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TO: Les Lemm
Wetland Conservation Act Coordinator
Minnesota Board of Water and Soil Resources

FROM: Mike Hirst Josh Stromlund
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RE: Minnesota Wetland Conservation Act Rule Amendments
Minnesota Rules, Chapter 8420
Revisor's Number R-04356

DATE: December 18, 2015

Please consider the following comments to be addressed during the rule making process that has been initiated by the Board of Water and Soil Resources (BWSR). While we fully recognize that some of the comments relate to statute, we feel compelled to provide context in support of appropriate rule and/or statute changes.

Wetland Banking vs. Project-Specific Wetland Mitigation Under a Permit to Mine

During the 2011 Legislative session, Minnesota Statute §103G.005, subdivision 10e, was amended to establish the Department of Natural Resources (DNR) as a local government unit (LGU), for wetland banking projects established solely for replacing wetland impacts under a permit to mine (PTM) under Minnesota Statute §93.481. The intent was to increase flexibility for the DNR and mining companies, while also increasing transparency for local governments and other interested parties, as the banking process provides a formal role for the locals and BWSR.

Minnesota Statute §93.481 establishes the boundaries of the proposed mining area and reclamation or restoration operations while, MN Rule 8420.0200, subpart 1, D, establishes the DNR as the approving authority for activities associated with projects requiring a PTM under Minnesota Statute §93.481. Minnesota Statute §103G.222, subdivision 1, provides the link to a wetland replacement and mining reclamation plans. A reclamation plan is specific to an established PTM boundary; therefore, any off-site (outside the PTM boundary) project-specific

mitigation is outside of DNR's authority to approve under a PTM, and subject to approval of all LGU's in accordance with MN Rule 8420.0200, subpart 1, H. This provision is not being complied with and should be clarified and reinforced in the new rule.

We agree that for determining wetland impacts and on-site mitigation, within the established PTM boundary, it is appropriate for DNR Lands and Minerals to address that through their PTM process. It is incorrect to believe that when the project-specific wetland mitigation is located off-site, in a different county, and many miles away, it is covered under the PTM process without any LGU approval. That position is not only unsupported, but contrary to both the intent and plain language of statute and rule.

Recommendations

1. Clarification of MN Rule 8420.0200, subpart 1, D, is warranted to formally establish DNR as a LGU for project-specific wetland replacement conducted under a permit to mine.
2. Clarify and enforce 8420.0200, subpart 1, H, which applies to off-site wetland mitigation.
3. Utilize MN Rule 8420.0200, subpart 1, J.
4. Clarification of MN Rule 8420.0111, subparts 55 and 67, is warranted to further define what constitutes a wetland banking and a project-specific wetland mitigation project.
5. Clarification of MN Rule 8420.0930, subparts 2 and 3 is warranted. Additional language needs to recognize existing mining operations and new wetland replacement plans.
6. Clarification of MN Rule 8420.0930, subpart 4, is warranted to ensure the BWSR has oversight of the credits generated. The credits can be used to offset mining-related wetland impacts or be sold on the open market.

Siting Requirements for Wetland Replacement

Wetland mitigation siting requirements, specifically Minnesota Statute §103G.222, subdivision 3, was amended by the 2011 and 2015 Legislative sessions. The most recent Legislative change directs the BWSR to improve the siting and targeting of wetland replacement, including the use of high priority areas, through replacement ratios and BSA priorities. While we are encouraged by the concept of using high priority areas for wetland mitigation, currently, there is no incentive or requirement to utilize the high priority areas.

Recommendations

1. Modification of the current siting criteria is warranted. An additional step which identifies high priority areas must be incorporated to ensure these areas are included in the review of potential mitigation opportunities.
2. The establishment of replacement ratios will be directly related to this item. Make it simple for everyone to understand.

3. Specify what a high priority area will consist of. Will it be a major or minor watershed, county or BSA, or a specific area/corridor identified by section, township and range?
4. Establish a process by which the LGU can work with the BWSR in designation of high priority areas.

BSA 1 Wetland Impacts Replaced in BSA 2

Currently, wetland impacts in BSA 1 are allowed to be replaced in BSA 2 with no increased replacement ratio. Minnesota Statute §103G.222, subdivision 1, states, *“For project-specific wetland replacement completed prior to wetland impacts authorized or conducted under a permit to mine within the Great Lakes and Rainy River watershed basins, those basins shall be considered a single watershed for purposes of determining wetland replacement ratios.”*

As mentioned above, the most recent Legislative change directs the BWSR to improve the siting and targeting of wetland replacement, including the use of high priority areas, through replacement ratios and BSA priorities.

Recommendation

1. Clarification of MN Rule 8420.0522, subpart 4, B, is warranted by removing the connection between BSA 1 and BSA 2. If the intent of the Legislation is to further the concept of public value of wetland replacement, severing these BSA's is essential and is consistent with the intent of the Legislature.

Buffers for Mitigation Projects

There has been much discussion regarding existing wetland areas qualifying as buffer credit according to MN Rule 8420.0526, subpart 2. Although a buffer may be required according to MN Rule 8420.0522, subpart 6, the current language allows the LGU to vary the standards in this subpart based upon the recommendations by the TEP. However, the language in this subpart doesn't specify what standards the LGU is allowed to vary from. For example, can the LGU vary from the upland standard and utilize existing wetland as buffer, or the minimum average width requirement, or can the LGU vary from the requirement of a buffer completely?

Depending on the location of the proposed wetland mitigation site, there may not be any upland associated with the proposed site. In some instances, the existing wetland, proposed as buffer, would not qualify for preservation credit as it would not meet the criteria as outlined in MN Rule 8420.0526, subpart 9; however, the existing wetland, if included as buffer, would further the sustainability of the overall wetland mitigation site.

If the purpose of wetland replacement is to ensure adequate replacement of lost public value from unavoidable impacts, it would make sense to include existing wetland as buffer to further the purpose of MN Rule 8420.0500, .0522, and other pertinent subparts. It shouldn't matter if the buffer is upland or wetland; there still resides an undisputed fact that there is public value in a buffer.

Recommendations

1. Clarification of MN Rule 8420.0526, subpart 2, is warranted to include existing wetland areas as buffer.
2. Clarification of what standards the LGU may vary from in MN Rule 8420.0522, subpart 6 is warranted.
3. In certain circumstances, the buffer (wetland or upland) has unique or rare species, provides unique functions, and contributes to overall value of the project. Therefore, keeping a sliding scale for credit allocation allows for flexibility to encompass these situations.
4. Define a “buffer” in MN Rule 8420.0111.
5. Clarification of MN Rule 8420.0100, subpart 2, is warranted as it needs to be re-worded such as, “...replace any wetland impact with another area of at least equal function and value.”

De minimis

During the 2012 Legislative session, Minnesota Statute §103G.2241, subdivision 9, which is specific to MN Rule 8420.0420, was amended to add clarity. While clarity has been provided in certain parts of statute and rule, it still is complicated and administratively burdensome in others. In order to lessen the complication and administration, removal of MN Rule 8420.0420, subpart 8, C, and the 20 square feet de minimis amount should be considered.

Recommendations

1. Remove MN Rule 8420.0420, subpart 8, C.
2. Remove those parts of MN Rule 8420.0420 referencing the 20 square feet de minimis requirement.

Preservation

During the 2011 Legislative session, Minnesota Statute §103.2251 was amended to allow the use of preservation regardless of property ownership in the greater than 80% area. Prior to this change, the use of preservation was strictly limited to public lands in the greater than 80% area. MN Rule 8420.0526, subpart 9, is self-explanatory, protection of an unique resource, while the use of Exceptional Natural Resource Value (ENRV), MN Rule 8420.0526, subpart 8, requires restoration and protection. Because these two subparts are very similar and the use of preservation is an important component of an ENRV project, they should be merged into a single action eligible for credit.

During the 2015 Legislative session, MN Statute §103B.3355 was amended to require the BWSR to establish high priority areas of the state for preservation, enhancement, restoration, and establishment of wetlands where these actions would have a high public value. Because preservation is currently limited to the greater than 80% area and in order to comply with the intent of the Legislature, the option to utilize preservation will have to be allowed statewide.

Recommendations

1. Merge MN Rules 8420.0526, subparts 8 and 9, into a single action eligible for credit. In the guidance document for ENRV projects, a table is present which outlines potential credit allocation. This table could be simply modified to include a preservation project with no restoration activities.
2. Keep the subparts separate but, increase the credit allocation for MN Rule 8420.0526, subpart 9, to allow for unique sites.
3. The use of MN Rule 8420.0526, subpart 9, should be allowed on a statewide basis.

In conclusion, we thank you for the opportunity to provide comments to the current rule making process. It is the intent of these proposed recommendations to further improve upon the efficiency and effectiveness of the Minnesota Wetland Conservation Act. In the event you need further clarification of an item above, please contact us.