resources. This study can be separate from the regulatory framework and should not look at more than projects that are currently under review by local/state/federal agencies.

5) WCA and CWA Section 404 Consistency

a. We would like to see consistency between DNR and BWSR as one of the current initiatives. Specifically we would like to see the following items addressed:
    i. A definition for project-specific project that applies to all projects, regardless of the LGU.
    ii. Requirement for a conservation easement on all project specific wetland replacement sites, regardless if they were approved by an LGU or DNR Lands and Minerals.
    iii. Consistent review standards for wetland replacement projects, especially in the early stages of the review of potential bank or project-specific sites.
b. Continued development and promotion of the "Rapid Response" Interagency Review Team to engage early in the review of wetland mitigation projects. This action is described on pages 28 and 29 of the "Siting of Wetland Mitigation in Northeast Minnesota" report. Local government engagement should also be standard in the "Rapid Response" review to ensure that watershed goals and priorities are identified and communicated effectively.
c. Development of a BWSR and DNR operated online system to provide a platform for tracking, noticing, reporting and displaying wetland replacement plans, projects and approved wetland mitigation sites across the state, a recommendation addressed on pages 27-28 of the *Siting of Wetland Mitigation in Northeast Minnesota* report.