



March 26, 2009

Legislative Reference Library  
645 State Office Building  
100 Constitution Avenue  
St. Paul, Minnesota 55155

Re: In The Matter of the Proposed Rules of the Board of Water and Soil Resources  
Proposed Rules Relating To Wetland Conservation; Governor's Tracking #AR 458

Dear Librarian:

The Minnesota Board of Water and Soil Resources (BWSR) intends to adopt rules Relating To Wetland Conservation. We plan to publish a Notice Of Hearing in the March 30, 2009 State Register.

BWSR has prepared a Statement of Need and Reasonableness. As required by Minnesota Statutes, sections 14.131 and 14.23, BWSR is sending the Library a copy of the Statement of Need and Reasonableness at the same time we are mailing our Notice of Hearing.

If you have questions, please contact me at 651-297-3432.

Sincerely,

Dave Weirens  
Land and Water Section Manager

Enclosure: Statement of Need and Reasonableness – In the Matter of Proposed Amendments to the Rules Relating to the Wetland Conservation Act, Minnesota Rules 8420

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**STATE OF MINNESOTA**

**BOARD OF WATER AND SOIL RESOURCES**

**IN THE MATTER OF PROPOSED ADOPTION OF**

**AMENDMENTS TO RULES RELATING TO THE**

**WETLAND CONSERVATION ACT**

**MINNESOTA RULES 8420**

**STATEMENT OF NEED AND REASONABLENESS**

**March 25, 2009**

## PURPOSE

A principal purpose of this rulemaking is to convert an exempt rule into a permanent rule as required by Laws of Minnesota, Chapter 57, Section 166. The exempt rule expires on August 5, 2009 and thus the permanent rule adoption process has a goal of effecting adopted permanent rules by publishing them at least five days prior to this date.

In 2007 the Legislature made a number of significant changes to wetland regulations and their application within the state. Because of these changes, the Board of Water and Soil Resources (BWSR) are required to revise and adopt new rules concerning the regulation of wetlands.

Other purposes of this rulemaking are increased coordination with federal regulatory authorities, improving the efficiency of the regulations through reorganizing the structure of the rule, and improving the consistency of the regulation with the no net loss policy as provided in Minn. Stat. 103A.201.

## INTRODUCTION

**Agency background:** BWSR is the state's administrative agency for 91 soil and water conservation districts, 45 watershed districts, 18 metropolitan watershed management organizations, and 80 county water managers. The agency's purpose, working through local government, is to protect and enhance the state's soil and water resources by implementing the state's soil and water conservation policy, comprehensive local water management, and the Wetland Conservation Act (WCA) as it relates to the 41.7 million acres of private land in Minnesota. The BWSR Board consists of 17 members, including local government representatives that deliver BWSR programs, state agencies, and citizens.

**Wetland Conservation Act Permanent Rulemaking:** In 1991, the Minnesota Legislature approved and Governor Arne Carlson signed the Wetland Conservation Act (WCA), one of the most sweeping wetlands protection laws in the country. The purpose of WCA is to maintain and protect Minnesota's wetlands and the benefits they provide.

Local government units—cities, counties, watershed management organizations, soil and water conservation districts (SWCD), and townships—implement WCA locally. The BWSR administers WCA statewide and the Department of Natural Resources and other licensed peace officers enforces it.

To retain the benefits of wetlands and address the legislation's goal of no-net-loss of wetlands, WCA requires anyone proposing to drain, fill, or excavate a wetland first to try to avoid disturbing the wetland; second, to try to minimize any impact on the wetland; and, finally, to replace any lost wetland acres, function, and value. Certain wetland activities are exempt from WCA, allowing projects with minimal impact or projects located on land where certain pre-established land uses are present to proceed without regulation.

The Legislature has amended WCA many times since 1991, most recently in 2007 and 2008.

**Current Issues:** The genesis of this rulemaking is the 2001-2003 Minnesota Wetland Report issued by BWSR in August 2005. This report identified an annual average net loss of wetlands of approximately 456 acres under WCA as reported to BWSR by LGUs.

Governor Pawlenty on September 7, 2005 issued a letter to the Clean Water Cabinet stating that “we should consider doing more to limit the loss of wetlands through the regulatory mechanisms of the state’s Wetland Conservation Act” and directing the Cabinet to report to him on the following issues so “that we may more closely align with the principle of “no net loss””:

1. Improvements to the accounting and reporting system for exemptions;
2. Alternatives to the existing WCA exemptions;
3. Alternatives to the existing replacement ratios;
4. Improvements to voluntary efforts that build on the success of the past but require a minimum of additional resources; and
5. Other recommendations you deem appropriate.

BWSR, in response to the Governor’s request, undertook an Assessment (<http://www.bwsr.state.mn.us/wetlands/assessment/WCAfinaldraft.doc>) of WCA that included stakeholder participation. The Assessment was completed in December 2006 and included more than 20 recommendations in the areas of:

- Wetland Reporting and Accounting;
- Exemptions;
- Wetland Replacement; and
- Wetland Administration.

The Assessment led to the development and enactment of statutory amendments in 2007. These amendments included changes to the following provisions:

- The 60-day rule (Minn. Stat. 15.99);
- Administrative Penalty Orders;
- Deed restrictions;
- Stormwater ponds;
- Wetland replacement siting;
- Exemptions: Agricultural Activities, Drainage, Wetland Restoration, Approved Development, De minimis;
- Exemption estimates and reporting;
- Appeals; and
- Rulemaking.

Of particular significance to this SONAR is the amendment required the adoption of exempt rules within 90 days of becoming effective (Laws of Minnesota 2007, Chapter 57, Section 166) which expire 2 years from the date of publication in the State Register.

The exempt rules were published on August 5, 2007. The permanent WCA rule process was begun by publishing a request for comments on this same date.

The rule development process began in the fall of 2007 when BWSR staff held a series of meetings with stakeholder organizations to discuss the rulemaking process and issues. Keys to the process were the formation of a Permanent Rule Advisory Committee and a Technical Advisory Committee. These committees included representation from organizations and interests that include: agriculture; business, environment/conservation; local government; state government; federal government, and technical/professional organizations. These advisory committees began meeting in January 2008 to review rule issues and proposed language.

The scope of this rule development includes:

1. Conversion of the exempt rule adopted on August 5, 2007 to permanent status.
2. 2007 and 2008 statutory changes not included in the exempt rule: exemption reporting and data tracking, replacement wetland credit for wetland preservation, and to clarify that "transportation projects" don't include airports for purposes of buying credits from BWSR.
3. Changes identified in the WCA Assessment, BWSR-U.S. Army Corps of Engineers Wetland Mitigation Memorandum of Understanding, and Federal Mitigation Rule.
4. Improved application of wetland replacement science to improve resource outcomes.
5. Other changes identified by BWSR staff and stakeholders.
6. Organizational/formatting changes intended to improve clarity and understanding.

A key purpose of this rulemaking is to incorporate changes that will further regulatory simplification and state/federal coordination. BWSR and the U.S. Army Corps of Engineers, St. Paul District (Corps) signed a Wetland Mitigation Memorandum of Understanding (MOU) in May 2007 (<http://www.bwsr.state.mn.us/wetlands/BWSR-COEmemo.pdf>). BWSR via this rulemaking, and the Corps through the development of Clean Water Act, Section 404 guidance have been working to implement this MOU to maximize regulatory consistency.

In summary, this rulemaking is proceeding because:

- Statute requires the adoption of permanent rules by August 6, 2009 to replace the exempt rule that expires on this date;
- Rule amendments are necessary to ensure the rule is consistent with statutory amendments enacted in 2007 and 2008;
- Changes to the rule are necessary to improve state/federal wetland regulatory consistency;
- Governor Pawlenty has directed the agencies to reduce the loss of wetlands under WCA; and
- Changes to improve the effectiveness and efficiency of the WCA rules in addressing the statutory goal of a no net loss of the quantity, quality, and biological diversity of wetlands.

#### **ALTERNATIVE FORMAT.**

Upon request, this Statement of Need and Reasonableness can be made available in an alternative format, such as large print, Braille, or cassette tape. To make a request, contact:

Les Lemm  
WCA Coordinator  
Mn Board of Water and Soil Resources  
520 Lafayette Road  
St. Paul, MN 55155  
651-296-6057 (phone)  
651-297-5615 (fax)  
[les.lemm@state.mn.us](mailto:les.lemm@state.mn.us)

### **STATUTORY AUTHORITY.**

The specific statutory authority for this rulemaking is provided in Laws of Minnesota 2007, Chapter 57, Section 166. Also, BWSR has authority to develop rules governing wetland conservation under Minn. Stat. 103G.2242.

### **REGULATORY ANALYSIS**

The development of the permanent rule has been given substantial review from January – December 2008 by a multitude of interest groups, persons, and subcommittees of the BWSR Board. Local government, land developers, landowner interests, forest industry representatives, agricultural and environmental interests as well as state and federal agencies were represented on the rulemaking committees. In addition, BWSR staff have met on an individual basis with a number of interest group representatives to discuss specific wetlands regulatory issues.

#### **Determination of the Classes of Persons Affected by the Proposed Rules.**

The proposed rule will most significantly affect present and future landowners of property containing wetlands. It will also affect local governments who have the primary responsibility to carry out the WCA law and rule requirements. The current rule imposes costs that are primarily borne by the affected landowners, taxpayers supporting local government operations, and state taxpayers who support state grants to local government and the state operations required to oversee the program. The proposed rule amendments, to the extent there are changes in costs, will affect the same classes of persons.

However, this rule proposes to reduce inconsistency with federal regulations. This improved coordination should result in direct benefits to local governments and landowners through reduced delays in project approvals, reduced costs in program administration, and reduced cost in complying with state and federal regulatory requirements.

Beneficiaries of the rule will be the general citizenry who realize the environmental benefits of wetland protection (water quality, flood control, fish and wildlife habitat, etc.).

State agencies affected by the rule (in order of likely impact) are BWSR, the Department of Natural Resources (DNR), the Minnesota Department of Transportation (MnDOT), the Pollution Control Agency (PCA), and the Department of Agriculture. Implementation costs to these agencies will likely be unchanged by the proposed rule adoption, as dedicated appropriations exist. The effect on state revenues is expected to be negligible as compared to the current rule.

### **Determination of Alternative, Less Costly or Less Intrusive Methods for Achieving the Purpose of the Proposed Rules.**

There is no known alternative to the proposed rule, which would be less costly or less intrusive. The current rule and the proposed rule amendments are required by and necessary to implement statute. During rule development, BWSR staff and stakeholders discussed numerous ideas for accomplishing the purpose of the statute. Many of these were incorporated into the proposed rule as they provided a means to comply with the statute in an efficient and effective manner.

The rules have been developed as the fundamental comprehensive document used to understand and administer WCA. It would be possible to develop a slightly smaller rule (fewer pages) if all statute language were omitted and the rules only addressed program elements that required further elaboration or specificity. However, the confusion it would cause among local governments implementing the program and the regulated public affected by this action would quickly outweigh any initial savings in printing costs.

The exempt rule has incorporated most of the statutory changes enacted in 2007. BWSR, often via comments and suggestions from interest group representatives, are proposing numerous changes that will likely improve the application and effectiveness of the rules by local governments. This interaction with local governments and interested parties will ensure that these changes will have the anticipated positive effects on implementation.

### **Probable Costs of Complying with the Proposed Rules.**

The probable costs of complying with the proposed rule is difficult to determine but it is likely that these costs will be relatively unchanged from current levels. An increased cost of compliance is anticipated due to statutory changes intended to reduce the wetland losses as well as improved wetland replacement standards that have been incorporated into the proposed rule.

However, a decrease is anticipated as the rule streamlines administrative requirements and improves consistency with federal regulations. Proposed changes in both areas will reduce costs for local governments and landowners.

### **Probable Costs or Consequences of not Adopting the Proposed Rule.**

The consequences of not adopting the proposed rule amendments would be a rule that does not comply with statute. The result would be conflicts and inconsistencies between statute and rule. The resulting confusion and uncertainty would have negative consequences for landowners who would have difficulty in determining how to undertake projects that comply with state wetland regulatory requirements. This uncertainty would result in increases in project costs and delays.

Local governments would have similar difficulty in administering the rule and law that would have conflicts and inconsistencies. These problems would hamper their ability to effectively carry out their responsibilities and ensure that state wetland regulatory policy is complied with.

Both landowners and local governments would experience difficulty due to inconsistencies between state and federal wetland regulatory requirements. Project delays and increased project costs would be the principal result of not implementing measures to improve state and federal coordination.

**Assessment of Differences between the Proposed Rules and Existing Federal Regulations.**

The BWSR and the Corps signed a Wetland Mitigation MOU in May 2007. This agreement serves as the basis for many of the proposed rule changes as they relate to wetland replacement requirements of the rule. In turn, the Corps will be making changes to their regulatory guidance that corresponds to the WCA rule. However, much of the proposed rules cover areas that are not addressed by federal laws or regulations.

The Corps/EPA Mitigation Rule was jointly released by the U.S. Environmental Protection Agency and Corps on March 31, 2008. A key component of this rule is to base wetland regulatory decisions, to the extent appropriate and practicable, on a watershed approach. According to guidance from the EPA, “mitigation decisions should be made from a watershed perspective in which the type and location of compensatory mitigation follows from an analytically-based watershed assessment to assure that the proposed compensation furthers watershed goals”. This approach emphasizes analysis, planning, and determining the wetland regulatory decision is not just tied to the specific wetland proposed to be impacted, but on broader watershed needs.

BWSR believes increased focus on watershed based wetland management in these proposed rule amendments will benefit the wetland resources in Minnesota, will allow for improved coordination between WCA and other water quality and natural resource management programs, and foster improved state/federal wetland regulatory coordination.

**Description of How the Agency Considered and Implemented the Policy to Adopt Rules that emphasize Superior Achievement in Meeting the Agency’s Regulatory Objectives and maximum Flexibility for the Regulated Part and Agency in Meeting these Goals.**

BWSR’s objective with regards to wetland protection is to provide for resource conservation, public health and safety, and equitable use, while maintaining flexibility for local government and the public to enjoy and use the wetland resources consistent with state and federal law. Consistent with this overall agency objective, the goals and considerations of this rule making are to:

- Clarify rule requirements;
- Simplify the rule where possible;
- Ensure the changes are implementable;
- Have a tangible result;
- Improve accountability;
- Limit impacts to local government workload;
- Limit unintended consequences;
- Balance public costs and benefits; and
- Be aware of stakeholder support.

These goals and considerations span the breadth of ecological, economic, and sociopolitical issues that relate to wetlands management and protection. BWSR, in undertaking our responsibilities in overseeing implementation of WCA, have always worked to balance the economic and social impacts with the biological requirements needed to conserve and protect



Minnesota's wetland resources. Obtaining this balance is a challenge due to increased demands for regulation on the one hand, and demands for increased program simplicity and reduced costs associated with regulation on the other.

In developing the proposed rules, BWSR sought to provide local governments with increased decision-making flexibility and reduced administrative burden without compromising resource protection. The proposed rule amendments provide for consistent requirements in processing applications, increased support from the technical evaluation panel, and increased ability to place approval conditions to meet local needs and issues.

The agency has also sought to provide the regulated public increased flexibility in complying with regulatory requirements, again without compromising resource protection. The proposed changes include increased flexibility in providing wetland replacement, increased ability to work with the LGU and TEP in establishing appropriate project approval conditions, and increased ability to coordinate project planning that will comply with state and federal regulations. Overall, the proposed rule provides greater flexibility and accountability by moving towards a more outcome-based decision-making framework.

In addition, to the above discussion of flexible approaches to an outcome based program, BWSR has promoted the voluntary development of local comprehensive wetland protection and management plans at the local level to:

- Generate an increased understanding of the importance of wetland resources to those affected by the rules;
- Integrate wetlands into daily local land use decisions rather than being as a separate land use decision;
- Encourage local governments to develop a WCA-consistent approach that addresses specific local needs and issues; and
- Improve the acceptance and compliance by the public with wetland protection goals of the WCA as a means of promoting conservation of these resources without additional increased regulation.

One barrier to more local governments developing and adopting these plans is the need for plans that can be accepted by the Corps for application under the Clean Water Act, Section 404 Program. This rule modifies the planning process to provide an avenue for this to occur, but BWSR and the Corps still have additional work to make this a reality on a statewide basis.

However, these plans have not been developed by local governments on a statewide basis, and therefore cannot be relied upon as a means to achieve the necessary wetland protection across the state. These rules are therefore necessary and reasonable to ensure that wetland protection is carried out on a statewide basis, consistent with WCA's purpose and state law.

#### **ADDITIONAL NOTICE.**

A. The Request for Comments on the rule was published in the State Register on August 6, 2007. The Request for Comments was distributed to over 500 persons, interest group

organizations, and government offices that have been participating in the implementation and development of WCA since enacted in 1991. In addition, BWSR staff held a number of meetings prior to the beginning of the stakeholder and technical committee process to discuss rule topics.

Local government listening sessions were held as follows:

January 8, 2008 in Cloquet  
January 9, 2008 in Brainerd  
January 10, 2008 in Thief River Falls  
January 15, 2008 in Fergus Falls  
January 16, 2008 in Marshall  
January 17, 2008 in Rochester  
January 18, 2008 in Rochester

In addition, pre-rule development meetings were held with several environmental organizations on November 14, 2007, with Minnesotans for Wetlands on November 16, 2007, the Minnesota and Twin Cities Associations of Home Builders on November 28, 2007 and open houses were held at the annual meetings of the Minnesota Association of Watershed Districts on November 29-30, 2007, Association of Minnesota Counties on December 3, 2007, and the Minnesota Association of Soil and Water Conservation Districts on December 4, 2007.

B. The rule development process included two advisory committees. The Technical Advisory Committee, consisting of local government staff and consultants met 11 times during the rule development process. Participants were from the following local governments/consultants;

1. Blue Earth County;
2. Dakota Soil and Water Conservation District;
3. Eagan, City of;
4. Kjolhaug Environmental;
5. Lake of the Woods County;
6. Pine Soil and Water Conservation District;
7. Redwood Soil and Water Conservation District;
8. Rice Creek Watershed District/Emmons and Olivier Resources; and
9. Westwood Environmental.

The WCA Permanent Rule Advisory Committee, consisting of numerous stakeholder organizations and state and federal agencies met 11 times during the rule development process. Organizations represented on this committee were:

#### **Agriculture**

1. Minnesota Corn Growers Association
2. Minnesota Farm Bureau
3. Minnesota Farmers Union
4. Minnesota Soybean Growers Association
5. Minnesota Wheat Growers Association

**Business**

6. Builders Association of Minnesota
7. Builders Association of the Twin Cities
8. Minnesota Association of Realtors
9. Minnesota Chamber of Commerce
10. Minnesota Forest Industries
11. Utilities
12. Aggregate Ready-Mix Association of Minnesota

**Environment/Conservation**

13. Audubon Minnesota
14. Izaak Walton League - Minnesota Division
15. Minnesota Center for Environmental Advocacy
16. Minnesota Conservation Federation
17. Sierra Club - North Star Chapter

**Local Government**

18. Association of Minnesota Counties
19. Metropolitan Inter-County Association
20. Minnesota Association of Soil and Water Conservation Districts
21. Minnesota Association of Townships
22. Minnesota Association of Watershed Districts
23. Minnesota County Engineers Association
24. Minnesota Rural Counties Caucus

**Others**

25. Minnesota Viewers Association
26. Wetland Professionals Association
27. Minnesotans for Wetlands
28. Minnesota Association of Professional Soil Scientists

**Federal Government**

29. U. S. Army Corps of Engineers
30. U.S. Fish and Wildlife Service
31. USDA Natural Resources Conservation Service

**State Government**

32. Department of Agriculture
33. Department of Natural Resources
34. Department of Transportation
35. Pollution Control Agency

In addition, several other organizations were regular attendees and participants in these meetings, as follows: Agricultural Drainage Management Coalition; American Property Rights Coalition; Minnesota Land Improvement Contractors Association; and Red River Water Management Board.

To further the stated goal of state and federal coordination, BWSR staff had a number of meetings with the Corps to discuss WCA rule, District Guidance, and the Wetland Mitigation Memorandum of Understanding.

In addition, BWSR staff held individual meetings during the course of the rule development process with Wetlands for Minnesota, Builders Association of the Twin Cities, Builders Association of Minnesota, Sierra Club, Minnesota Center for Environmental Advocacy, representatives of agricultural organizations, and made a presentation at the Water Resources Conference in St. Paul.

Throughout the development of the proposed rule, BWSR maintained significant information on the agency's website that included draft rule language, advisory committee meeting notes, rule process information, and supporting information.

C. BWSR intends to send a copy of the Public Hearing Notice to:

- All individuals who have registered with BWSR for the purpose of receiving notice of rule proceedings as required by Minn. Stat. 14.14, subd. 1a;
- All organizations that have participated in the stakeholder advisory committee (see list of organizations above);
- All WCA local government units, all soil and water conservation districts, all watershed districts, and all local water planners;
- All individuals and representatives of associations that BWSR has on file as interested and affected parties;
- Minn. Stat. 14.116 requires a copy of the notice, the rules, and SONAR be sent to the chairs and ranking minority members of the committees with jurisdiction over the subject matter of the proposed rules. This statute also states that if the mailing of the notice is within two years of the effective date of the law granting rulemaking authority that the agency must make reasonable efforts to send a copy of the notice and SONAR to all sitting legislators who were chief authors of the bill granting the rulemaking authority. Under this statutory directive the following legislators will be sent the above referenced documents: the chairs and ranking minority members of (1) the House Environment and Natural Resources Policy Committee; (2) the House Environment and Natural Resources Finance Committee; (3) the Senate Environment and Natural Resources Committee; (4) Environment, Energy and Natural Resources Budget Division; and chief authors of WCA legislation in 2007 and 2008: Rep. Rick Hanson; Rep. Tom Anzelc; Sen. Satveer Chaudhary; and Sen. Tom Saxhaug.
- In addition, a copy of the notice, proposed rule and draft SONAR will be posted on the BWSR website.

Because of the broad distribution of the Request for Comments, and as copies of the proposed rule are available on the BWSR website, BWSR believes a thorough effort to reach significantly affected persons has been accomplished.

## **NOTIFICATION TO THE COMMISSIONER OF AGRICULTURE**

Minn. Stat. 14.111 requires that before an agency adopts or repeals rules that affect farming operations, the agency must provide a copy of the proposed rule to the Commissioner of Agriculture no later than 30 days prior to publication of the proposed rule in the State Register. The WCA rules apply to agricultural operations, however these rule changes are proposed to have minimal increased changes for agriculture as compared to the current rule.

Based on this assessment, the Commissioner of Agriculture was sent a copy of the rule on February 25, 2009. This notification, while required by statute, is in addition to the participation of the Department on the stakeholder advisory committee and on the BWSR Board itself.

### **CONSULT WITH FINANCE ON LOCAL GOVERNMENT IMPACT.**

As required by Minn. Stat. 14.131, the Board has consulted with the Commissioner of Minnesota Management and Budget to help evaluate the fiscal impact of the proposed rule. We did this on January 20, 2009 by sending to the Commissioner of Minnesota Management and Budget copies of the documents sent to the Governor's Office for review and approval by the Governor's Office prior to the Board publishing the Notice of Hearing. The documents included: the Governor's Office Proposed Rule and SONAR Form; proposed rules; and proposed SONAR. Minnesota Management and Budget responded on January 28, 2009. In this response the Department stated, "that BWSR has adequately analyzed and presented the potential costs to local units of government of the proposed rule and that the rule will have minimal fiscal impact on local units of government."

### **COST OF COMPLYING FOR SMALL BUSINESS OR CITY.**

As required by Minn. Stat. 14.127, the Board has considered whether the cost of complying with the proposed rules in the first year after the rules take affect will exceed \$25,000 for any small business or small city. The Board has determined that the cost of complying with the proposed rules in the first year after the rules take affect will not exceed \$25,000 for any small city.

The Board has reached this determination based on the probable increased costs of complying with the proposed rule changes as compared to the current rule. The discussion of probable costs in the regulatory analysis identifies cost savings and cost increases to small cities. The net affect is anticipated to be minimal for any small city.

Most small businesses will also experience a minimal fiscal impact of the rule changes for the same reason as small cities. Regulatory process reductions will be offset by increased wetland development and monitoring requirements for a minimal overall impact. The net affect is that no small business will experience an increased cost of more than \$25,000 in the first year after the rules take affect.

One class of small business warrants special consideration. Wetland bank account holders businesses' are built around selling wetland replacement credits to allow landowners to meet their wetland replacement requirements under WCA and Section 404 of the U.S. Clean Water Act. The rule amendments propose to eliminate the current two credit system (new wetland credit – NWC and public value credit – PVC) to a single credit system which requires converting

existing PVC to this new system. Existing non-wetland PVC will be converted to the new single credit system at 90% of the amount of current NWCs. The reasons why this conversion factor is reasonable and included in the proposed rule include:

- This PVC are upland buffer areas adjacent to replacement wetlands, that contribute to wetland functions but are not wetland and therefore should not replace wetland impacts at a 1:1 ratio;
- An analysis of the sale price of PVC from September 2007-2008 identified the value of these credits at approximately 95% of the value of new wetland replacement credits; and
- Discussions with the Corps identified this as a conversion factor that both regulatory programs found reasonable. Regulatory coordination between state and federal programs is a key goal of this rulemaking.

As part of our effort to comply with this requirement, BWSR staff analyzed existing wetland bank accounts to identify any that may be negatively affected by this conversion. This analysis examined:

- current (as of January 8, 2009) NWC and PVC balances;
- calculated the credit yield that would result from the conversion of PVC as proposed;
- calculated the value of these credits based on existing sales prices; and
- identified the number of sales that wetland banks made over the past four years.

This analysis initially determined that up to seven banks may lose economic value from their wetland banks as a result of this conversion. However, further examination of their ratio of NWC to PVC, and sales volume eliminated six of these bank accounts as being extremely unlikely to experience a financial impact of more than \$25,000 in the first year after the rules become effective.

However, additional factors are relevant in determining whether any wetland banker will experience a financial impact in the first year after these rules go into effect. These are discussed below.

- The rule places a greater emphasis on wetland banking as a means to provide wetland replacement credits. The increased demand should serve to increase the price that wetland bank account holders can receive for their credits, thereby offsetting any lost value by a conversion rate of less than 100%.
- The Corps currently regulates a significant majority of projects that impact wetlands in Minnesota. Their current guidance “converts” PVC at 25% (1 acre of PVC = 0.25 credits). The effect of dual regulation is that PVC in many cases is already available at a rate far below the 90% proposed by these rule amendments.
- The Minnesota economy is experiencing a recession that has been especially significant for land development businesses that are a major market for wetland banking credits.

The net result of this conversion factor based on the financial and policy analysis is that no wetland bank account holder should have a cost of \$25,000 for complying with the rule.

## RULE BY RULE ANALYSIS

(citations based on the Proposed Rule as approved by the Revisor of Statutes, 3/16/09)

### PURPOSE AND SCOPE.

#### 8420.0100 PURPOSE.

The purpose and introduction sections (current 8420.0102) are proposed to be consolidated as part of the re-organization of the rule. These separate sections are very similar and the rule can be more efficiently used if they are combined.

Other changes to this part update statutory references and make minor changes for language consistency and clarity. The addition of “regulatory provisions” specifies that the WCA rule is a regulatory program and the provisions should be read and applied from that perspective.

Using the term “impact” (impact is defined in 8420.0111, subpart 31) and eliminating “by draining, excavating, or filling,” which is repeated throughout the rule, will simplify language and reference all regulated wetland activities consistently.

#### *Current Rule:* 8420.0103 **WETLAND FUNCTIONS FOR DETERMINING PUBLIC VALUES.**

This part was relocated to the Replacement Standards part 8420.0522.

#### 8420.0105 SCOPE.

Changes to this part are largely based on the proposed reorganization and clarification of this part with no-loss criteria (8420.0415) and exemption standards (8420.0420). The current rule does not clearly differentiate between types of activities that are identified in the scope of the rule, as a no-loss (current rule 8420.0220), or as an exemption (current rule 8420.0122). Including activities that do not result in permanent wetland impacts under an exemption and some that do under scope is confusing, results in inaccurate data on wetland losses, and complicates policy issues such as how the rule treats road ditches through upland. The proposed rule clarifies the distinctions between activities in scope versus a no-loss versus an exemption as follows:

- Scope contains those landscape features that may be wetland but are not regulated by WCA and activities in certain wetlands that are not regulated because statute does not allow it.
- No-Losses are activities in wetlands that do not typically impact wetlands or result in a permanent loss in wetland functions, but could if conducted differently. For example, removal of debris from a wetland typically does not result in a loss, but if that removal results in fill or changes the wetland cross-section a loss could result.
- Exemptions are permanent impacts to wetlands where replacement of lost functions is not required.

These organizational changes along with corresponding changes in the no-loss and exemption standards parts provide a consistent framework for dealing with wetlands and activities in wetlands that are not regulated or do not require replacement. These changes do not affect how WCA is applied or the implementation of statutory intent. It does simplify and clarify the rule

while improving the accuracy of data reported on jurisdictional wetlands lost due to exemptions, which is consistent with statutory direction enacted in 2007 (Minn. Stat. 103G.2241, subd. 11(d)).

The following three changes to this part implement this framework, as follows:

- The deleted language addressing “*wheeled booms on irrigation devices*” has been relocated to the agricultural activities exemption (8420.0420, subd. 2). This language allows a permanent wetland impact without replacement and therefore is more appropriate in the exemption part.
- The new language addressing “*normal farming practices*” has been relocated from the agricultural activities exemption to scope (8420.0105) as it defines activities that do not result in wetland impacts regulated by WCA.
- The new language addressing “*incidental wetlands*” has been relocated from the incidental wetland exemption to scope (8420.0105) as it defines activities in and impacts to landscape features that are not wetland areas regulated by WCA. The word “detention” has been added to prevent the potential misapplication of the rule due to a literal interpretation of “retention”.

Language requiring state agencies to coordinate with local government has been moved to the Determining Local Government Unit; Duties part (8420.0200) as it discusses the responsibilities of state agencies when implementing WCA as a local government under WCA.

## **DEFINITIONS AND REFERENCES.**

### **8420.0111 DEFINITIONS.**

This part is relocated from the current 8420.0110 in order to allow for the removal of definitions that are obsolete or have been previously repealed. Most of the definitions are unchanged from the current rule; the discussion below only addresses those that are proposed to be changed in this rulemaking.

Subpart 5. **Activity.** This is the current subpart 3. This term is used throughout the rule and is proposed to be changed to create a clear distinction between the term “impact” which are always regulated by this chapter, and “activities” that may not be regulated or require replacement.

Subpart 7. **Applicant.** This is the current subpart 5a. This term is used throughout the rule and is proposed to be simplified to refer to the definition of application in subpart 8.

Subpart 8. **Application.** This is a new subpart. This term is used throughout the rule to simplify and provide consistency in the processes and requirements for the various actions for which a request for approval can be made under this chapter. This proposed change allows a single word to be used where the current rule requires many.



Subpart 9. **Approve or approval.** This is a new subpart. The rule proposes to clarify decisions and actions taken by the LGU, by LGU staff, and the TEP. This definition provides clarity by specifying that approvals of applications are solely the purview of the LGU.

Subpart 11. **Banking credits.** This is a new subpart. This term is proposed to be renamed and relocated from 8420.0110, subpart 51a in the current rule. Language changes are for clarity and consistency purposes.

Subpart 12. **Best management practices.** This is the current subpart 7. The current definition is proposed to be modified to clarify that best management practices can be associated with all activities, not just those associated with draining, filling, or replacing wetlands.

*Current Rule:* Subpart 10a. **Contractor.** This definition is proposed to be deleted and included in 8420.0335 (Contractor's Notification Responsibility) as this term is only used in that part.

Subpart 18. **Decision.** This is a new subpart. The rule proposes to clarify decisions and actions taken by the LGU, by LGU staff, and the TEP. This proposed definition provides clarity by specifying that decisions are approvals made by the LGU or delegated LGU staff.

Subpart 20. **Determination or determine.** This is a new subpart. The rule proposes to clarify decisions and actions taken by the LGU, by LGU staff, and the TEP. This proposed definition provides clarity by specifying that determinations are technical findings made by the TEP or staff.

*Current Rule:* Subpart 19. **Floodplain wetland.** This term is proposed to be deleted as it is not used in the current or proposed rule.

*Current Rule:* Subpart 20. **Flow through wetland.** This term is proposed to be deleted as it is not used in the current or proposed rule.

Subpart 31. **Impact.** This is the current subpart 23. The proposed changes to this definition are intended to ensure consistency with the language used in scope to describe the jurisdiction of this chapter. This term is used throughout the rule.

Subpart 33. **Indirect impact.** This is a new subpart. This proposed new term is necessary to ensure that statute is complied with as it relates to activities that occur outside of a wetland, but result in an impact as defined in subpart 31. This term is used in 8420.0100 (Purpose), 8420.0240 (Technical Evaluation Panel Procedures), and 8420.0520 (Sequencing).

*Current Rule:* Subpart 28. **Isolated wetland.** This term is proposed to be deleted as it is not used in the current or proposed rule.

Subpart 39. **Major watershed.** This is a new subpart. This definition is proposed to be relocated from the current subpart 50 and used to define "major" watershed for clarification, as the term watershed occurs in the rule in general terms as well as in reference to "minor" and "major" watersheds.

*Current Rule:* Subpart 31. **New wetland credit or NWC.** The proposed elimination of the current two wetland replacement credit system makes this term unnecessary and, thus, it is proposed for deletion.

*Current Rule:* Subpart 32 . **Nondegraded wetland.** This term is proposed to be deleted as it is not used in the current or proposed rule.

Subpart 47. **Ordinance.** This is a new subpart. This definition is proposed to be added to ensure a connection in this rule with current statutory authority of counties, cities, and townships to develop regulations and requirements as provided in 8420.0233 (Other Local Government Unit Wetland Rules and Ordinances).

Subpart 51. **Plant Community.** This is a new subpart. This new definition is necessary due to the proposed inclusion of the wetland typing system “Wetland Plants and Plant Communities of Minnesota & Wisconsin” in 8420.0240 (Technical Evaluation Panel Procedures) and other parts of the rule.

Subpart 54. **Project-specific.** This is the current subpart 36. This definition is proposed to be modified for clarity and consistency with the remainder of the rule.

*Current Rule:* Subpart 37a. **Public value credit or PVC.** The proposed elimination of the current two wetland replacement credit system rules makes this term unnecessary and, thus, it is proposed for deletion.

*Current Rule:* Subpart 42. **Right of way acreage.** This term is proposed to be deleted as it is not used in the current or proposed rule.

*Current Rule:* Subpart 43. **Riverine wetland.** This term is proposed to be deleted as it is not used in the current or proposed rule.

Subpart 62. **Rule.** This is a new subpart. This definition is proposed to be added to ensure a connection in this rule with current statutory authority of watershed districts and watershed management organizations to develop regulations and requirements as provided in 8420.0233 (Other Local Government Unit Wetland Rules and Ordinances).

*Current Rule:* Subpart 44a. **Shoreland wetland.** This definition is proposed to be deleted and combined with the current definition of Shoreland wetland protection zone in subpart 63. This is because this definition only has meaning within the shoreland wetland protection zone.

Subpart 63. **Shoreland or shoreland wetland protection zone.** This is the current subpart 44b. This definition is proposed to be modified to incorporate the current rule term “shoreland”, as it is unnecessary as a stand alone definition.

*Current Rule:* Subpart 48. **Tributary wetland.** This term is proposed to be deleted as it is not used in the current or proposed rule.

Subpart 69. **Watershed.** This is the current subpart 50. The current definition is proposed to be relocated to the new definition of major watershed (subpart 39), and this definition modified to provide a more fundamental and general definition of what a watershed is, and to differentiate it from “minor” and “major” watersheds. The term watershed is primarily used in the Wetland planning part (8420.0830) to provide additional direction on how these plans should be developed that will provide increased consistency with the National Mitigation Rule and other state water management programs and activities.

*Current Rule:* Subpart 51a. **Wetland banking credits.** This term is proposed to be re-named “banking credits” and is moved to subpart 11 of this part. The word “wetland” in the current term is unnecessary as all banking credits approved under this chapter are wetland banking credits.

#### **8420.0112 INCORPORATION BY REFERENCE.**

This part is relocated from the current 8420.0105. A new item P is proposed to be added to reference the Wetland Plants and Plant Communities of Minnesota and Wisconsin that has been added as a tool for use by TEPs in 8420.0240 and in designing replacement wetlands. A new item Q has been added to provide a reference to the resource that documents major and minor watershed boundaries. These areas are used throughout the rule in evaluating wetland replacement plans, developing comprehensive wetland management plans, among other provisions.

#### **8420.0117 PRESETTLEMENT WETLAND ACRES AND AREAS.**

Subpart 1. **County classification.** This part is moved from the current 8420.0545 as the presettlement wetland areas are a foundational element of the rule and as such should be presented early in the rule. In addition, the 50 to 80 percent areas are moved to be more logically between the less than 50 percent areas and greater than 80% areas

Subpart 2. **County or watershed reclassification.** The ability to reclassify a county or watershed on the basis of its presettlement wetlands should be consolidated with the establishment of these areas in the rule. Moving this subpart from the current 8420.0250, subpart 4 is a more logical placement than under appeals as in the current rule. Language changes are intended to clarify the application of this provision when a watershed is located in more than one county.

#### *Current Rule:* **8420.0115 SCOPE OF EXEMPTION STANDARDS.**

This part is relocated to the Exemptions Standards part 8420.0420.

#### *Current Rule:* **8420.0122 EXEMPTION STANDARDS.**

This part is relocated to the Exemptions Standards part 8420.0420.

#### **LOCAL GOVERNMENT UNIT DUTIES AND PROCEDURES.**

#### **8400.0200 DETERMINING LOCAL GOVERNMENT UNIT; DUTIES.**

The proposed changes are to provide rule language consistent with 2003 statute changes (Minn. Stat. 103G.005, subd. 10e) to achieve a statewide standard for defining a local government unit (LGU). Clarification was added on the process for delegating WCA authority from one local government to another. Also, items C, D, F, and J have been relocated within this part.

Subpart 1. **Determining local government unit.** Describing the types of applications, as defined in 8420.0110, subpart 8 (Definitions), eligible for a decision has been eliminated to minimize redundancy throughout the rule. The LGU responsibility has been clarified as one of decision, in place of determination or approval.

**Item A & B.** The language utilizing “drain or fill” has been deleted as it is unnecessary due to the proposed definition of activity in 8420.0110 (Definitions), subpart 5.

*Current Rule:* **Item C.** The language in this item has been relocated to the new item F of this subpart.

**Item C.** The last sentence regarding the “board” responsibility is relocated to a new item J. The requirements of state agencies have been clarified and relocated here from the Scope (current rule 8420.0105). It is more efficient to locate all of the rule language regarding LGUs and how they interact in the same subpart.

**Item E** establishes a procedure for one LGU to delegate administrative implementation to another LGU. The requirement for both jurisdictions to pass a resolution and to provide notice ensures that delegation has legal effect.

**Item G** establishes a new procedure for determining the LGU for replacement sites that is consistent with the process provided in Item F for impacts. This language is necessary to provide direction to LGUs in cases where replacement areas overlap jurisdictional boundaries. The current rule does not address these situations.

**Item H** has been relocated from the current 8420.0230, subd. 2 and edited to provide decision making processes for project-specific replacement when the replacement will occur in a different LGU than the impact. This is necessary to ensure that procedures are in place when this occurs so that the separate decisions do not result in non-compliance with the replacement requirements of the rule.

**Item I** has been added to ensure that WCA activities in multiple jurisdictions are coordinated when more than one LGU is involved according to items F, G, and H.

**Item J** is relocated from the current 8420.0200, subd. 1.

Subpart 2. **Local government unit duties.**

**Item A.** The requirement to acknowledge administrative responsibilities is relocated from the current 8420.0260, item A. The first sentence is a clear statement that decisions under this chapter are the responsibility of local governments, consistent with Minn. Stat. 103G.2243.

**Item B.** The new language that specifies experience in water resource management will ensure that staff have the technical skills necessary to address the activities regulated under this chapter. This language is consistent with the requirements for technical evaluation panel (TEP) membership in 8420.0240.

**Item C** clarifies staff delegation regarding the administration of WCA and the local appeal process. The addition of the word “evidentiary” will clarify the type of public hearing that must be held to address an appeal of a delegated staff decision. The local appeals process under the current rule is unclear and has resulted in unnecessary confusion at the local level on how to structure an appeal hearing. The local appeals process has been relocated to the appeals part (8420.0910) part to place common rule activities into one location.

*Current Rule:* **Item C.** The notice of decision is relocated to the Local Government Unit Application and Decision Procedures part (8420.0255, subpart 5).

**Item D** is relocated from the current 8420.0510 (Replacement Plan Procedures). Moving this item here makes it clear that technical questions can occur for all WCA decisions, not just replacement plans.

**Item E** clarifies that a decision must be made and based on a finding of fact (evidence). This item also includes language that is consistent with the Technical Evaluation Panel Procedures part (8420.0240) under the current rule, and as proposed by this rulemaking.

**Item F** clarifies the LGU’s ability to evaluate evidence and provide advice, without making a decision, on all wetland activities without the landowner going through the expense of developing an application. This language is proposed to be modified to not only apply to exemptions and is relocated from the current 8420.0210. Finally, the proposed practice is existing practice among LGUs to work with landowners on potential projects.

**Item G.** Language has been added to provide clarity regarding record retention, and that the ten years begins when project conditions are met. This is important in that complying with conditions will often be 3 to 5 years after the LGU decision was made.

**Item I** clarifies that LGUs are required to provide an annual report to BWSR. LGU data is necessary for BWSR to evaluate the effectiveness of the rule and of LGU’s implementation of it. The proposed language states that BWSR may subject the LGU to penalty under subpart 3 for failure to comply with this requirement. This language also complies with the exemption reporting requirement of Minn. Stat. 103G.2241, subd. 11(d).

### Subpart 3. **Procedures and penalty for local government unit failure to apply law.**

**Item A.** The first sentence is proposed to be relocated to the LGU duties subpart, (subpart 2, item A). The remainder of this item is a restatement and clarification of the potential moratorium if the acknowledgement requirement is not met. BWSR’s authority to end the moratorium must include a determination that the LGU is capable of implementing its duties under this chapter.

This is necessary as it does not serve the interests of the state for an LGU to have the responsibility to administer WCA when it cannot do so due to staff or other resource limitations.

**Item B.** Most of the proposed changes to this item are for overall rule consistency. A change adds failure to comply with the reporting requirement as provided in subpart 2, item I allows BWSR to take action for non-compliance with this provision. This language provides a consequence to the requirement, which could be rendered meaningless without an enforcement mechanism.

**Item C.** Language is added to clarify the process of addressing an application when a LGU is under a moratorium. It provides a 15 day timeframe to return an application to be consistent with Minn. Stat. 15.99. This language is necessary to provide a clear process for managing applications that have been received, but the LGU can no longer make a decision due to the moratorium.

*Current rule:* **8420.0210 EXEMPTION DETERMINATIONS.**

This part is relocated to the General Application Requirements part (8420.0305) and Exemption Applications part (8420.0320).

*Current rule:* **8420.0220 NO-LOSS DETERMINATIONS.**

This part is relocated to the No Loss Applications part (8420.0315) and the No-Loss Criteria part (8420.0415).

*Current rule:* **8420.0225 WETLAND BOUNDARY OR TYPE DETERMINATION.**

**Item A.** This item is relocated to the Wetland Boundary or Type Applications part 8420.0310.

**Item B.** This item is relocated to the Technical Evaluation Panel Procedures part 8420.0240.

**Items C and D.** These items were relocated to the Local Government Unit Application and Decision Procedures part 8420.0200.

*Current rule:* **8420.0230 REPLACEMENT PLAN DETERMINATIONS**

This part is relocated to the Replacement Plan Applications part 8420.0330.

**8420.0233 OTHER LOCAL GOVERNMENT UNIT WETLAND RULES AND ORDINANCES.**

This part is relocated from 8420.0245 in the current rule.

**8420.0240 TECHNICAL EVALUATION PANEL PROCEDURES**

**Item A.** The language at “least three person” has been deleted to clarify the make-up of the TEP is three (or 4 when a public water is involved) and to be consistent with Minn. Stat. 103G.2242, subd. 2. The terminology “wetland management” has been deleted and changed to “water resource management” to be consistent with statute. Required DNR participation has been clarified by deleting redundant language.

**Item B.** “The Wetland Plants and Plant Communities of Minnesota and Wisconsin” (Eggers and Reed 1997) classification system has been added to identify this wetland identification system as

an information resource in making decisions under this chapter. The primary reason for adding this wetland identification system is to allow WCA decisions to be made consistent with Corps requirements.

**Item C.** The proposed changes clarify the role of the TEP, including making findings and recommendations regarding direct and indirect impacts, road projects, banking projects and the monitoring of replacement wetlands. The new language also includes provisions relocated from the current Wetland Boundary or Type Determinations, 8420.0225, item B. The language clarifies the role of the TEP by changing the current rule requirement for the TEP to make determinations to findings. The term determination is defined in 8420.0110, subpart 20. This change has been made throughout the rule for consistency. In addition, this language was relocated from the current 8420.0510, subpart 3. This item also clarifies the requirement of the TEP to work with the enforcement authority when a violation occurs.

**Item D.** The proposed changes to this item are intended to improve clarity and consistency.

**Item E.** The language in the first sentence has been deleted for consistency with the remainder of the rule. The second paragraph is proposed to be deleted to ensure the LGU has TEP input in implementing a comprehensive wetland protection and management plan. The last paragraph is proposed to be deleted as the language is addressed in item C of this subpart.

#### **8420.0255 LOCAL GOVERNMENT UNIT APPLICATION AND DECISION PROCEDURES**

This new part combines portions of the current 8420.0210, 8420.0220, 8420.0225, and 8420.0230 as they relate to application and decision procedures. The purpose of this new part is to provide a single place in the rule that can be referenced for LGU application and noticing requirements.

Subpart 1. **General.** The new language is added to clarify the existing requirement that Minn. Stat. 15.99 must be complied with for applications and decisions made under this chapter.

Subpart 2. **Determination of Complete Application.** In 2003 Minn. Stat. 15.99 was amended to extend the time to determine if an application is complete from 10 working days to 15 business days. The change will make WCA consistent with Minn. Stat. 15.99. Language has been added to clarify the process and manner in which applicants are notified of an incomplete application consistent with Minn. Stat. 15.99. In addition, a provision is added that allows LGU's to consider an application as incomplete if it is received outside of the growing season and requires field verification within the growing season. The ability to use seasonal constraints to determine an application incomplete is not open ended, but must provide a date when the application is considered to be complete, which cannot be later than the average start of the growing season. These provisions in total reconcile the required use of the Corps Wetland Delineation Manual (January 1987), while still respecting the time requirements of Minn. Stat. 15.99.

Subpart 3. **Notice of Application.** The first paragraph was relocated to the Replacement Plan Application part (8420.0330). The changes will clarify when re-notification is required in

relation to changes to previously-approved applications. Current rule language only referred to replacement plan applications and did not address instances where changes could significantly alter how the proposed project satisfies WCA requirements. The notice requirements for impacts of under 10,000 square feet was deleted to provide common requirements for all applications. The current rule language did not save time for applicants and LGUs as intended due to incomplete information provided in the summary. Also, the time period for noticing a complete application is proposed to be 15 business days to be consistent with Minn. Stat. 15.99.

This subpart does not apply to exemption or no-loss applications. This language maintains the notice requirements in the current rule, where notice of application of these proposals is not required. The concern with requiring notices for exemption and no-loss applications is the potential to discourage landowners from requesting approval of these actions due to delays in the decision making process. Providing more LGU oversight of exemptions and no-losses will reduce potential violations, ensure that rule requirements are met, reduce impacts that do not require replacement, and improve the data on wetland activities. Additional changes are proposed in subpart 4, and to Exemption Applications (8420.0320) that are required to fully implement this proposal.

**Item A.** The addition of this clarifying language provides both the LGU and applicant more specific thresholds which if exceeded require another formal review. This change is also proposed because of the wetland replacement ratio calculation requirements. Requiring this type of replacement plan change to be noticed will eliminate a potential loophole in which the applicant could initially avoid a high quality wetland and then later impact it without the TEP and LGU being aware of this project change and having it be addressed in the initial application.

**Item B.** Changing the wetland replacement type or basin impacted could require modification of the proposed replacement.

Subpart 4. **Decision.** The decision noticing requirements are clarified and standardized for all types of decisions. LGUs are allowed to make on-site decisions for exemption and no loss applications to encourage landowners to request approval. This will provide for an easier and more timely process that does not change rule requirements. Language regarding the validity of a decision (3 years) unless otherwise specified has been moved to this subpart from the current 8420.0220 and expanded to include all types of decisions for simplicity and consistency among LGUs.

Subpart 5. **Notice of Decision.** Language has been added to allow BWSR to establish minimum information requirements as they relate to decision notices mailed by LGUs. This will reduce the number of decision notices with insufficient information and will benefit the applicant and other members of the TEP by requiring the LGU to be specific as to what decision was actually made. The inclusion of information of the appeal period of the decision has been relocated to this subpart from the current 8420.0220, subpart 2C.

Subpart 6. **Decisions and noticing for replacement via banking.** This change clarifies the LGUs responsibility when a replacement plan proposes the use of banking credits. Part of this subpart was relocated from the current banking part (8420.0740, subpart 2F). The remaining two



paragraphs were relocated to Determining Local Government Unit; Duties (8420.0200, subpart 1C).

**8420.0265 PREVIOUSLY APPROVED APPLICATIONS**

This clarification requires that the LGU approval to be valid for this part to apply to an activity.

*Current Rule:* **8420.0245 OTHER LOCAL GOVERNMENT UNIT WETLAND RULES AND ORDINANCES.**

This part is relocated to the new Other Local Government Unit Wetland Rules and Ordinances (8420.0233).

*Current rule:* **8420.0250 APPEALS.**

Subparts 1 and 3 are relocated to the Appeals part (8420.0905) and subpart 4 is relocated to the Presettlement Wetland Acres and Areas part (8420.0117).

*Current rule:* **8420.0260 PENALTY FOR LOCAL GOVERNMENT UNIT FAILURE TO APPLY LAW.**

This part is relocated to the Determining Local Government Unit; Duties part (8420.0200, subpart 3).

*Current rule:* **8420.0268 COMPENSATION CLAIMS AGAINST LOCAL GOVERNMENT UNITS.**

This part is relocated to the new Compensation Claims Against Local Government Units part (8420.0910).

*Current rule:* **8420.0270 COMPENSATION.**

This part is relocated to the Compensation to Landowners part (8420.0915).

*Current rule:* **8420.0280 APPEAL FROM BOARD DECISIONS.**

This part is relocated to the Appeals part (8420.0905).

*Current rule:* **8420.0290 ENFORCEMENT PROCEDURES.**

Subparts 1 through 5 were relocated to the Enforcement Procedures part (8420.0900), except Subpart 3c, which was relocated to the Appeals part (8420.0905).

Subpart 6. **Contractor's responsibility when work drains, excavates, or fills wetlands.**

This subpart was relocated to the new Contractor's Notification Responsibility part (8420.0335).

*Current rule:* **8420.0300 MINING.**

This part is relocated to the Activities Under Department of Natural Resources Authority – Mining (8420.0930).

*Current rule:* **8420.0350 HIGH PRIORITY REGIONS AND AREAS.**

This part is relocated to the new High Priority Regions and Areas, part 8420.0835.

*Current rule:* **8420.0400 WETLAND PRESERVATION AREAS.**

This part is relocated to the Wetland Preservation Areas, part 8420.0840.

## **APPLICATION PROCEDURES.**

### **8420.0305 GENERAL APPLICATION REQUIREMENTS.**

The requirements for all applications under this chapter are primarily an edited version of the current 8420.0530, item A, with the addition of information from the current 8420.0530, item B. The information required to be included in all applications is essential to processing applications under the Rule, and should be readily available to applicants.

**Item C** is modified from language in the current replacement plan part (8420.0510, subpart 2) that was added to emphasize that the applicant can seek assistance from the LGU without submitting an application. This provision allows for flexibility on the part of a landowner and LGU to evaluate the feasibility of a potential project without going through the full cost of developing a complete application and review by the LGU.

### **8420.0310 WETLAND BOUNDARY OR TYPE APPLICATIONS.**

The language from the current 8420.0225, item A was re-worded to better reflect the current technical requirements of wetland delineation reports and documentation. The list of requirements in the current rule is not comprehensive and has not been updated to reflect advances in science. The proposed language avoids a static list of requirements and replaces it with Board submittal guidelines that can be updated based on future scientific advances. The language also provides flexibility to apply for and make these decisions independent of any other application. But if an applicant has a valid wetland boundary or no-loss decision, then it may be incorporated into a subsequent application. This flexibility provides an opportunity to develop essential information that a landowner may want to have prior to making an investment in a proposed project.

### **8420.0315 NO-LOSS APPLICATIONS.**

The first 2 paragraphs of the current 8420.0220 were moved to this part and re-worded. Landowners have two application options under the proposed rule, a standard no-loss decision or an on-site no-loss decision. This addition is made to be consistent with 8420.0255, subparts 3 and 4 (Local Government Unit Application and Decision Procedures). This part clarifies the submittal requirements for a no-loss application and gives the LGU flexibility as to whether or not an application warrants a wetland delineation or functional assessment. The language on record retention was moved to 8420.0200 (Determining Local Government Unit; Duties). The language regarding Minn. Stat. 15.99 in the current 8420.0220 was moved to 8420.0255 (Local Government Unit Application and Decision Procedures). Language was added to clarify that a no-loss application can be made to determine if a proposal falls within the scope of the Chapter.

The last sentence is deleted as it is redundant with 8420.0305 General Application Requirements, item C.

### **8420.0320 EXEMPTION APPLICATIONS.**

This part clarifies submittal requirements for requesting an exemption decision from the LGU and makes language changes for consistency and clarity. Landowners have two application options under the proposed rule, a standard exemption decision or an on-site exemption decision.

This addition is made to be consistent with the changes proposed in 8420.0255 (Local Government Unit Application and Decision Procedures, subparts 3 and 4). See this part for more discussion regarding this change. The language on record retention was moved to 8420.0200 (Determining Local Government Unit; Duties) to eliminate redundant language. The language regarding Minn. Stat. 15.99 was moved to 8420.0255 (Local Government Unit Application and Decision Procedures) to eliminate redundant language and ensure consistent application of requirements. The deletions in item B have been moved to 8420.0305 (General Application Requirements), 8420.0255 (Local Government Unit Application and Decision Procedures), and 8420.0240 (Technical Evaluation Panel Procedures).

**Exemption Reporting.** The 2007 Minnesota Legislature directed (in Minn. Stat. 103G.2242, subd. 11(3)(d)) BWSR to develop rules to address concerns over WCA exemptions. The intent of the Legislature in enacting this requirement is to improve the data available on exemptions. Several rule amendments and administrative initiatives are either proposed or currently implemented to improve data on exempt activities, while minimizing the fiscal impact on the state and local governments. These proposals are briefly discussed below.

Amend the Rule to differentiate between “exempt” activities and “unregulated” activities. The current rule identifies some activities that do not impact wetlands as “exempt.” Yet activities that do not impact wetlands are not regulated under WCA, and therefore do not require an exemption. This is contradictory, causes confusion as to what LGUs should report regarding exempt impacts, and contributes to inaccuracies in the data. The proposed rule reorganizes the exemptions so that only permanent impacts to wetlands that do not require replacement are classified as exempt. Activities that do not impact a wetland and temporary impacts are considered in Scope (8420.0105) or as a No-Loss (see No-Loss Criteria 8420.0415). These changes, once adopted will improve the accuracy of data.

Reduce barriers to exemption approvals. The proposed rule will make it easier for landowners to request and receive exemption determinations (8420.0320). The new process will allow LGUs to make on site exemption approvals without a formal application process. All applicable decision notice and appeal processes will apply, but there will be fewer barriers to getting accurate decisions from LGU staff. One goal of this change is to increase the number of approved exemption determinations that will correctly apply the rule. More LGU determinations will improve the quality and completeness of the data on exempt activities.

Require all LGUs to report WCA activities to BWSR. Currently, only LGUs that receive WCA administrative funding are required to report annual WCA activities to BWSR. The proposed rule amendments require all WCA LGUs to annually report their activities to BWSR. This will provide a more comprehensive picture of statewide activity on exempt activities.

Develop an improved reporting form with more detail regarding exemptions. Prior LGU reporting only requested the total number of exemption determinations made by the LGU and the acres of impact. Separate from the proposed rule, BWSR developed a new reporting form for LGU reporting starting with 2008 that requests the number of exemption determinations and acres of impact specific to each individual exemption category. This will improve the precision

of the data, allowing for a comparison of approved impacts under each individual exemption, and across LGUs on a statewide basis.

In addition, to the items discussed above, several options were considered during rule development to address the intent of the legislation in a more comprehensive manner. Each of these are discussed below.

A) Require LGU approval of all exemptions. Under this option, landowners would be required to apply to the LGU and receive approval for an exemption before conducting the activity. Although there are a variety of perspectives among stakeholders regarding this option, BWSR did not seriously consider this option as current statute (Minn. Stat. 103G.2241, subd. 11(c)) precludes mandatory statewide exemption approval.

B) Require landowner notification of exempt activity. Under this option, landowners would be required to provide a written notice to the LGU or BWSR prior to conducting an exempt activity. The proposed rule did include this option at one point, but it was withdrawn due to concerns over conflicts with statute, low quality and incomplete data, inability to enforce and therefore low compliance; and increased LGU and BWSR costs.

C) Statistical analysis by sampling area. Under this option, a comprehensive study would be conducted to generate statistically valid estimates of statewide exempt activity. Existing LGU and enforcement data would be mined as the beginning point for this effort. This option would have the least impact on LGUs and landowners, but would require additional state funds, and further examination to determine how useful the results of this study would be.

BWSR is planning on proceeding with C, following the conclusion of the current rulemaking effort.

#### **8420.0325 SEQUENCING APPLICATIONS.**

The current 8420.0520 Subpart 2 was relocated here and edited to reflect the proposed changes to that part of the rule. Onsite sequencing for small impacts was problematic and contradictory to other rule provisions because some type of written documentation is still required in order for a decision to be made and appealable, so the provision was eliminated. Language was added to make requirements for a separate application for sequencing consistent with those under a replacement plan application. Language was added to allow LGUs to provide on-site sequencing advice without making a formal decision.

#### **8420.0330 REPLACEMENT PLAN APPLICATIONS.**

This part now includes separate subparts for application contents and approval conditions primarily to differentiate between application requirements that are essential to review an application from those that can be provided after approval but prior to impacting the wetland. These items are mingled in the current rule and separation will improve clarity. Additionally, some items were modified to make the requirements applicable to all actions eligible for credit, not just wetland creations to improve conformance to program standards and uniformity in their use.

Subpart 1. **Requirement.** This subpart requires replacement plan approval from the LGU prior to impacting a wetland. This requirement will help ensure that program requirements for avoidance, minimization, and replacement are met as required by this chapter. This is necessary in evaluating a replacement plan and to ensure rule requirements are met.

Subpart 2. **Pre-application conference and site visit.** The current 8420.0520, Replacement Plan Procedures subpart 2 is proposed to be relocated to this subpart.

Subpart 3. **Application contents.** The deleted language in this subpart is proposed to be relocated to 8420.0305 (General Application Requirements).

**Item A** identifies the information that must be included in a replacement plan application regarding the wetland that is proposed to be impacted. The deleted language is relocated to 8420.0305 (General Application Requirements). The additional requirements of the amount of wetland proposed to be impacted, and its location is necessary to determine replacement requirements. Sub-item (7) provides documentation that sequencing has been met. According to statute and this rule, wetland impacts must first be avoided, and then minimized prior to evaluating replacement of unavoidable impacts.

**Item B.** Numerous changes are proposed to increase language clarity and consistency when project specific replacement is proposed in the replacement plan. The new sub-items (1) through (6) in the current rule (8420.0530, Item D) have been edited for consistency and concurrently deleted later in this item. The new sub-item in (11)(a) is added to make sure that replacement requirements are consistent and that landowners are aware of the responsibility that replacement must occur prior to or concurrent with the impact as required by statute. Failure to replace impacts in advance or concurrent with the impact may result in enforcement action and/or affect replacement requirements.

**Item C** establishes application requirements for when wetland bank credits are proposed to be used as the required wetland replacement. The information requirements are different from those in item B as the replacement credits have been developed prior to the proposed impact.

**Item D.** This language provides a direct connection to the wetland replacement requirements and standards (8420.0522). This explicit connection will help manage expectations and reduce conflicts in the replacement plan review, approval, and monitoring process. This is because compliance with the replacement standards will determine the time and expense that will be incurred by a landowner and LGU in complying with these rules.

Subpart 4. **Approval conditions.** **Item A** makes a reference to the financial assurance provision of 8420.0522, subpart 9, unless waived by the LGU. **Item B** was relocated from the current 8420.0530, item D. **Item C** establishes the requirement that there must be confirmation that wetland bank credits have been withdrawn prior to an authorized impact. This requirement is to ensure the replacement requirements of this chapter are met.

### **8420.0335 CONTRACTOR'S NOTIFICATION RESPONSIBILITY.**

This rule part is proposed to be relocated from the current 8420.0290 as it is a not an enforcement procedure, but a notification procedure between the landowner, contractor and local government unit.

Contractor is defined for this part, rather than in the definitions as nowhere else is this term used in the WCA rule. The definition is unchanged from the current rule (8420.0110, subpart 10a). The remaining proposed changes are to consistently use the term contractor and revising the requirement of BWSR to develop a form. The detail on what the form should include is proposed to be deleted as it is unnecessary for purposes of implementation of this requirement.

### **BOUNDARY OR TYPE, NO-LOSS, AND EXEMPTION STANDARDS.**

#### **8420.0405 BOUNDARY OR TYPE.**

Subpart 1. **Wetland boundary.** This subpart is relocated from the current 8420.0510. The Corps has developed regional supplements to be used in association with the 1987 Wetlands Delineation Manual. The addition of a specific reference to regional supplements and updates is intended to clarify WCA's use of these for wetland determination and delineation purposes, to ensure that WCA keeps up with the advances in wetland science and practice that is offered by these updates, and to maintain consistency with the Clean Water Act, Section 404 Program.

Subpart 2. **Wetland type.** This subpart is relocated from the current 8420.0510. The Corps no longer uses the U.S. Fish and Wildlife Circular 39 or Classification of Wetlands and Deepwater Habitats methodologies for wetland classification and now uses the Wetland Plant Community classification, as does the Wetland Mitigation MOU signed by the Corps and BWSR. This plant community based classification is introduced in table form to allow for better coordination between WCA and the Corps. BWSR considered eliminating references to the Circular 39 methodology and Classification of Wetlands and Deepwater Habitats of the United States (Cowardin et al. 1979) in order to have a single wetland classification system; however, statutory reference to these methodologies prevented this proposal.

The table is inserted here from the current 8420.0549 and modified to reference the wetland plant community classification.

#### **8420.410 NO LOSS AND EXEMPTION CONDITIONS.**

Current language in the Scope of Exemption Standards part (8420.0115) requires that an impact exempted from replacement plan requirements incorporates erosion control, does not block fish activity, and is compliant with all other federal, state, and local requirements. No such language applied to a no-loss determination in the current rule and; therefore, a no-loss approval could have potentially contributed to these problems. For these reasons, the current language from the scope of exemption standards was relocated here to prevent these problems.

Language was added to **item B** because in certain cases it may be desirable to block fish activity while undertaking an exempted or no-loss activity. The proposed language was recommended by the Department of Natural Resources and includes a reference to a recommendation from the

commissioner in order to provide a minimum threshold for using this determination. Without the proposed language, a project intended to exclude a non-native or undesirable fish species from another water body that would otherwise qualify for an exemption or no-loss determination could not gain approval.

#### **8420.0415 NO-LOSS CRITERIA.**

A definition for no-loss was added to this part in order to clarify specifically what a no-loss is intended to mean. Language specifying that activities that do not qualify as a no-loss may require replacement is proposed to be relocated from the current 8420.0520, subpart 5. Location of this language here will reduce confusion and conflicts.

**Item A.** Throughout the no-loss part, the term “activity” was substituted for “impact” and “work” in order to standardize terminology where “activity” is intended to mean an action in a wetland that, if conducted properly, does not result in a permanent wetland impact.

**Item B.** Beaver dams and blockage of culverts was added to the sediment or debris removal category along with language currently contained in the current 8420.0122, subpart 5. Currently, removal of beaver dams and culvert blockages are only allowed through the use of the incidental wetland exemption. Both beaver dams and culvert blockages are generally considered to be temporary non-permanent conditions and therefore removal of these obstructions is not considered a permanent wetland impact. Relocating the beaver dam and culvert blockage language from the incidental exemption to the no-loss criteria does not result in substantive programmatic change, but it does add clarity to the rule by placing activities that do not result in a permanent impact to wetlands under the umbrella of no-loss.

**Item C.** Language was added to clarify the intent of this part to include maintenance or management activities, conducted as part of a seasonal or temporary activity. This increased specificity will help ensure the intent of the statute and rule by identifying what can be conducted under this provision.

**Item D** in the current rule (8420.0220) was deleted because it pertained to areas that would not be identified as wetland, or areas where wetland replacement would have already been required in order to establish the surface impoundment. Therefore, this no-loss category was found to be unnecessary and was omitted. The “new” item D is item E in the current rule that was edited to clarify intent and proposes no substantive change.

**Item E** is the re-organized item F in the current rule without change.

**Item F.** This new item introduces activities to the no-loss part associated with utilities that do not result in permanent wetland impacts. This language is located in the utilities exemption (current 8420.0122, subpart 6); however, because the activity specified could not result in any additional wetland impact, and has been relocated in the no-loss part. This relocation does not alter WCA jurisdiction and was done for organizational purposes and to ensure that data reported by LGUs on exemptions only includes permanent wetland impacts.

**Item G.** This new item introduces activities to the no-loss part associated with temporary forestry activities. The temporary forestry activity language is located in the forestry exemption (current 8420.0122, subpart 7); however, because the activities specified do not result in permanent wetland loss, and has been relocated in the no-loss part. This relocation does not alter WCA jurisdiction and was done for organizational purposes and to ensure that data reported by LGUs on exemptions only includes permanent wetland impacts.

**Item H** is currently contained in the no-loss part; however, the actual implementation language was contained within the sequencing part of the current 8420.0520, subpart 5. Because the impact rectification language was utilized specifically by the no-loss part the implementation language should be located here as well. This relocation of current language does not alter WCA jurisdiction and was done for organizational purposes only. An option to extend the six-month timeline was added to allow for unique circumstances.

Sub-item (4) has been relocated from the current rule at 8420.0520, subpart 5B.

#### **8420.0420 EXEMPTION STANDARDS.**

Subpart 1. **Scope.** Language is proposed to be added to clarify that exemptions are wetland impacts that are exempted from the replacement plan requirements of WCA rather than activities exempted from WCA regulation which is consistent with statute. Other changes to this subpart reorganize current language to make the subpart more concise and understandable.

The requirements in the list under item A are currently in 8420.0115 with the exception of sub-items (2) and (3) which are currently in 8420.0720 and 8420.0530, respectively. This reorganization and relocation of current language does not add or remove any WCA jurisdiction and was done for organizational and clarification purposes.

Current requirements for all exempt impacts were relocated to the new No-Loss and Exemption Conditions (8420.0410).

**Item C** is proposed to be relocated from the drainage exemption (current 8420.0122, subpart 2) in order to keep the consistent with every other permanent and emergency rule to date. This language was inserted in statute in 2007, relocated to the drainage exemption and, inadvertently omitted from the agricultural exemption during exempt rule development. This relocation will make the permanent rule consistent with WCA purpose, provide for simplification and clarification, and protect the integrity of agriculture exemptions by preventing potential abuses of these exemptions for non-agricultural projects.

Subpart 2. **Agricultural activities.** No substantive changes are proposed to **items A or B**. Changes are intended to clarify intent and implementation. The deletion of the landowner affidavit has been replaced by other applicable documentation to acknowledge that there may be information in addition to the landowner's affidavit that can be used as evidence for this exemption.



Former item C was moved to Scope (8420.0105) because activities covered by this exemption are not regulated by WCA and therefore, no exemption from replacement plan requirements was necessary. Inclusion of an exemption for “normal farming practices” implied that WCA regulated the use of the bed of a wetland during dry periods for cropland. Current statute clearly states that WCA does not regulate these activities and therefore, retaining this exemption would cause a conflict with current statute. This relocation of current language does not add or remove any WCA jurisdiction and was done for organizational and clarification purposes and to ensure that data reported by LGUs on exemptions only include permanent wetland impacts.

Changes to the new **item C** were made in order to make the exemption more consistent with statute and increase clarity. Minimization language was included (from the forestry exemption) in order to limit potential wetland loss from the use of this exemption.

New **item D** was relocated to the agricultural exemption subpart from Scope (8420.0105). Filling for wheeled irrigation booms can result in permanent wetland impact which is not subject to the replacement requirements; therefore, this action is better addressed as an exemption.

Subpart 3. **Drainage.** The drainage exemption subpart has been re-organized to include a drainage maintenance or repair section and a drainage enhancement section. Modifications to this subpart are primarily related to reorganization of the subpart and clarification of current language. Two exceptions are the addition of a new **item C** which requires stabilization of dredged spoil resulting from exempted actions and relocation of former item H regarding land use conversion language to the scope of exemption standards part referenced above.

Subpart 4. **Federal approvals.** No substantive changes are made to the federal approvals exemption; however, language was added to clarify intent and implementation of the exemption and improve conformance with statute.

Subpart 5. **Restored Wetlands.** No substantive changes are made to the restored wetlands exemption; however, language was added to clarify intent and implementation of the exemption. The deletion of affidavit has been replaced by other applicable documentation to acknowledge that there may be information in addition to an affidavit that can be used as evidence for this exemption.

The current incidental wetlands exemption was relocated to Scope (8420.0105) and No-Loss Criteria (8420.0415). Rationale for this action can be found in those parts.

Subpart 6. **Utilities; public works.** As discussed in the no-loss part, portions of the utilities exemption that did not result in permanent wetland impact were relocated to No-Loss Criteria (8420.0415). Other changes to this exemption were limited to clarification of intent and implementation and do not include substantive changes to current rule. The new language referring to expansion of sewage treatment systems is intended to ensure the exemption is used for repair or updating, and not to increase capacity.

Subpart 7. **Forestry.** The temporary forestry activities language has been relocated to No-Loss Criteria (8420.0415). Because activities specified in this former exemption did not result in

permanent wetland impact, they are more appropriately addressed under the no-loss provisions. This relocation does not alter WCA jurisdiction and was done for organizational and clarification purposes. The requirement that, to be eligible for the exemption, forest roads be “solely” constructed, and “primarily used,” to provide access for silvicultural activities was added to clarify the purpose of the exemption, which is not applicable for activities other than silviculture.

Subpart 8. **De minimis.** Changes to the de minimis exemption were limited to clarification of implementation by reorganizing the exemption into greater than 80% areas, 50 to 80% areas, and less than 50% percent areas, and including all potential de minimis amounts for each area within each category. The edits reorganize current rule language and are intended to make it easier to determine the applicable de minimis amount for a given project without adding or removing any WCA jurisdiction.

Subpart 9. **Wildlife habitat.** No substantive changes were made to the wildlife habitat exemption.

## **WETLAND REPLACEMENT.**

### **8420.0500 PURPOSE AND REQUIREMENT.**

Subpart 1. **Purpose.** Current language is edited to reflect the new rule organization. No substantive changes are proposed.

Subpart 2. **Requirement.** This subpart was relocated from the current 8420.0510, subpart 1, edited for clarity, and language added to be consistent with statute to clarify that sequencing requirements must be met prior to approval of a replacement plan and to establish the requirement for meeting replacement requirements.

The current 8420.0510, subpart 2 was relocated to 8420.0330 Replacement Plan Applications, subpart 2.

Subpart 3. **Alternative evaluation methodologies.** This subpart was relocated from the current 8420.0549, subpart 6. No substantive changes are proposed.

*Current Rule:* **8420.0510, Subpart 3. Evaluation.** This subpart was split up and relocated to three different rule parts, as follows: the first two sentences are relocated to 8420.0200, subpart 2 (Determining Local Government Unit; Duties); the 3<sup>rd</sup> and 4<sup>th</sup> sentences are relocated to 8420.0405 (Boundary or Type); and the last sentence is relocated to 8420.0240, item C (Technical Evaluation Panel Procedures).

### *Current Rule:* **8420.0505 PREVIOUSLY APPROVED DETERMINATIONS.**

This part is relocated to the new Previously Approved Applications part (8420.0265).

### **8420.0515 SPECIAL CONSIDERATIONS.**

The Special Considerations part (currently 8420.0548) is proposed to be relocated to this location in order to make it clear to applicants up-front that their application must be in conformance with these requirements.

Subpart 1. **Scope.** Language is clarified that applicants must consider the special considerations prior to submitting a replacement plan.

Subpart 4. **Special fish and wildlife resources.** Minor edits are proposed for clarity. The term “impact” is replaced with “effect” in order to provide consistent use of terminology throughout the rule. No substantive changes are proposed.

Subparts 5 (**Archaeological, historic, or cultural resource sites**), 6 (**Groundwater sensitivity**), and 7 (**Sensitive surface waters**). The term “impact” is replaced with “effect” in order to provide consistent use of terminology throughout the rule. No substantive changes are proposed.

Subpart 8. **Education or research use.** This subpart is edited to provide consistent language throughout this part. No substantive changes are proposed.

Subpart 10. **Consistency with other plans.** Local water management plans were added to provide consistency with water resource planning activities by counties and watershed districts, whose local water management plans often include provisions regarding wetlands. “Master” plans were replaced with “comprehensive” plans to be consistent with current planning terminology.

#### **8420.0520 SEQUENCING.**

Subpart 1. **Requirement.** Minor edits are proposed for clarity.

Subpart 2. **Impact avoidance.** Minor edits are proposed to improve clarity and readability. Item C3 from the current rule was deleted as it is unnecessary and rarely used, and in order to treat all wetland types the same to provide consistency with current science. **Item C3(f)** was added to address general site suitability and indirect impacts.

The current subpart 2 (8420.0520) is proposed to be relocated to 8420.0325 (Sequencing Applications).

Subpart 3. **Impact minimization.** This subpart was relocated from the current 8420.0520, subpart 4. Item B was deleted to reduce confusion regarding LGU responsibilities, to provide for a consistent application and approval process, and to eliminate a conflict with Minnesota Statute 15.99. Sequencing applications will be allowed as a stand-alone application, or as part of a replacement plan application. Details on sequencing applications can be found in this SONAR, at part 8420.0325.

Subpart 4. **Impact rectification.** This subpart was relocated from the current 8420.0520, subpart 5. This subpart describes criteria for a no-loss and is proposed for relocation to the No-Loss Criteria part (8420.0415, item H) with a reference to that part provided in this subpart.

Subpart 5. **Determination of reduction or elimination of impacts over time.** This subpart was relocated from the current 8420.0520, subpart 6. Minor edits are made for clarity.

Subpart 6. **Unavoidable impacts.** This subpart was relocated from the current 8420.0520, subpart 7.

Subpart 7. **Sequencing flexibility.** This subpart was relocated from the current 8420.0520, subpart 7a. Items A and B were switched from their order in the current rule as part of the rule reorganization effort to improve readability and clarity. **Item A** (item B in the current rule) includes new language to clarify that sequencing flexibility is requested by the applicant while the authority to grant it remains with the LGU. Language was also added to item A so that a lack of appropriate best management practices cannot be used as justification for sequencing flexibility. Language was added to the first sentence of **item B** (item A in the current rule) to clarify what “sequencing flexibility” actually means.

Subpart 8 **Wetlands on cultivated fields.** Language was added to clarify that the landowner must provide documentation in order for the LGU to verify that the notice has been recorded.

*Current Rule: 8420.0520, subpart 9. Calcareous fens.* This subpart is proposed to be deleted as regulation of impacts to calcareous fens is covered in 8420.0935 (Standards and Criteria for Identification, Protection, and Management of Calcareous Fens).

#### **8420.0522 REPLACEMENT STANDARDS.**

This part was relocated here from the current 8420.0103 and renamed.

Subpart 1. **General requirement.** This language was relocated here from the current 8420.0549, subpart 1 in order to establish a direct tie between the requirement that wetland replacement replace lost public value and the requirement that the public value of wetlands must be based on the functions of wetlands. This will improve clarity and compliance with statutory intent.

Subpart 2. **Determining impacts of partial drainage.** This subpart was relocated from the current 8420.0549, subpart 5. Edits were made to clarify the intent of the requirement, which is to determine the amount of “impact” rather than the amount of replacement. Language regarding the determination of the amount of impact for partially drained areas was changed from an “assessment of the wetland functions” to an “assessment.” This change was made because the technical determination of wetland area remaining after partial drainage is typically a result of lateral effect estimates, hydrology studies, or other similar methods in addition to or in place of a wetland functional assessment. The change will allow more flexibility in determining the appropriate assessment method(s) for the particular site conditions. The language has also been changed to require the assessment be “acceptable” to the TEP rather than chosen by the TEP. This change is consistent with current use and practice in which the applicant, with input from the TEP, provides the information for the LGU and TEP to review, rather than the TEP actually choosing and performing the assessment.

Subpart 3. **Replacement ratios.** The determination of replacement ratios described in this subpart incorporates language from current 8420.0549, subparts 4a, 4b, and 4c. Consistent with input from stakeholders and BWSR staff, the process to determine replacement ratios has been

simplified as compared to the current rule. Rather than beginning at a base ratio of 1:1 or 2:1 and increasing the ratio based on penalties, the proposed language begins at a ratio of 1.5:1 or 2.5:1 and provides incentives to lower the ratio. This does not change the minimum or maximum replacement ratios in the current rule but, rather, provides an incentive-based system for achieving replacement in a way that is easier for applicants to understand.

The current rule utilizes three criteria to determine the ultimate replacement ratio, with a .25:1 penalty for non-compliance with each. Those three criteria are “in-advance, in-place, and in-kind.” Current part 8420.0548, subpart 4a defines in-advance. For purposes of determining replacement ratios, a reduction in the ratio for in-advance can only be achieved in the proposed rule when that replacement consists of wetland bank credits. For project-specific replacement, a reduction in the replacement ratio is not granted for in-advance since the standard was rarely used by applicants and difficult to administer and enforce by LGUs. This allows for substantial simplification of the process for determining replacement ratios and the tables that summarize it. Current part 8420.0548, subpart 4b defines in-place. That language has been deleted and relocated to this subpart by adding the watershed and bank service area concepts into **item A**, and by relocating the current 8420.0549, subpart 4b, items A and B. These organizational changes help to clarify and simplify the rule.

For purposes of determining replacement ratios, the in-kind criteria will only apply to project-specific replacement. Tracking replacement wetland credits and transactions within the state wetland bank by plant community type has resulted in substantial complications for applicants in finding appropriate replacement, for bank owners in selling credits, for LGUs in implementing WCA, and for BWSR in administering the bank. Removal of the in-kind criteria from consideration when banking credits are used as replacement will significantly simplify the process, remove a disincentive to use wetland bank credits to provide required replacement, and remove a disincentive for individuals who may become wetland bankers in the future. The intent of the in-kind criteria is to achieve functional replacement and, thus, replacement of lost public value, particularly for difficult to replace wetlands when those wetlands are impacted. However, the .25:1 replacement ratio increase is not sufficient to incent establishment of difficult to replace wetlands, and other options are needed to achieve the in-kind intent.

For wetland banking, that intent will be achieved through a greater emphasis on wetland planning, upfront site selection, connectivity with other resources, and other concepts consistent with a watershed approach to wetland replacement as described elsewhere in the rule. These other concepts include a reduced amount of credit allowed for created wetlands (see the Actions Eligible for Credit part-8420.0526). Reduced credit for created wetlands, combined with a greater emphasis on replacement within the watershed or bank service area, will create an incentive for wetland restorations in watersheds, which are nearly always in-kind from a watershed perspective. Additionally, wetland planning efforts will now be required to identify, prioritize, and pursue functionally beneficial replacement sites within watersheds (see the Comprehensive Wetland Protection and Management Plan part, 8420.0830). BWSR will also, to the extent practicable utilize the road replacement program to target replacement wetlands of types and locations that have been disproportionately lost in the affected watershed and/or are difficult to replace, that would provide the greatest functional benefit, and that are consistent with a watershed approach to wetland replacement. Targeting these replacement wetlands will

not only result in the desired replacement through the road replacement program, but also in private banking as unsuccessful applicants often choose to pursue their projects outside of the road program. The proposed changes to in-kind will significantly simplify the process for determining replacement ratios, making it easier for applicants to understand and for LGUs to implement. Those changes, combined with changes in other parts of the rule, will also better achieve the intent of the in-kind provision. In-kind criteria are discussed in greater detail under subpart 4 below.

The current rule prescribes a .25:1 penalty for non-compliance with each of the three replacement criteria as described above. The proposed language provides for substantial simplification by allowing a .5:1 reduction for meeting two of the criteria (in-place and in-advance for replacement via banking, and in-place and in-kind for project-specific replacement). This proposed language also provides greater incentive for watershed-based replacement (within the major watershed or bank service area) which is consistent with the watershed approach of the federal mitigation rule and current science.

**Items C and D** have been relocated from the current 8420.0546. **Item E** has been relocated from the current 8420.0549, subpart 4b item C.

Subpart 4. **In-Kind wetland replacement.** 8420.0548, subpart 4c of the current rule defines replacement as in-kind when it is the same type as the impacted wetland, with type referring to the plant community. Current science, including a National Academy of Sciences report on mitigating wetland losses, suggests that an automatic preference for on-site and in-kind replacement (same plant community) can and has led to poor quality replacement wetlands. A focus purely on plant communities may not take into consideration other factors, such as hydrology and landscape position, which will ultimately affect the type of plant communities that will occur in the long term. Furthermore, plant communities have often been used as a surrogate for function in wetland regulation, however, literature and experience suggests that plant communities can in fact be a poor surrogate for wetland function. As such, the proposed rule provides for a watershed approach to determining in-kind, with flexibility to allow for plant communities to be used as the in-kind criteria if desirable or in the absence of other information. Specifically, sub-item 1 adds language that recognizes the historic, natural wetland type should be considered in-kind in the case of degraded wetlands; sub-item 2 allows for use of hydrologic conditions and landscape setting (which strongly influence the ultimate plant community and determine wetland function to a large degree) as in-kind; and sub-item 3 allows types that have been significantly lost in the watershed or important to the watershed according to the TEP and/or watershed planning efforts to be considered in-kind. Sub-items 2 and 3 are consistent with a watershed approach to wetland replacement, will add flexibility to the process, and should result in higher quality replacement and better replacement of lost public value. See subpart 3 above for additional discussion on in-kind and replacement ratios.

Subpart 5. **Ecological suitability and sustainability.** This subpart contains both new language and language that is relocated from other parts of the current rule and edited. **Item A** was relocated from the current 8420.0540, subpart 2, item A, with language added from the current 8420.0543, item D(1). **Item B** is relocated from the current 8420.0547, subpart 2 with language added regarding ecological suitability in relation to desired functions and adjacent land use, and

the last sentence relocated from the current 8420.0543, item D(3). **Items C and D** are new and add concepts to the rule consistent with a watershed approach to replacement. All of the concepts in this subpart are similar and located together for effectiveness and efficiency. Locating them together will also highlight their importance. Taken together, these provisions provide greater emphasis on up-front site selection and consideration of the factors that directly affect the quality, biological diversity, and long-term sustainability of wetland replacement in order to better replace the public value lost to wetland impacts.

**Subpart 6. Required upland buffer.** This subpart establishes a new requirement for upland buffers to be established around all replacement wetlands. One of the goals of this rulemaking is to improve the quality of replacement wetlands, thus better meeting the statutory requirement to replace the public value lost to wetland impacts. Buffers are vital to the function and sustainability of wetlands, and requiring buffers is possibly the single most effective step that can be taken to improve the quality of replacement wetlands. **Item A** establishes the requirement; item B provides the minimum and average widths; and item C provides for flexibility when the requirement is not practicable or feasible, or when varying from it would be ecologically beneficial. The minimum width of the buffer necessary to provide and protect a desired function varies from one function to another and is dependent on various landscape and site conditions. However, requiring variable buffer widths based on the particular functions and site conditions would not be implementable, would result in inconsistent application, and would be onerous to applicants and LGUs. As such, a 25 foot minimum/50 foot average width was chosen as a reasonable width to improve wetland function and sustainability without being overly burdensome to comply with. These widths also have precedence in the current rule at 8420.0541, subpart 6. A lesser, 25 foot minimum-average, width was allowed for small wetlands under two acres in size because the wetland to upland ratio decreases as the size of the replacement wetland is reduced. Replacement credit will be granted for qualifying upland buffer according to the actions eligible for credit part (8420.0526). The requirement for upland buffer around replacement wetlands will significantly improve the quality and sustainability of replacement wetlands.

**Subpart 7. Siting of replacement.** The siting requirements contained in this subpart are relocated from current 8420.0543 and reorganized for clarity. General siting requirements are located in **item A**, alternative siting criteria for banking in greater than 80 percent areas are located in **item B**, and siting requirements specific to the seven-county metropolitan area are located in **item C**. Minor wording changes in items A to C improve clarity of intent and consistency with a watershed approach to replacement. **Item D** was added as a reference to 8420.0560 where the public transportation project siting criteria (sub-item 6 of the current rule) were relocated. 8420.0543, items B and C of the current rule are proposed to be deleted as they were inadvertently left in the current rule without pertaining to any current rule provisions. **Item E**, sub-items 1 to 3 are deleted and replaced with a reference to the similar but more detailed ecological suitability and sustainability concepts in subpart 5 to provide a more direct tie to the site suitability requirements of the rule. Language was also added in item E so the cost of replacement credits alone is not sufficient reason to seek a lower siting priority. This addition will improve market confidence so that wetland bankers are more likely to establish bank credits in the bank service areas where the replacement is needed, rather than creating them where it is least expensive. This addition will also provide greater consistency with a watershed approach

for wetland replacement and to better replace the public value lost to impacts within specific bank service areas.

**Subpart 8. Timing of Replacement.** The requirements contained in **items A and C** were relocated from the current 8420.0540 and reworded for clarity. The option in the current rule to complete replacement after the wetland impact if an “irrevocable bank letter of credit or other security” is submitted to the LGU has been removed as it was rarely used, is inconsistent with federal policy, and is unnecessary because replacement via banking is always an option. A requirement was added, however, for submittal of a financial assurance to the LGU for replacement that is not in-advance, as discussed in subpart 9. **Item B** was relocated from the current 8420.0549, subpart 4a and reworded for clarity. The language in sub-item 2 was modified so the specific requirement in the current rule regarding hydrology and vegetation was replaced with the submittal of the first required monitoring report and achievement of the replacement standards applicable to that specific site and development stage. These two timeframes are similar, but the proposed language is clearer to applicants and LGUs as to when the replacement actually meets the in-advance criteria, providing a clear decision point and criteria for the decision specific to the particular site and type of wetland being established.

**Subpart 9. Financial assurance.** This subpart requires a financial assurance to be submitted to the LGU, in an amount and form determined by the LGU, for project-specific replacement that is not in advance. Improving the quality and biological diversity of replacement wetlands was identified as an important goal of the rulemaking process by BWSR staff and stakeholders. Many LGUs reported difficulty in obtaining satisfactory monitoring, vegetative establishment, and maintenance of replacement sites after initial construction. BWSR staff and stakeholders identified a financial assurance as the most effective way to ensure applicant compliance with replacement standards and to achieve adequate replacement of lost public value as required by statute. The current rule requires a financial assurance for wetland creations and for all replacement that is not accomplished at least concurrent with the impacts. The proposed language treats all actions eligible for credit the same for purposes of requiring a financial assurance and adds successful replacement as the standard. The financial assurance is required until the replacement is successful. This provides an incentive for applicants to fulfill their replacement responsibilities. If the LGU determines that a financial assurance is not necessary to ensure successful replacement, the LGU can waive the requirement. This allows flexibility in situations where the LGU has a high degree of confidence in the action being taken, or the applicant, in achieving successful replacement of the public value lost to the wetland impact. The language also provides a process for the use of the financial assurance and an opportunity to appeal actions taken by the LGU regarding the financial assurance.

***Current Rule: 8420.0530 REPLACEMENT PLAN COMPONENTS.***

This part is relocated to the Replacement Plan Applications part 8420.0330.

***Current Rule: 8420.0540 REPLACEMENT PLAN EVALUATION CRITERIA.***

Subpart 1 is relocated to the Wetland Replacement Purpose and Requirement part 8420.0500, subpart 2.

Subpart 2, item A is relocated to Replacement Wetland Construction Standards part 8420.0528, subpart 3, item A, and edited there.



Subpart 2, items B and C are relocated to the Actions Eligible for Credit part 8420.0526, subpart 1, item D.

***Current Rule: 8420.0541 ACTIONS ELIGIBLE FOR CREDIT.***

This part is relocated to the new Actions Eligible for Credit part 8420.0526.

***Current Rule: 8420.0542 TIMING OF REPLACEMENT.***

This part is relocated to the Replacement Standards part 8420.0522, subpart 8.

***Current Rule: 8420.0543 WETLAND REPLACEMENT SITING.***

This part is relocated to the Replacement Standards part 8420.0522, subpart 7.

***Current Rule: 8420.0545 PRESETTLEMENT WETLAND ACRES AND AREAS.***

This part is relocated to the new Presettlement Wetland Acres and Areas part 8420.0117.

***Current Rule: 8420.0546 SIZE OF REPLACEMENT WETLANDS.***

This part is relocated to the Replacement Standards part 8420.0522, subpart 3.

***Current Rule: 8420.0547 OTHER REQUIREMENTS.***

Subpart 1 has been deleted as it is redundant with provisions requiring establishing native vegetation in Replacement Wetland Construction Standards (8420.0528).

Subpart 2 of is relocated to the Replacement Standards part 8420.0522, subpart 5.

***Current Rule: 8420.0548 SPECIAL CONSIDERATIONS.***

This part is relocated to the new Special Considerations part 8420.0515.

***Current Rule: 8420.0549 EVALUATION OF WETLAND FUNCTIONS AND VALUES.***

This part is relocated as follows:

Subpart 1 is relocated to the Replacement Standards part 8420.0522, subpart 1;

Subpart 2 is relocated to the Boundary or Type part 8420.0405;

Subpart 3 is relocated to the Replacement Standards part 8420.0522, subpart 4;

Subpart 4 is proposed to be deleted as it is unnecessary.

Subparts 4a, 4b, and 4c are relocated to the Replacement Standards part 8420.0522, subpart 3;

Subpart 5 is relocated to the Replacement Standards part 8420.0522, subpart 2;

Subpart 6 is relocated to the Replacement Standards part 8420.0522, subpart 3;

subpart 7 is proposed to be deleted as the processes for review of wetland replacement plans in parts 8420.0500 to 8420.0550 adequately address all possible wetland replacement projects.

Subpart 8 is relocated to the Wetland Replacement-Purpose and Requirement part 8420.0500, subpart 2.

***Current Rule: 8420.0550 WETLAND REPLACEMENT STANDARDS.***

This part is relocated to the new Wetland Replacement Construction Standards part 8420.0528.

***8420.0526 ACTIONS ELIGIBLE FOR CREDIT.***

The proposed changes in this part include the elimination of public value credit (PVC) and conversion to a single credit system. Many of the changes are proposed to provide more

consistency between the WCA Rule and the Wetland Mitigation MOU signed by BWSR and the Corps on May 20, 2007.

Subpart 1. **Scope. Item A** deletes “Or wetland banking credit” because it is redundant. The new language clearly states that sufficient information must be submitted by the applicant to the LGU to determine credit. **Item B** clarifies how credit is determined and the process the LGU must use if allocating less credit than the amount requested by the applicant, which will improve applicant certainty, still allow LGU flexibility when warranted, and retain LGU decision-making authority. **Item C** provides a tie to the requirement for the establishment of upland buffers around replacement wetlands found in 8420.0522, subpart 6. The language in **item D** is relocated from current part 8420.0540, subpart 2, with a clarification that wetland violations are not eligible for replacement credit as allowing credit for restoration of violations would encourage violations, reduce the effectiveness of enforcement, and contribute to a loss of wetlands.

#### Subpart 2. **Buffer areas.**

**Item A** establishes the base credit allocation amounts and criteria allowing for the incorporation of existing wetlands (within the maximum size restriction) to improve wetland connectivity and function. The proposed base credit allocation (10-25 percent) is consistent with the Corps and reflects the switch to a single replacement credit system.

**Item B** establishes the maximum area of buffer for which credit can be granted, consistent with the current rule (8420.0541, subpart 6).

**Item C** provides flexibility for the LGU to increase the maximum credit allowed up to 50 percent in instances when it would have a significant public value benefit, and is consistent with a watershed-based approach to wetland replacement. Buffers have tangible benefits to wetlands and is consistent with statute to provide adequate buffers around replacement wetlands. Providing a means to increase buffer credit is intended to create an incentive for landowners to provide more buffer than the minimum amount, particularly when those buffers will significantly improve wetland function and sustainability. See also the discussion on buffers under part 8420.0522, subpart 6 of this SONAR.

Subpart 3. **Restoration of completely drained or filled wetland areas.** The words “or filled” were added to clarify that filled wetland areas are also eligible for credit if restored. Language was also added to clarify that both natural hydrology and vegetation must be restored. The last sentence clarifies that the goal of the vegetative management plan should be restoration of native vegetation at the wetland replacement site. Restoring native vegetation is a consistent with statute and an important goal to meet the habitat functions that wetlands provide.

Subpart 4. **Restoration of partially drained or filled wetland areas.** The changes to this subpart accommodate the proposed conversion to a single credit system and recognize degradation and functional gain in credit allocation. It sets a base credit amount of 50 percent for partially drained wetlands, with an allowance for additional credit for partially drained farmed wetlands, recognizing the additional level of degradation and the additional functional benefits

that would accrue from restoration of partially drained and farmed wetlands. The proposal acknowledges that wetlands that are regularly disturbed by farming have reduced function that warrants a proportionately higher level of credit than those not farmed.

**Subpart 5. Vegetative restoration of farmed wetlands.** The changes are intended to clarify the intent of this subpart to apply only to farmed wetlands that have not been partially drained. Partially drained wetlands (regardless of farmed status) should use subpart 4 for credit allocation. The changes are consistent with the proposed conversion to a single credit system and attempt to simplify the applicability of this subpart by specifying an applicable credit ratio rather than a sliding scale. With the exception of item B, this will treat all eligible farmed wetlands the same which will prevent an unintended bias in credit allocation for drier wetlands.

**Item B** provides flexibility to allow a greater credit amount (up to 90 percent) based on cropping history in select bank service areas, and was added for the following reasons: much of the intent of this provision is to allow credit for restoration of flat, farmed wetlands in the northwest. These farmed wetlands are functionally very different than farmed wetlands in other parts of the state with greater variations in topography (i.e. temporarily flooded basins). In addition, regular tillage of the flat wetlands in these areas has a greater impact on early season hydrology due to topographic and soil conditions and the increased evaporation that results, often effectively removing wetland hydrology and function. A higher frequency of tillage of these flat wetland areas typically results in a higher degree of hydrologic manipulation. Farming of these flat wetland areas also can have greater impacts to water quality due to increased wind erosion and runoff than is the case with farmed basins. Thus, additional credit should be allowed to account for the additional degree of degradation and increased gains in function resulting from restoration.

**Subpart 6. Protection of wetlands previously restored via conservation easements.** This subpart has been reworded to provide additional clarity. The provision for allowing credit for buffer areas as part of this subpart was removed for simplification, as credit for buffers will be provided under subpart 2. A provision was added to allow for credit allocation according to other applicable actions eligible for credit if that eligibility can be sufficiently documented. This maintains the current streamlined process but allows flexibility when another action eligible for credit is more appropriate and can be documented.

*Current Rule: 8420.0541, subpart 8, Restoration of wetland vegetation.* This subpart is proposed to be deleted because the requirements are difficult to achieve; it is rarely utilized due to the relatively low credit yield; the maintenance timeframe in the current rule is unclear and has been interpreted anywhere from 5 years to perpetual; the provision allows for replacement of permanent impacts with temporary management activities, which can lead to a long-term loss of public value; and the subpart only allowed for PVC, which is eliminated under the proposed rule. Restoration of permanent wetland vegetation for replacement credit will still be allowed under the proposed rule when the site is degraded and lacking vegetation (subpart 5, vegetative restoration of farmed wetlands) and as part of a restoration of rare or valuable wetland resources (subpart 8, restoration and protection of exceptional natural resource value), making this subpart unnecessary. Accomplishing vegetative restoration under those subparts will ensure that

vegetative restorations receiving replacement credit will be targeted to areas where they will provide the most functional benefit.

**Subpart 7. Wetland creations.** Select items from current rule 8420.0541, subparts 9 and 10 (“Wetlands established via mineral extraction site reclamation” and “Water quality treatment areas”) are proposed to be incorporated into this subpart to simplify the rule, as they are all wetland creations. In addition, current statutory requirements for “Water quality treatment areas” are effectively the same for any created wetland, so it is reasonable and appropriate to include this provision as a creation. The revised language regarding mineral extraction sites clarifies confusion regarding areas eligible for credit and was relocated here because it refers to a type of creation. Combining these three will simplify the rule, and ensure consistent requirements for all three creation methods.

*Current rule: 8420.0541, subpart 9* items B, C, and D are proposed to be deleted as they are redundant with proposed rule language in the Technical Evaluation Panel Procedures (8420.0240), Replacement Wetland Construction Standards (8420.0528) and Establishing a Wetland Bank Site (8420.0705) parts.

*Current rule: 8420.0541, subpart 10.* Item A1 is proposed to be deleted. The purpose of this requirement was to ensure proper maintenance of single cell or other stormwater management systems that provide primary treatment. Legislative changes in 2007 eliminated the single cell option so the requirement of A1 is no longer necessary. Similarly, item A4 of this subpart was necessary to prevent banking of PVC generated from primary stormwater treatment ponds unrelated to any wetland impact. Statutory changes in 2007 that require stormwater treatment systems to be functioning wetlands in order to receive credit make item A4 unnecessary. Items A2 and A5 are proposed to be relocated to Replacement Wetland Construction Standards (8420.0528). Items A3, A6, A8, and B are consistent with statute and proposed to be incorporated into the new subpart 7 and edited there for consistency and clarity. Item A7 is proposed for deletion because it already applies to all replacement wetlands and is redundant and unnecessary here.

**Subpart 8. Restoration and protection of exceptional natural resource value.** This subpart was reworded to provide additional clarity and detail. The new language defines “exceptional natural resource” consistent with the current Special Considerations part (8420.0548). In addition, some of the new rule language is based on guidance that was approved by BWSR in October 2002 ([http://www.bwsr.state.mn.us/wetlands/wca/Exceptional\\_Natural\\_Resource\\_Value.pdf](http://www.bwsr.state.mn.us/wetlands/wca/Exceptional_Natural_Resource_Value.pdf)). This new language will provide increased direction to the future use of this subpart for generating wetland credit. **Item E** adds a process to identify exceptional resources that may qualify under this subpart that is consistent with the watershed approach concepts in the federal mitigation rule.

**Subpart 9. Preservation of wetlands owned by the state or a local unit of government.** This is a new subpart, added partially in response to a 2008 statute change. It will provide an additional option for replacement credit in the greater than 80 percent pre-settlement wetland areas where there are limited opportunities for credit, and provide a mechanism to preserve high valued wetlands thereby reducing the net loss of wetland quality and biodiversity. The amount

of credit proposed for wetland preservation under this subpart is 12.5 percent (8 acres of preserved wetland to 1 acre of wetland credit) which is consistent with the Wetland Mitigation MOU. To be eligible under this subpart, the wetland must be a valuable resource and under a threat of degradation or loss. Preservation as an action for credit is particularly important for rare or valuable wetland types and functions that are difficult to replace; where replacement can replace the acres of wetland lost to an impact but not the lost function, thus resulting in a loss of public value.

Subpart 10. **Replacement credit conversion.** This language is needed to allow for current wetland bank account holders to convert their PVC to the new single replacement credit system. **Item A** proposes 100 percent credit for existing PVC that has been derived from activities that directly provide wetland functions.

**Item B** proposes to convert existing PVC derived from upland buffer at the slightly lower rate of 90 percent to recognize the difference between adjacent upland buffer and actual wetland. This conversion rate is reasonable due to current rule requirements that allow for the use of PVC at 100 percent for the portion of required replacement above 1:1. In less than 80 percent areas, the practical effect is that PVC has the same replacement value as new wetland credit (NWC). As replacement ratios have increased in the greater than 80 percent areas, the effect has increasingly been the same.

In addition, the reported sale price of NWC and PVC, as a statewide average from September 1, 2006 to September 24, 2008, indicates that the economic value of PVC is within approximately 95% of that of NWC. These reported sale values are consistent with PVC being used to meet replacement obligations similar to that of NWC. Finally, for most actions, the amount of PVC allocated was discounted in the credit allocation process and, thus, does not require further discount to convert to a single credit system.

#### **8420.0528 REPLACEMENT WETLAND CONSTRUCTION STANDARDS.**

This part has been expanded and reorganized from the current 8420.0550 to serve as a single location for replacement wetland design and construction standards. The standards apply to all replacement wetlands, whether project-specific or banking. The language also differentiates between requirements and considerations or recommendations.

Subpart 1. **General requirement.** This subpart was edited for clarity, removing redundant language and providing the standard that proposed replacement plans must meet.

Subpart 2. **Design requirements.** This item was renamed and edited to contain design requirements for the construction of all replacement wetlands.

**Item B** was edited to clarify the requirements for best management practices and erosion control measures.

**Item C** was modified to eliminate the prescription to seed or plant a site when native vegetation is “not likely” to become dominant naturally, and replace it with the outcome-based standard that native vegetation must be established, regardless of the method chosen. Item C also includes the

requirement for replacement and banking plans to include vegetation establishment and management plans to establish plant communities that correspond to the hydrology and landscape position of the replacement site. This will improve the likelihood for success and sustainability of replacement wetland vegetation. The Minnesota Wetland Restoration Guide was referenced for planting stock origin as it provides additional information and greater detail that will be helpful to applicants. Language was added to provide the standard for LGUs to evaluate the vegetation establishment and management plan. Finally, the reference to specific invasive vegetative species was deleted from item C as the list changes as new species are added and it is best to provide those details separate from the rule.

The current item D is deleted as it is covered under item B. The new **item D** (currently item F) was modified to require that bottom contours of replacement wetlands with deeper water regimes be comparable to natural wetlands in the vicinity in order to improve the quality of replacement wetlands.

**Item E** (currently item G) was modified so the edges and slopes of created replacement wetlands will be designed comparable to naturally occurring wetlands, and the slope requirements for replacement wetlands were simplified by providing a single minimum slope requirement of 8:1, which is consistent with Corps requirements.

**Item F** includes two sentences relocated and modified from the current 8420.0541, subpart 10, item A, sub-items 2 and 5 requiring the treatment of runoff prior to discharge and the separation of the treatment system from the replacement wetland, as these requirements apply to all replacement wetlands. Language was added to clarify what “treatment of runoff” means in order to improve implementation of this requirement and provide increased certainty to applicants and LGUs.

**Item G** was relocated from the current 8420.0740, subpart 1, item I(1) to simplify the rule by providing one clear and consistent standard for all replacement wetlands, both project-specific and banking. Applying this standard to project-specific replacement will also improve the quality and sustainability of those replacement wetlands.

Subpart 3. **Design considerations.** This subpart contains design elements that must be considered and utilized to the extent practicable and feasible, but are not required for all replacement wetlands due to site-specific conditions that vary from project to project sometimes making the design elements not necessary or attainable.

**Item A** sets the goal for restored wetlands to be consistent with the natural ecology of the site, but allows flexibility for landscape changes that have made recreating the historical condition impossible. **Item B** was added to improve functional sustainability beyond the minimum requirements when site conditions allow. **Item C** references guidance for managing hydraulic bounce without requiring a single standard as hydrologic conditions naturally vary depending on wetland type and landscape setting. **Item D** was relocated from the current 8420.0550 subpart 2, item E, and includes provisions for organic substrate in replacement wetlands. The language was slightly modified to provide an outcome-based standard of establishment of a functioning wetland and achieving replacement goals, and is included as a design consideration to allow

flexibility for instances where it is desirable to exclude organic substrate in order to achieve an earlier successional stage for the replacement wetland or to prevent the spread of invasive or non-native vegetation.

**8420.0544 REPLACEMENT FOR PUBLIC TRANSPORTATION PROJECTS.**

Changes to this part are largely organizational and grammatical in nature in order to clarify existing requirements.

**Item A** was added to clearly state that public transportation projects must be replaced according to standard WCA requirements, with this part providing the exceptions. **Item B** (the current 8420.0544, item A) was reworded to more clearly communicate the statutory siting requirements for different areas of the state, now separated by sub-item, as the current language is confusing and unclear. The last sentence of the current item A was deleted as it pertains to applications submitted by April 1, 1996 and is no longer relevant. Current item B was deleted as it is covered in the new item A and the replacement procedures described elsewhere in the draft rule, and it is unnecessary language.

**Item C** replaces a partially deleted sentence in item D to clarify the current requirement that a replacement plan must be submitted for new and expanded roads. **Item D** was edited and reorganized for clarity, including additional language to clarify the information required to be submitted for projects, and to clarify that projects that do not follow the process required under this item must be replaced by the responsible road authority. **Item E** was relocated from item C in the current rule, with language added to clarify that the purchase of credits is not allowed when credits are not available. **Item F** was relocated from the current item E. **Item G** was relocated from the current item F. **Item H** was relocated from the current item G. **Item I** was relocated from the current item H, with language added to correspond with the requirements of item D, and a sentence regarding replacement in critical watersheds is deleted as it is confusing, lacks a process for implementation, and is better covered in the replacement standards part of the rule. **Item J** was relocated from the current item I.

*Current Rule:* **8420.0600 MONITORING.**

This part is relocated to the Replacement Wetland Monitoring part 8420.0810.

*Current Rule:* **8420.0610 DURATION OF MONITORING.**

This part is relocated to the Replacement Wetland Monitoring part 8420.0810.

*Current Rule:* **8420.0620 MONITORING ANNUAL REPORT.**

This part is relocated to the Replacement Wetland Monitoring part 8420.0810.

*Current Rule:* **8420.0630 MONITORING DETERMINATIONS BY THE LOCAL GOVERNMENT UNIT.**

This part is relocated to the Local Government Unit Monitoring Responsibilities part 8420.0820.

***Current Rule:* 8420.0650 LOCAL COMPREHENSIVE WETLAND PROTECTION AND MANAGEMENT PLANS.**

This part is be relocated to the Local Comprehensive Wetland Protection and Management Plans part 8420.0830.

***Current Rule:* 8420.0720 Principles of Wetland Banking; 8420.0730 Administration and Management Authority; 8420.0740 Procedures; 8420.0750 Auditing and Monitoring; and 8420.0760 Enforcement and Corrective Actions.**

These parts have been relocated to the new wetland banking parts 8420.0700 to 8420.0760 and edited there.

## **WETLAND BANKING.**

With the exception of part 8420.0700, the entire wetland banking section (8420.0720, 8420.0730, 8420.0740, 8420.0750, and 8420.0760) is reworded and reorganized. The existing language is unclear, contains unnecessary and redundant language that is not always located appropriately or in an intuitive order, and is unnecessarily complicated. The proposed language should substantially clarify and simplify the wetland banking process and requirements for both applicants and LGUs.

### **8420.0700 PURPOSE OF WETLAND BANKING.**

This part is Modifications to the purpose statement reduces ambiguity by specifying that 8420.0700 to 8420.0755 provide standards for the wetland banking system and individual wetland banking sites. Additional changes more clearly convey the purpose of the State's wetland banking system which is to provide a market based system for pre-establishing wetland replacement sites. Wetland banking has been a successful mechanism for private landowners to establish wetland replacement credits that can be used to meet the regulatory requirements of approved wetland replacement plans. This system has been, and is anticipated to continue to be, an efficient private sector solution to compliance with the wetland replacement requirements of WCA. Language was also added to clarify that BWSR is the state entity responsible for management of the bank.

### **8420.0705 ESTABLISHING A WETLAND BANK SITE.**

Subpart 1. **Eligibility of wetland banking.** Clarification is made to inform wetland bank applicants that all bank plans must receive LGU approval before initiating activities related to implementing the wetland banking project. Obsolete language in the current 8420.0740, subpart 1 referencing a July 1993 grandfather clause was deleted to inform potential applicants that this requirement applies to all wetland bank applications. This requirement is essential to ensuring that projects are undertaken with full knowledge by landowners and LGUs, and to ensure that the requirements for establishing a wetland bank site of this part and Replacement Wetland Construction Standards (8420.0528) are complied with.

Subpart 2. **Local government unit and board authority.** Terminology was changed in this subpart describing LGU authority, when approving bank plans, from "certify" to "approve". Current rule 8420.0730, subpart 2, allows LGUs the authority to decline to accept all wetlands



within its jurisdiction for banking. The proposed language allows LGUs to limit the establishment of bank sites only by rule or ordinance based on a BWSR approved plan. This is necessary to provide a public process for making that decision, to inform landowners up-front of the restrictions, and to prevent arbitrary decisions on banking plans. Identifying the limitations through a planning process will ensure that issues relating to resource needs and program implementation are considered prior to enacting the limitations. The remaining language is consistent with Standards and Criteria for State Wetland Banking in the current rule.

**Subpart 3. Application procedures.** Language in this subpart is edited to establish the standards for submitting a banking plan application and to clarify who is required to receive a copy. Consistent with the current rule, the applicant will be required to submit the plan to the Corps to ensure regulatory coordination between state and federal authorities. The remaining language is consistent with the current 8420.0740, subpart 1, item F. A new requirement specified in this rule is for the banking plan to include a credit release schedule. This is generally followed under current practice, but the specific inclusion will improve clarity in the rule by ensuring that all banking plans include this schedule which will outline when credit certification may take place. This will ensure clear expectations for all involved which will result in better quality banking sites and more efficient implementation of the rule.

**Subpart 4. Combined banking and project-specific replacement.** This subpart was added to provide direction to those applicants wishing to combine project-specific replacement with wetland banking. In the current rule, the language discussing the combining of project specific replacement and banking was unclear, resulting in varied interpretations and errors in application procedures by unknowing applicants. The proposed language clarifies that applicants are allowed to combine these two types of wetland replacement projects, but must indicate their intentions early in the process of bank site establishment. It also clarifies that a bank application must be submitted, which would need to identify the credits proposed to be used according to a project-specific replacement plan, prior to deposit in the bank. This requirement will help ensure a smoother regulatory process and avoid misunderstandings and conflicts.

**Subpart 5. Conservation and access easement.** This subpart clarifies that wetland bank easement boundaries must encompass the entire replacement wetland and the associated upland buffer area, unless the LGU and BWSR approve an alternative boundary. Current language (8420.0720, subpart 10) requiring easement boundary posting was moved to this subpart to consolidate language regarding the land area included in a wetland bank. The remaining language is consistent with the current 8420.0720, subpart 8.

**Subpart 6. Time Limits for construction.** This new subpart addresses language in the current 8420.0740, subpart 1, item H. The current requirement to complete the restoration or creation activity within two years was changed to initiate within three years in order to provide a reasonable timeframe to gain any other necessary approvals, complete planning and coordination activities, and to provide consistency with 8420.0255, subpart 4, (Local Government Unit Application and Decisions Procedures) which prescribes a three year window for which an LGU approval remains valid. The proposed rule language also establishes a clear requirement for construction certification to be achieved within five years of bank plan approval. The time frames of three and five years respectively are reasonable for both the applicant and the LGU

required to track these projects from plan approval to deposit of available credits. These requirements will reduce confusion and conflict over bank site establishment.

#### **8420.0725 CERTIFICATION AND DEPOSIT OF CREDITS.**

**Item A** first establishes the requirement for LGU certification of credits prior to deposit into the bank. Current rule language was reworded to better define the processes involved with depositing wetland replacement credits into the bank. Under the proposed rule, the LGU is responsible for certifying credits and BWSR is responsible for depositing the credits. The proposed language also clarifies the process by which the applicant requests certification, the role of the TEP, and the role of the LGU. These clarifications will improve the efficiency of the banking system and reduce conflicts. The review by the TEP must be based on the approved plan and the applicant's compliance with it. Furthermore, the LGU must base their credit certification on the finding and recommendation of the TEP. These specific requirements will help manage the process and ensure that the various rule provisions are substantively connected.

**Item B** identifies the information required to be contained in the certification and request for deposit. The language includes information required in the current 8420.0740, subpart 1, item K, with the addition of the conservation easement and TEP recommendation.

**Item C** is consistent with current 8420.0740, subpart 1, item I, specifying that an initial deposit of credits of up to 15% may be made upon completion of construction. The requirement for the recording of the conservation easement is consistent with the current 8420.0720, subpart 8.

**Item D.** Clarification is provided in this item to inform wetland bank applicants that subsequent deposits, beyond the initial 15%, will incorporate and utilize a credit release schedule and performance standards. In the absence of these two tools, subsequent deposits will continue to be based on the findings and recommendation of the TEP.

**Item E** requires the LGU to forward the signed request for deposit form to BWSR, and specifies that no credits will be deposited until BWSR has received the form. This is necessary in order to establish a clear process for credit certification and deposit. BWSR is required to inform the applicant and LGU of the deposit in order to assure the proper communication of deposits.

**Item F** is partly new language that establishes a process for an applicant to follow if they decide not to pursue a wetland banking project that has already been initiated. This is necessary to provide consistency and reduce conflicts when such instances occur. The language specifying that wetland bank areas wholly or partially deposited into the wetland bank are subject to this chapter is consistent with the current rule 8420.0522, item D, sub-item 6(a).

#### **8420.0735 MONITORING AND CORRECTIVE ACTIONS.**

##### **Subpart 1. Monitoring.**

**Item A** was edited to specify that monitoring of each wetland bank site must occur according to the requirements of 8420.0810. Clarification is also added to inform account holders of the

consequences of not completing the required monitoring. Monitoring of wetland bank sites is necessary to ensure they meet the wetland replacement standards of this rule and statute.

**Item B** modifies a current requirement regarding the periodic inspection of bank sites by BWSR after monitoring has been completed under item A. The language was modified from the currently required 5-year timeframe to allow for inspections by BWSR on an as needed basis. Flexibility on the frequency is necessary to provide BWSR with management authority to inspect sites at a frequency necessary based upon unique site conditions and consistent with established management practices, taking into consideration available staff and financial resources.

Subpart 2. **Maintenance responsibilities.** This subpart is not substantively different from the current 8420.0760, item A.

Subpart 3. **Corrective actions.** This subpart has been reworded and reorganized from, but is not substantively different than, the current 8420.0760, items B to G.

#### **8420.0745 WITHDRAWALS AND TRANSFERS.**

Subpart 1. **General.** This subpart groups current banking credit transaction requirements into one area to improve readability, and to consolidate current rule language addressing use and withdrawal of credits from the current 8420.0720, subparts 6 and 7, and 8420.0740, subpart 2, item B.

Subpart 2. **Withdrawals.** Language under this subpart was reworded to improve readability and to consolidate current rule language from the current 8420.0740, subpart 2, items E and H and 8420.0720, subpart 8a.

Subpart 3. **Transfers.** Language in this subpart was reworded to improve readability and to simplify the current rule language in 8420.0740, subpart 2, item I. A clarification was also made to inform applicants that credit transfers are not final until BWSR establishes a new account for the transferred credits.

Subpart 4. **Reporting credit transactions.** This subpart was expanded from the current 8420.0720, subpart 8a to simplify and better convey the now consistent reporting requirements for all types of credit transactions. This consistency will reduce confusion and delays in the wetland bank account administration process. Language was also added to allow restrictions on withdrawals as a penalty for an account holder failing to report withdrawals to provide a penalty for non-compliance.

#### **8420.0755 BANK ACCOUNT ADMINISTRATION.**

Subpart 1. **Account information.** This subpart consolidates language from the current 8420.0749, subpart 1, items K and L, and subpart 2, item D using updated terminology to describe the information that BWSR must maintain and will provide in response to inquiries for each wetland bank site. This information is reasonably available and necessary for BWSR to provide information on wetland bank sites to potential purchasers of these credits.

Subpart 2. **Administrative Fees.** This subpart corresponds to the current 8420.0720. The requirement is unchanged, however the language was edited to clarify that the account maintenance annual fee applies to years the account is active, that the fees can be used to cover the board's monitoring responsibilities, and that the fees are not deposited in the State's general fund.

Subpart 3. **Audit.** This subpart is identical to the current rule language in 8420.0750, subpart 1, item C.

### **INSPECTION AND MONITORING OF REPLACEMENT WETLANDS.**

The purpose of the changes to the inspection and monitoring parts is to clarify current requirements and processes; provide more incentive for the applicant and LGU to correctly conduct, implement, and enforce monitoring of replacement wetlands; and ultimately to improve the quality and public value of replacement wetlands. This part of the rule is essential to ensuring that the statutory requirement of replacing the public value lost to wetland impacts is achieved via wetland replacement. All changes are modifications and/or clarifications of current rule requirements.

### **8420.0800 REPLACEMENT WETLAND CONSTRUCTION CERTIFICATION**

The replacement wetland construction certification part is a new part that was added to clarify the difference between the initial construction, and monitoring the establishment of a replacement wetland's hydrology, vegetation, and function. It consolidates and adds to language from the monitoring part of the current rule (8420.0600 to 8420.0630) that addresses the replacement wetland upon completion of construction and seeding. This new language provides a more formal review and approval of initial construction activities, and clarifies when and how LGU certification of construction occurs. This clarification will provide more certainty to applicants and a more consistent process for LGUs to follow. The initial activities are also often the most important for long-term success, and corrections are more easily made at this early stage of wetland development when contractors are still mobilized on the site. It benefits the applicant and the LGU to carefully scrutinize the initial restoration activities rather than identifying problems several years after construction when contractors and sometimes landowners have moved on.

Subpart 1. **Purpose.** This subpart establishes the requirement for the LGU to certify that replacement wetland construction is completed in accordance with the approved replacement plan. Language was added to clarify that the LGU may require a pre-construction meeting and that the certification of replacement wetland construction applies to wetland banking and project specific replacement. Providing one construction certification process that applies to both banking and project-specific replacement improves consistency and simplifies administration of the rule.

Subpart 2. **Construction as-built documentation.** This subpart adds to language moved from the current 8420.0620 to establish the requirement for the landowner to provide as-built information to the LGU upon completion of initial construction, and to clearly identify the information required for submittal. This information is reasonably available and necessary for

the LGU to determine if the replacement wetland was constructed in accordance with the approved replacement or banking plan. The added language clarifies responsibilities, provides consistency between LGUs, and improves certainty for applicants.

**Subpart 3. Construction inspection and certification.** This subpart modifies and expands on three sentences relocated from the first paragraph of the current 8420.0630 to establish the requirement for the LGU to inspect the replacement wetland and to clarify the purpose of inspection and certification. The LGU is required to notify the applicant if it determines the construction is not in compliance with the plan. This clarification from the current rule will reduce conflicts and misunderstandings later in the replacement wetland certification process. Clarification was also added so that it is clear that, when a project requires an engineer to certify construction, it is the responsibility of the applicant's engineer and not part of the LGU's certification. A sentence was added stating that the LGU may release a portion of the financial assurance (if obtained) after initial construction certification. This is appropriate as the purpose of the financial assurance is to ensure successful replacement which, in part, is dependent on compliance with the approved replacement or banking plan. The risk of failure of the replacement site is reduced after construction has been completed properly.

#### **8420.0810 REPLACEMENT WETLAND MONITORING**

This part is derived from the current 8420.0600 through 8420.0630 that applied to wetland replacement projects after the certification of construction.

**Subpart 1. Purpose.** This subpart modifies the first sentence of the current 8420.0600. The current purpose, to ensure replacement of lost functions and values, was deleted and replaced with measuring success according to the approved replacement or banking plan. The determination of whether a replacement wetland replaces lost function and value should be made during the review of the replacement or banking plan. Measuring success based on the standards of the approved plan provides both the applicant and LGU with a common set of specific criteria from which to determine success. This helps to clearly define LGU expectations for applicants, provides for a more direct tie to other rule requirements, and more clearly defines LGU duties.

**Subpart 2. Responsibilities.** This subpart adds new language to clarify monitoring responsibilities for applicants and LGUs. **Item A** establishes that monitoring is the responsibility of the landowner, and that any agreement to transfer monitoring responsibilities must be in writing. Requiring a written agreement will ensure proper communication between both parties and the LGU when monitoring responsibilities are transferred. **Item B** allows for transfer of monitoring responsibilities between LGUs when the replacement occurs in a different LGU, through written agreement. The written agreement will ensure proper communication between LGUs and provide documentation necessary for BWSR oversight.

**Subpart 3. Duration of Monitoring.** This subpart modifies and expands on current requirements to provide clear separation between project construction and the start of the monitoring period. Previously construction and monitoring were combined in the current rule, but have been separated in these proposed rule amendments to emphasize the importance of proper construction and seeding prior to the start of the monitoring period (see 8420.0800 Replacement Wetland Construction Certification). The changes also clarify when the monitoring

period begins. Language was added such that monitoring length is referred to in terms of “full growing seasons” rather than “years” as growing season is the relevant factor that determines the progress of a replacement site in meeting the goals of the plan. Further changes have been made to establish a minimum monitoring period to better reflect the realities of replacement success and compliance, while at the same time placing more emphasis on the LGU to be involved in monitoring oversight. This modification recognizes the fact that some replacement wetlands can be fully functional in a short amount of time, that the LGU is the decision maker, and that it is difficult for LGUs to track and enforce monitoring for long periods of time due to staff turnover and landowners that are no longer accessible. Additional responsibility is put on the LGU to justify extension of monitoring beyond the maximum which will require greater involvement by the LGU.

Subpart 4. **Monitoring reports.** This subpart encompasses the current 8420.0620 and adds additional language. **Item A** clearly establishes the requirement for the applicant to submit monitoring reports to the LGU. Language was added to emphasize tying the replacement wetland progress to the goal of the replacement plan. The sentence related to the LGU potentially preparing the monitoring report was struck because it was stated at the beginning of the monitoring part under responsibilities (subpart 2). A specific due date for submittal of monitoring reports was added to clarify and provide certainty for both applicants and LGUs. New language is added that requires the LGU to distribute copies of the monitoring report to the TEP. Providing the TEP with copies of monitoring reports is necessary to accommodate the expanded role of the TEP in monitoring and ultimately to improve the quality of replacement wetlands. A sentence was added specifying that monitoring reports for banks be sent to the BWSR Bank Administrator to improve BWSR’s abilities to effectively provide oversight of banking projects.

**Item B** expands on existing requirements for monitoring report content. Monitoring report requirements were strengthened by adding more specific language, providing a direct tie to the goals and standards of the approved plan, and by requiring landowners to identify the previous year’s activities and activities planned for the next year. The information required to be included in the monitoring report, most of which is required in the current rule, is essential to determining if the wetland is meeting the goals of the plan which are generally dependent on hydrology, vegetation, and area measurements. The clarifications included in item B provide up-front expectations for applicants and will improve the information provided to LGUs in monitoring reports, thereby reducing conflicts and providing the LGU with the information necessary to properly oversee replacement activities.

#### **8420.0820 LOCAL GOVERNMENT UNIT MONITORING RESPONSIBILITIES.**

This part was relocated from the current part 8420.0630.

Subpart 1. **Monitoring Oversight.** **Item A** adds new language to establish the requirement for LGUs to review and evaluate monitoring reports.

**Item B** is substantially re-written from the current 8420.0630 to clarify required actions when replacement is not successful, and how corrective actions can be required or undertaken. The modified language defines the LGU’s responsibility in relation to oversight of monitoring and

emphasizes the purpose of monitoring to ensure that goals of the replacement plan are being met. The option of ordering specific corrective actions was added to allow the LGU to order corrective actions without having to request a new replacement plan or restoration order through the enforcement authority. This authority is a more efficient and cost effective means to ensuring the replacement requirements are met than the alternative of developing a new replacement plan and possibly abandoning the initially proposed replacement site.

**Item C** adds language to clarify LGU duties and the potential penalty to the applicant when monitoring reports are not submitted as required. This ability of the LGU to undertake monitoring when the applicant fails to do so is an essential element to determine if the replacement site meets rule requirements. The ability to finance these costs via fees is reasonable, especially as the landowner can avoid the fees by conducting the work themselves. The ability of the LGU to pursue corrective actions is necessary to provide some penalty for non-compliance and therefore, an incentive for compliance.

Subpart 2. **Certification of successful replacement and completion of monitoring.** This new subpart provides the process for which the landowner requests an evaluation of the success of the replacement wetland. The evaluation of replacement wetland success now includes the TEP in order to utilize the panel's technical expertise in making this purely technical determination. The subpart also requires the LGU to provide written notification to the applicant when the replacement wetland is considered successful and the monitoring requirements have been fulfilled. The language in this subpart will clarify the process for certifying replacement and provide for a clear end to the monitoring period and communication of such to the applicant.

## **WETLAND PLANNING.**

### **8420.0830 LOCAL COMPREHENSIVE WETLAND PROTECTION AND MANAGEMENT PLANS.**

This part has been relocated from the current 8420.0650 in its entirety and edited to increase clarity, improve the focus of planning efforts, provide guidance and structure where little existed before, and provide consistency with the watershed approach to wetland replacement in the Corps/Environmental Protection Agency (EPA) Wetland Mitigation Rule. The overall heading of "Wetland Planning" was added to encompass the local comprehensive wetland protection and management plans, high priority areas, and wetland preservation areas parts of the rule.

Subpart 1. **Purpose and eligibility.** This subpart has been renamed from "General requirements and participation" in the current rule. The bottom sentence in **item A** was relocated from the current item C of this subpart. The new **item B** states that the plan should have a broad watershed and ecosystem focus that will provide a framework for local flexibility under WCA and provides consistency with the Corps/EPA Mitigation Rule. As discussed throughout this SONAR, a priority of the rule amendments is to increase consistency between WCA and the Clean Water Act, Section 404 program.

**Item C** is relocated from the current 8420.0650, subpart 7 and edited to specify that the documentation must demonstrate the ability to implement the plan, which may be more rigorous than the standard provisions of WCA.

Subpart 2. **Relationship to other plans.** Language in this subpart was relocated from the current subpart 3, item G. New language was added to clarify that wetland plans should be coordinated with relevant local and regional plans to promote increased overall local/regional plan consistency as well as consistency with the Corps/EPA Mitigation Rule. A sentence was also added to encourage a tie between watershed-based wetland goals and local land use decisions in order to improve effectiveness. This consistency and coordination will maximize program efficiency, and the efficiency of local governments in managing their natural resources. In addition, program conflicts and landowner confusion and conflicts should be reduced.

Subpart 3. **Plan area.** This new language adds a preference for the plan, or an analysis within the plan, to be developed based on watershed boundaries. This subpart also helps provide consistency with the Corps/EPA Mitigation Rule as some of the language is taken directly from that rule. This direction will provide benefits relating to coordination with other watershed based plans and programs as well.

Subpart 4. **Flexibility options under a local plan.** This subpart was relocated from the current subpart 2 and renamed from the current title of “Plan contents.” The new title will more accurately identify its contents and the new location provides a more chronological order to the plan elements. The majority of the language in this subpart is unchanged from the current rule, with the exception of terminology changes made for overall rule consistency, the removal of language referring to PVC, and the relocation of current items A and H.

*Current Rule:* **Subpart 2a. Project notice and appeal under local ordinance.** This subpart was deleted as it is unnecessary and covered under the new “Implementation” subpart 9 and other rule provisions addressing appeals and noticing for all decisions.

Subpart 5. **Plan content.** This subpart is added to differentiate between the allowable actions and minimum standards of subpart 4 and the analysis, context, and content that must be contained in the plan. This distinction should improve the ability of local governments to develop plans that provide local benefits while meeting statewide standards and requirements. The more detailed analysis required by this subpart will improve the classification of existing wetlands and the public value of replacement sites within the plan area.

**Item A** provides the context for plan development, which must be based on an assessment of existing conditions and the identification of watershed-based goals, and provides more consistency with the Corps/EPA Mitigation Rule. Flexibility is provided in that an LGU may use an existing plan if one exists.

**Item B** was relocated from the current 8420.0650, subpart 2, item A, as it is a planning activity that may be done as part of the plan and is not in itself a minimum standard.

**Item C** is added to require a watershed-based inventory, analysis, and prioritization of replacement sites and to provide consistency with the watershed approach to wetland replacement in the Corps/EPA mitigation rule. It also requires the plan to include strategies for achieving plan goals by promoting restoration and/or banking of high priority sites. This new



language will result in more focused plans that identify the types and locations of wetland replacement that will provide the greatest public value by providing benefits to the watershed. Much of the language in items A and C was summarized directly from the Corps/EPA Mitigation Rule.

**Item D** provides a tie to part 8420.0835 (High Priority Regions and Areas). While statute does not directly allow a stand-alone local comprehensive wetland protection and management plan developed under this authority to be used to identify high priority areas, those that are developed as part of a local water management plan may identify high priority areas. The added language provides that clarification.

**Item E** requires a periodic self-assessment of the success of plan implementation by the LGU. Many LGUs conduct evaluations as part of other planning processes as a way to improve their effectiveness by identifying and building on strengths while adapting to changes and overcoming barriers to achieving identified goals. Specifying this as a requirement for wetland plans developed under this authority will help ensure that plans goals are met over time and improve BWSR oversight of plan implementation.

**Item F** provides clarification of the minimum and maximum period covered by the plan and requires that the plan state the period of time for which it covers. The timeframe provides consistency with current Minn. Stat. 103B water planning processes and stating it more explicitly will improve LGU knowledge and application of the requirement.

Subpart 6. **Plan development and review process.** The purpose of the edits in this subpart are to clarify the plan development, review, and approval process. The current rule provides some direction but is unclear regarding much of the process, only requiring that it be “consistent with the local water planning processes.” **Item A** is relocated from current subpart 1, item A(1). When proposing to develop a plan, the LGU is now required to notice the TEP to reflect the TEPs involvement in plan development, the Department of Agriculture to be consistent with statute, watershed organizations for consistency and coordination on a watershed basis, and the Corps of Engineers to provide consistency with the federal mitigation rule and Clean Water Act Section 404.

**Item B** utilizes language from current subpart 1, item B, with the addition of “prioritizing replacement sites” in order to improve the public value of replacement sites and provide consistency with the watershed approach of the federal mitigation rule.

**Items C, D, E, and F** provide clarification and a consistent structure to the plan development and approval process, and are consistent with existing public comment and hearing requirements of Minn. Stat. Chapters 394, 462, 366, 103D, and 103B as specified in current 8420.0650, subpart 1 regarding plan implementation. Items D and E are consistent with the 60-day review period for watershed and groundwater plans under Minn. Stat. Chapter 103B.231 Subd. 7 and 103B.255 Subd. 8 respectively. Item F is consistent with Minn. Stat. Chapter 103B.315 Subd. 5. **Item H** relocates language from the current subpart 3, item G and adds language that allows for local comprehensive wetland protection and management plans to be developed and approved

according to the applicable local water planning process when the plan is developed as part of a local water plan and the corresponding process differs from this part.

The new language in this subpart provides a distinction between the agency review period and the BWSR approval process, and is consistent with current WCA requirements for local comprehensive wetland protection and management plans and local water planning processes. The edits also clarify that the implementing ordinance must be included with the plan during the review process.

Subpart 7. **Board decision; mediation; judicial review.** This subpart was relocated from the current subpart 3. The title was changed, replacing “review and approval” with “decision” to clarify that BWSR must make a decision on the plan but that decision could include denial (disapproval). The edits to **item A** are intended to clarify BWSR’s role in approving or disapproving the plan and the process for making a decision. Current rule item B was incorporated into item A. The remaining items are re-lettered with non-substantive language edits.

Subpart 8. **Effective date and amendments.** This subpart was relocated from the current subpart 4. **Item A** is edited to clarify that BWSR approval is required. **Item B** contains new language that clarifies the length of time covered by the plan and allows an extension, both of which are consistent with Minn. Stat. 103B.311, Subd. 4. **Item C** clarifies the process for amending the plan consistent with the approval process, except for minor amendments where a streamlined process is allowed. The minor amendment approval process will reduce bureaucratic requirements for minor changes and is consistent with Minn. Rule 8410.0140, except for the 60-day window which is consistent with WCA statutes. **Item D** defines what constitutes a minor amendment in order to provide clarity and reduce conflicts due to differing interpretations.

Subpart 9. **Implementation.** **Item A** is relocated from the current subpart 1, item A (2). **Item B** was relocated from the current subpart 4, item C and edited to provide consistent language. **Item C** contains new language to clarify that administrative processes cannot be changed under a local comprehensive wetland protection and management plan.

Subpart 10. **Reporting.** This subpart is relocated from the current subpart 8. The original language is deleted as reporting is already required elsewhere in the rule. The new language is intended to specify the additional information that is required for local governments that have plans developed under this subpart and clarify penalties for failure to comply with the reporting requirements.

#### **8420.0835 HIGH PRIORITY REGIONS AND AREAS.**

This part is relocated from the current 8420.0350.

Subpart 1. **High priority regions.** Only minor changes are made to this subpart to add a watershed context.

Subpart 2. **High priority areas.** “Must” was changed to “may” in **item A** because it is not a statutory requirement and it is currently not being followed consistently in practice. Identification of high priority areas is only a requirement if the local government wishes to accept applications for wetland preservation area designation. The last sentence of this item has been deleted and replaced with new language that provides more direction to local governments intending to designate high priority areas under this subpart. The language will improve consistency between the designation of high priority areas with the requirements and provisions of WCA as provided in this rule.

The first sentence in **Item B** is new and adds a watershed context to the designation of high priority areas. **Item B** was re-written from existing language in this subpart to improve clarity, specificity, and to provide more consistency with a broad ecosystem and watershed approach to wetland protection.

The requirement to include a buffer strip is proposed to be removed as the identification of high priority areas would typically not be to the level of precision necessary to delineate a buffer strip around it. The buffer strip requirement becomes relevant upon application for a Wetland Preservation Area, and it is included in that part of the rule.

**Item C** was added to differentiate between instances where an entire watershed is designated, vs. individual wetland areas. Both items B and C include ties to 8420.0830 (Local Comprehensive Wetland Protection and Management Plans).

**Item D** adds direction that plans that identify high priority areas and intend to accept application to specify how applications will be managed. This will help the LGU think through how this process will work in advance and communicate expectations to potentially interested landowners.

**Item E** is current rule language with an added title and minor edits.

#### **8420.0840 WETLAND PRESERVATION AREAS.**

This part is relocated from the current 8420.0400.

Subpart 1. **Purpose and eligibility.** The new language in the first sentence clarifies the purpose of the program and links it to the recommended watershed approach and local water management plans. The last sentence of subpart 1 was added to prevent replacement wetlands from being enrolled and becoming tax exempt, as that is not the intent of the program.

Subpart 2. **Landowner application for wetland preservation area.** The language change regarding buffer width is to provide consistency to other parts of this chapter (8420.0522, subpart 6-required upland buffer).

Subpart 3. **County or watershed district review of application.** The new language will ensure that applications are coordinated with affected local agencies and BWSR. The soil and water conservation district (SWCD) must provide an advisory statement after reviewing the application

consistent with statute. This advisory statement will assist the landowner and county or watershed district in evaluating the appropriateness of enrolling the land into this program.

Subpart 7. **Maps.** This subpart is modified for clarity.

Subpart 8. **Reimbursement of unpaid taxes.** This subpart was added to clarify in rule that Minnesota Statutes provide for reimbursement of lost tax revenue to LGUs.

## **ENFORCEMENT, APPEALS, AND COMPENSATION.**

### **8420.0900 ENFORCEMENT PROCEDURES.**

This part was relocated from the current 8420.0290.

Subpart 1. **Enforcement authorities.** “Notice of potential violation” was added to the current language to recognize this new enforcement tool. This is further discussed below.

Subpart 2. **Cease and desist orders; notice of potential violation.** A change was made to this subpart to create a new enforcement tool that provides a better fit for some of the violations identified by enforcement authorities. The change provides an alternative to the cease and desist order when the activity has already been completed, by providing the authority the option of issuing a “notice of potential violation.” The notice would inform the landowner of a likely violation and give the opportunity to provide information to support qualification for an exemption or no-loss, or to submit a replacement plan. The subpart was also split into 5 separate items to group like concepts and improve readability.

Changes to **item A** provide for clarification and consistency of language with the remainder of the proposed rule and the addition of the notice of potential violation. **Item B** was edited for clarity and a sentence was added to require the enforcement authority to consult with the LGU prior to issuing an order to determine whether the landowner is in compliance. This will improve consistency and coordination between the LGU and enforcement authority, ensure that the activity has not been previously approved by the LGU, and reduce potential conflicts and unnecessary issuance of orders. **Items C and D** were edited for clarity and consistency with the remainder of the rule. **Item E** contains a sentence that was relocated from a few sentences earlier in the current subpart and made a separate item as it speaks to a specific situation where BWSR makes a decision regarding a cease and desist order issued to a local government, which is a distinct process different than others that occur under this part.

Subpart 3. **Restoration and replacement orders.** Most of the proposed changes in this item are for clarity and language consistency with the remainder of the rule. Language was added to require the SWCD to consult with the enforcement authority when preparing a restoration plan. This will involve the enforcement authority early in the process and help identify potential problems or issues at an early stage. A new sentence has also been added to provide SWCDs with flexibility to request the assistance of the LGU in inspecting the site and preparing the restoration or replacement plan. This can be useful when the local government has the technical expertise and/or available staff to promptly and accurately prepare the plan, and will improve

flexibility and coordination between local agencies. The plan will still be developed under the authority of the SWCD and issued by the enforcement authority, per current rule.

Regarding the determination of whether restoration is possible or prudent, references to the SWCD and the enforcement authority are deleted. Specific mention of the SWCD is unnecessary as an employee of the SWCD is a member of the TEP as provided for in 8420.0240 (Technical Evaluation Panel Procedures). The specific inclusion of the enforcement authority is proposed to be deleted here as the determination of the possibility or prudence of restoration is purely a technical determination and therefore more appropriately rests with the technical representatives that serve on the TEP. In addition, Technical Evaluation Panel Procedures (8420.0240) are proposed to be modified to require the enforcement authority to be consulted for all violations of this chapter that may result in an enforcement order. These changes will ensure that the enforcement authority participates in all components of the development of the restoration/replacement plan under this subpart while clarifying roles and responsibilities when enforcement actions are pursued.

#### Subpart 4. **Contents of order.**

The changes to **item A** mirror those proposed in subpart 3 as they relate to clarity and language consistency. The new sentence at the end of this item provides 30 days by which a recipient of a restoration order must submit an application for a replacement plan, exemption or no loss. This new requirement coincides with existing enforcement practice to provide 30 days for the recipient to develop a complete application. Failure to comply with this timeline triggers the required compliance with the restoration order. Establishing a specific time period provides increased certainty of outcome for all involved in a violation.

**Item B** contains new language intended to ensure that restoration or replacement of a wetland impact that is subject to an enforcement order must meet the same standards and conditions as a replacement wetland developed under this chapter. The reason for this specific mention is that a restoration or replacement order does not follow the same process as a replacement plan that requires these same standards and conditions. It is reasonable that wetlands replaced or restored under an enforcement order should meet the same conditions as any other replacement wetland.

**Item C** contains new language that is coordinated with, and provides certainty to, the time period specified in an order as proposed in item A. This certainty and clarity is provided by requiring compliance with the order, if the recipient of the order does not submit an application for a replacement plan, exemption, or no loss within the specified time period. The current rule is ambiguous on the ability of the recipient of an order to file an application after the deadline in the order has elapsed. One of the goals of this rulemaking is to increase clarity and reduce conflicts, and this language is consistent with that goal.

Subpart 5. **Enforcement authority orders.** The changes to this subpart mirror those in subpart 3 as they relate to clarity and language consistency, and the role of the SWCD, TEP and enforcement authority as this role relates to a determination that restoration will not restore the loss caused by the impact. See the discussion there regarding these changes.

Subpart 6 **After-the-fact replacement.** The proposed change to subpart 6 provides a method to handle situations where a landowner has an approved wetland replacement plan that has not been implemented. The replacement requirements specify that replacement must be provided in advance of or concurrent with the impact. Impacting a wetland prior to the replacement is a violation that is addressed by this language. The other change is to allow more flexibility for the LGU and enforcement authority in determining the required replacement ratio for after-the-fact replacement. The current rule requires an all or nothing approach which may not be appropriate for all after-the-fact replacement situations.

#### **8420.0905 APPEALS.**

This part was relocated from the current 8420.0250 and consolidates additional language regarding appeals from current parts 8420.0200, subpart 2; 8420.0280; and 8420.0290, subpart 3, item C.

Subpart 1. **Appeals of replacement and restoration orders to the board.** This subpart was relocated from the current 8420.0290, subpart 3c as it addresses appeal procedures and is more appropriately located under this subpart. One change is to clarify that appeals of replacement and restoration orders are made to BWSR. In addition, the rule is modified to allow the extension of the timeframe to appeal if mutually agreed to by the landowner, the LGU, and the enforcement authority. The ability to extend the timeframe has been inserted to allow more time when all parties involved agree there is the potential to develop a solution that may prevent the appeal. Avoiding appeals will reduce costs incurred by BWSR, the LGU, the enforcement authority, and the landowner, and can result in the wetland being replaced or restored in a shorter timeframe. The reference to a \$200 filing fee was removed to prevent confusion, as the actual specific filing fee will be determined by BWSR, not to exceed the statutory limit of \$1,000.

Subpart 2. **Appeal of local government unit staff decisions.** This subpart was relocated from the current 8420.0200, subpart 2. Language was added to clarify that the appeal is not effective until mailing of the petition and submittal of any fees required by the LGU. This will inform landowners of this requirement up-front and reduce misunderstandings. A sentence was also added, consistent with other appeals procedures found in this part, to clarify that filing fees are not required for appeals by state agencies or members of the TEP.

Subpart 3. **Appeal of local government unit decisions to the board.** The proposed changes to this subpart are largely clarifying or made to provide consistency with other parts of the rule. These changes include specifying that appeals of LGU decisions under this subpart are made to BWSR.

The rule is modified to allow the extension of the timeframe to appeal if mutually agreed to by the landowner, the LGU, and the enforcement authority. The ability to extend the timeframe has been inserted to allow more time when all parties involved agree there is the potential to develop a solution that may prevent the appeal. Avoiding appeals will reduce costs incurred by BWSR, the LGU, the enforcement authority, and the landowner, and can result in the wetland being replaced or restored in a shorter timeframe. The reference to a \$200 filing fee was removed to prevent confusion, as the actual specific filing fee will be determined by BWSR, not to exceed the statutory limit of \$1,000.

Also, direction is provided that appeals should include information that provides grounds for the appeal, and requiring the local government unit to send a copy of the petition to those who received the notice of decision. The former change is made as direction to potential appellants, as BWSR receives numerous appeals where the appellant states no reason for the appeal. This absence of sufficient grounds to consider the appeal delays the process and could result in the undue rejection of the appeal by BWSR. The latter change is to ensure that individuals who received the notice of decision are notified that an appeal has been made on a project they may otherwise believe was finalized.

Subpart 4. **Board appeal procedures.** The second sentence of this subpart inserts new language consistent with Minn. Stat. 103G.2242, subd. 9 (c) that is not currently in the rule. This language requires specific information to be considered in determining whether to grant the appeal. BWSR's dispute resolution committee is added as an entity with the authority to grant the petition, consistent with additions to other areas of the proposed rule, to make the rule consistent with statute that specifies that the all appeals must be heard by this BWSR committee (Minn. Stat. 103G.2242, subd. 9(d)) and to recognize current practice.

Current language regarding the posting of a "letter of credit, cashier's check, or cash ..." has been deleted due to a 2007 amendment to Minn. Stat. 103.2242, subd. 9 (a) that removed this option and requires BWSR to establish a fee schedule. Language has been added that an appellant must pay the required filing fee without specifying the form this must take. The change also provides that a remand of an appeal does not require a new application, allowing additional information to be submitted with the original application. This change will reduce decision making delays and reduce both applicant and local government costs to develop and review remands.

Under the proposed rule, LGUs are required to provide the written record on a decision that has been appealed within 30 days of an appeal being granted by BWSR. This will help reduce delays in decision making by ensuring BWSR has the record in a timely manner. Without this record BWSR cannot proceed on making a decision on an appeal because the appeal is generally judged on the basis of the record before the LGU. A change from current practice requires the LGU to send only one copy of the rule, with BWSR making the required copies to forward to the parties to the appeal. This procedural change will improve statewide consistency while having no impact on the resolution or timeliness of appeal decision making, but will reduce local government costs and increase BWSR's costs in the appeals process.

Current language regarding written and oral argument, board review based on the record, and taking additional evidence or remanding the matter has been deleted and replaced with modified language to improve clarity, provide increased detail, and improve the process for reviewing and hearing appeals. Specifically, BWSR would be granted additional authority to either remand an appeal or hear additional testimony, under its own discretion, if specific information was not considered by the LGU or there are procedural concerns over how the LGU made its decision.

The changes also provide BWSR with the authority to require that new information be considered when the information is material and there is good cause for it not being presented

before the LGU. These changes should ensure that LGUs make decisions based on the rule that are supported by data; reduce the number of LGU decisions that are appealed by improving the completeness of the record and clearly laying out the process used by BWSR as a last resort to local decisions; increase the number of remands, and therefore local decisions, as BWSR will have increased authority to remand an LGU decision that has been appealed when the basis of that decision is questionable based on the data and/or process.

Similar to other changes made throughout the procedural portions of the rule, BWSR will be required to provide notice of its decision to the parties of the appeal. This change is made to ensure consistency of process and transparency of the WCA decision making process.

Subpart 5. **Appeal of board decisions.** This subpart is relocated from the current 8420.0268.

**8420.0910 COMPENSATION CLAIMS AGAINST LOCAL GOVERNMENT UNITS.**

This part is relocated from the current 8420.0268. The minor changes in this subpart are for language consistency with the remainder of the rule.

**8420.0915 COMPENSATION TO LANDOWNERS.**

This part is relocated from the current 8420.0270. The minor changes in this subpart are for language consistency with the remainder of the rule.

**ACTIVITIES UNDER DEPARTMENT OF NATURAL RESOURCES AUTHORITY.**

**8420.0930 MINING.**

This part is relocated from the current 8420.0305. The majority of proposed changes are minor, made for language consistency with the remainder of the rule.

The proposed new language in **item C** is intended to ensure that the separate permitting of mining projects by the DNR complies with the requirements of WCA. The specific change is that replacement credits developed under a permit to mine can only be used for mining projects, unless they have been deposited in the state wetland bank. This will help ensure appropriate tracking and use of wetland replacement credits that the banking system provides.

**8420.0935 STANDARDS AND CRITERIA FOR IDENTIFICATION, PROTECTION, AND MANAGEMENT OF CALCAREOUS FENS.**

This part is relocated from the current parts 8420.1010 to 8420.1070, which are renumbered into subparts under this single part in order to consolidate all requirements relating to calcareous fens.

Subpart 1. **Purpose.** Proposed changes to this subpart acknowledge that the DNR has the responsibility for identifying calcareous fens under Minn. Stat. 103G.223. The remaining language clarifies the current authority of the DNR to approve a management plan for an impact to a calcareous fen and that sequencing and exemptions do not apply to calcareous fens.

Subpart 3. **Procedures to list calcareous fens.** **Item B** adds the requirement that the list of fens be established by written order published in the state register in order to provide consistency with current statute.



Subpart 6. **Appeals.** The proposed changes to this subpart clarify and separate the two kinds of appeals that may be brought forward by a landowner under this part: (1) the determination by the DNR that a wetland is a calcareous fen; and (2) the decision by the DNR regarding a calcareous fen management plan. The ability of a landowner to appeal the determination that a wetland is a calcareous fen is proposed to be allowed at any time as a landowner may only become aware of this determination at the time of a project, not when the DNR makes this determination. The language regarding the appeal of a management plan decision by the DNR is identical to the current rule.

**Current Rule: 8420.1010 Purpose; 8420.1020 Identifying Calcareous Fens; 8420.1030 Procedures to List Calcareous Fens; 8420.1040 Management Plans; 8420.1050 Restoration; 8420.1060 Appeals; and 8420.1070 Enforcement Procedures.**

These parts have been relocated to the new calcareous fen part 8420.0935 and edited there.

#### **REPEALER.**

Numerous provisions of the current rule are repealed, most for the purpose of re-organizing the rule to simplify, clarify, and place rule provisions in a more intuitive order. This repealed or relocated language is identified throughout this SONAR, as being moved without substantive change, or discussing the change, its purpose and effect where the repeal or relocation occurs.

#### **LIST OF WITNESSES.**

The BWSR anticipates having the following individuals testify in support of the need for and reasonableness of the proposed rules:

Dave Weirens, Land and Water Section Manager  
Board of Water and Soil Resources  
520 Lafayette Road  
St. Paul, Mn 55155

Les Lemm  
WCA Coordinator  
Board of Water and Soil Resources  
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#### **EXHIBITS.**

1. 2001-2003 Minnesota Wetland Report (August 29, 2005).  
(<http://www.bwsr.state.mn.us/wetlands/publications/wetlandreport.pdf>)
2. WCA Assessment Final Report (December 20, 2006).  
(<http://www.bwsr.state.mn.us/wetlands/assessment/WCAfinaldraft.doc>)
3. WCA Statutory Amendments (May 29, 2007).  
(<http://www.bwsr.state.mn.us/wetlands/WCAamendments5-29-07.doc>)
4. Unofficial Compilation of WCA Statutes 1991-2008 (November 19, 2008).  
(<http://www.bwsr.state.mn.us/wetlands/wca/statutes.pdf>)

5. BWSR and U.S. Army Corps of Engineers Memorandum of Understanding, May 29, 2007. (<http://www.bwsr.state.mn.us/wetlands/BWSR-COEmemo.pdf>)
6. Request for Comments – State Register (August 6, 2007). ([http://www.comm.media.state.mn.us/bookstore/stateregister/32\\_06.pdf](http://www.comm.media.state.mn.us/bookstore/stateregister/32_06.pdf))
7. List of Commenters and Submitted Comments Organized by Current Rule Reference (September 21, 2007). (<http://www.bwsr.state.mn.us/wetlands/wca/WCA-comments.pdf>)
8. Permanent Rulemaking Plan (updated, July 1, 2008). (<http://www.bwsr.state.mn.us/wetlands/wca/2008-plan.pdf>)
9. WCA Permanent Rule Advisory Committee Meeting notes:
  - a. January 31, 2008. ([http://www.bwsr.state.mn.us/wetlands/wca/Adv\\_Committee1-31-08\\_Notes.pdf](http://www.bwsr.state.mn.us/wetlands/wca/Adv_Committee1-31-08_Notes.pdf))
  - b. February 28, 2008. ([http://www.bwsr.state.mn.us/wetlands/wca/Adv\\_Committee2-28-08\\_Notes.pdf](http://www.bwsr.state.mn.us/wetlands/wca/Adv_Committee2-28-08_Notes.pdf))
  - c. March 27, 2008. ([http://www.bwsr.state.mn.us/wetlands/wca/Adv\\_Committee3-27-08\\_Notes.pdf](http://www.bwsr.state.mn.us/wetlands/wca/Adv_Committee3-27-08_Notes.pdf))
  - d. April 24, 2008. ([http://www.bwsr.state.mn.us/wetlands/wca/Adv\\_Committee4-24-08\\_Notes.pdf](http://www.bwsr.state.mn.us/wetlands/wca/Adv_Committee4-24-08_Notes.pdf))
  - e. May 22, 2008. ([http://www.bwsr.state.mn.us/wetlands/wca/Adv%20Committee5-22-08\\_Notes.pdf](http://www.bwsr.state.mn.us/wetlands/wca/Adv%20Committee5-22-08_Notes.pdf))
  - f. June 26, 2008. ([http://www.bwsr.state.mn.us/wetlands/wca/Adv\\_Committee6-26-08\\_Notes.pdf](http://www.bwsr.state.mn.us/wetlands/wca/Adv_Committee6-26-08_Notes.pdf))
  - g. August 29, 2008. ([http://www.bwsr.state.mn.us/wetlands/wca/Adv\\_Committee8-29-08\\_Notes.pdf](http://www.bwsr.state.mn.us/wetlands/wca/Adv_Committee8-29-08_Notes.pdf))
  - h. September 11, 2008. ([http://www.bwsr.state.mn.us/wetlands/wca/Adv\\_Committee9-11-08\\_Notes.pdf](http://www.bwsr.state.mn.us/wetlands/wca/Adv_Committee9-11-08_Notes.pdf))
  - i. September 25, 2008. ([http://www.bwsr.state.mn.us/wetlands/wca/Adv\\_Committee8-29-08\\_Notes.pdf](http://www.bwsr.state.mn.us/wetlands/wca/Adv_Committee8-29-08_Notes.pdf))
10. BWSR Board Wetland Committee Minutes
  - a. March 25, 2008
  - b. April 22, 2008
  - c. July 23, 2008
  - d. September 24, 2008
  - e. October 21, 2008
  - f. November 20, 2008
  - g. December 16, 2008
11. Proposed WCA Rule Order (January 31, 2008). ([http://www.bwsr.state.mn.us/wetlands/wca/WCA\\_Rule\\_Outline1-25-08.pdf](http://www.bwsr.state.mn.us/wetlands/wca/WCA_Rule_Outline1-25-08.pdf))
12. Draft Scope, No-Loss and Exemptions Framework (February 28, 2008). ([http://www.bwsr.state.mn.us/wetlands/wca/Scope\\_No-Loss\\_Exemptns2-22-08.pdf](http://www.bwsr.state.mn.us/wetlands/wca/Scope_No-Loss_Exemptns2-22-08.pdf))
13. Supplemental Information about Replacement (February 28, 2008). ([http://www.bwsr.state.mn.us/wetlands/wca/Replacement\\_Supplement.pdf](http://www.bwsr.state.mn.us/wetlands/wca/Replacement_Supplement.pdf))
14. Draft Exemption: Application, Implementation, Estimates and Reporting (April 24, 2008). (<http://www.bwsr.state.mn.us/wetlands/wca/Exemption4-18-08.pdf>)
15. U.S. Army Corps of Engineers/U.S. Environmental Protection Agency Rules - Compensatory Mitigation for Losses of Aquatic Resources (April 10, 2008). [http://www.epa.gov/owow/wetlands/pdf/wetlands\\_mitigation\\_final\\_rule\\_4\\_10\\_08.pdf](http://www.epa.gov/owow/wetlands/pdf/wetlands_mitigation_final_rule_4_10_08.pdf)

16. National Research Council, Compensating for Wetland Losses under the Clean Water Act, June 26, 2001.
17. Wetland Plants and Plant Communities of Minnesota and Wisconsin” (Eggers and Reed 1997) (<http://www.npwrc.usgs.gov/resource/plants/mnplant/index.htm>)
18. WCA LGU Reporting Form and Instructions. ([http://www.bwsr.state.mn.us/wetlands/forms/WCA\\_LGU\\_Reporting\\_Form-and-Guidance.doc](http://www.bwsr.state.mn.us/wetlands/forms/WCA_LGU_Reporting_Form-and-Guidance.doc))
19. Exceptional Natural Resource Value Guidance (October 2002) ([http://www.bwsr.state.mn.us/wetlands/wca/Exceptional\\_Natural\\_Resource\\_Value.pdf](http://www.bwsr.state.mn.us/wetlands/wca/Exceptional_Natural_Resource_Value.pdf))
20. Mitigation Banking, Theory and Practice, Edited by Lindell L. Marsh, Douglas R. Porter, and David A. Salvesen
21. Planner’s Guide to Wetland Buffers for Local Governments, Environmental Law Institute, March 2008 ([http://www.elistore.org/reports\\_detail.asp?ID=11272](http://www.elistore.org/reports_detail.asp?ID=11272)).
22. Benefits of Wetland Buffers: A Study of Functions, Values and Size, prepared for the Minnehaha Creek Watershed District, December 6, 2001 ([http://www.minnehahacreek.org/documents/MCWD\\_Buffer\\_Study.pdf](http://www.minnehahacreek.org/documents/MCWD_Buffer_Study.pdf))
23. Riparian Buffer Width, Vegetative Cover, and Nitrogen Removal Effectiveness: A Review of Current Science and Regulations, U.S. Environmental Protection Agency, October 2005. (<http://www.epa.gov/nrmrl/pubs/600R05118/600R05118.pdf>)
24. Federal Guidance on the Use of Vegetated Buffers as Compensatory Mitigation Under Section 404 of the Clean Water Act, National Wetlands Mitigation Action Plan, August 27, 2004 – DRAFT. ([http://www.mitigationactionplan.gov/Buffer\\_8-27-04.htm](http://www.mitigationactionplan.gov/Buffer_8-27-04.htm))