

## CHAPTER 8420

### BOARD OF WATER AND SOIL RESOURCES

#### WETLAND CONSERVATION

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#### PURPOSE AND DEFINITIONS

##### 8420.0100 PURPOSE.

This chapter implements the Wetland Conservation Act of 1991, Laws 1991, chapter 354, as amended by Laws 1993, chapter 175; Laws 1994, chapter 627; Laws 1996, chapter 462; Laws 2000, chapter 382; and Laws 2001, chapter 146. This chapter shall be interpreted to implement the purpose of the act, which is to:

- A. achieve no net loss in the quantity, quality, and biological diversity of Minnesota's existing wetlands;
- B. increase the quantity, quality, and biological diversity of Minnesota's wetlands by restoring or enhancing diminished or drained wetlands;
- C. avoid direct or indirect impacts from activities that destroy or diminish the quantity, quality, and biological diversity of wetlands; and
- D. replace wetland values where avoidance of activity is not feasible and prudent.

**Statutory Authority:** *MS s 14.06; 103B.101; 103B.3355; 103G.2242*

**History:** *18 SR 274; 22 SR 1877; 25 SR 152; 27 SR 135*

##### 8420.0102 INTRODUCTION.

The Wetland Conservation Act achieves the purpose in part 8420.0100 by requiring persons proposing to impact a wetland by draining, excavating, or filling to first, attempt to

avoid the impact; second, attempt to minimize the impact; and finally, replace any impacted area with another wetland of at least equal function and value. As specified in greater detail in part 8420.0122, certain projects are exempt from the requirement for a replacement plan under the Wetland Conservation Act.

The Wetland Conservation Act is administered by local government units with oversight provided by the Board of Water and Soil Resources. Enforcement of the act is provided by Department of Natural Resources conservation officers and other peace officers. The Wetland Conservation Act became effective on January 1, 1992, and this chapter and portions of Minnesota Statutes, chapters 103A, 103B, 103E, 103F, and 103G, govern its implementation. The public is encouraged to contact their local government unit or soil and water conservation district for general information on wetlands and the interpretation of this chapter. This part is for general introductory information only. The other parts of this chapter shall control over this part.

**Statutory Authority:** *MS s 103B.101; 103B.3355; 103G.2242*

**History:** *22 SR 1877; 25 SR 152; 27 SR 135*

### 8420.0103 WETLAND FUNCTIONS FOR DETERMINING PUBLIC VALUES.

The public values of wetlands must be based upon the functions of wetlands, including:

A. water quality, including filtering of pollutants to surface and groundwater, utilization of nutrients that would otherwise pollute public waters, trapping of sediments, shoreline protection, and utilization of the wetland as a recharge area for groundwater;

B. flood water and storm water retention, including the potential for flooding in the watershed, the value of property subject to flooding, and the reduction in potential flooding by the wetland;

C. public recreation and education, including hunting and fishing areas, wildlife viewing areas, and nature areas;

D. commercial uses, including wild rice and cranberry growing and harvesting and aquaculture;

E. fish, wildlife, and native plant habitats;

F. low-flow augmentation; and

G. other functions, values, and public uses as identified in board-approved wetland evaluation methods.

The board shall maintain a publicly available list of preapproved wetland evaluation methods.

**Statutory Authority:** *MS s 103B.101; 103B.3355; 103G.2242*

**History:** *22 SR 1877; 25 SR 152; 27 SR 135*

### 8420.0105 SCOPE.

Wetlands must not be drained, excavated, or filled wholly or partially unless replaced by restoring or creating wetland areas of at least equal public value. This chapter regulates excavation in the permanently and semipermanently flooded areas of type 3, 4, or 5 wetlands, and in all wetland types if excavation includes filling or draining or results in conversion to nonwetland.

This chapter does not prevent the use of the bed of wetlands for pasture or cropland during dry periods if dikes, ditches, tile lines, or buildings are not constructed and the agricultural use does not result in the drainage of the wetlands. This chapter does not prevent filling a wetland to accommodate wheeled booms on irrigation devices if the fill does not impede normal drainage. This chapter does not prevent control of noxious weeds if the control does not drain or fill the wetland.

This chapter does not apply to the public waters and public waters wetlands as defined in Minnesota Statutes, section 103G.005, subdivisions 15 and 15a, which have been inventoried by the commissioner of natural resources according to Minnesota Statutes, section 103G.201, except that:

A. for projects affecting public waters wetlands, and for public transportation projects affecting the wetland areas of public waters, when the commissioner waives the re-

quirement for a public waters work permit consistent with chapter 6115, the local government unit shall make replacement, banking, wetland boundary, wetland type, no-loss, public road project notification, or exemption determinations; or

B. for projects affecting both public waters and wetlands, the local government unit may, by written agreement with the commissioner, waive the requirement for a replacement plan, no-loss, or exemption determination if a public waters work permit is required and the commissioner includes the provisions of this chapter in the public waters work permit.

This chapter is in addition to other regulations including those of the United States Army Corps of Engineers, United States Department of Agriculture, Minnesota state agencies, watershed districts, and local governments.

This chapter does not apply to peat mining as defined in Minnesota Statutes, section 93.461, which is subject to the permit to mine and reclamation requirements of Minnesota Statutes, sections 93.44 to 93.51, and the rules of the commissioner adopted under those sections.

This chapter does not require state agencies to obtain local government unit approvals. However, state agencies shall coordinate with local government units when conducting activities in wetlands within the jurisdiction of the local government unit. The state agencies shall follow the same sequencing and replacement requirements as prescribed by this chapter.

In addition to the provisions of this chapter, governmental decisions on draining, excavating, and filling of wetlands are subject to Minnesota Statutes, chapters 116B and 116D, which provide that an action which is likely to have material adverse effects on natural resources must not be allowed if there is a feasible and prudent alternative consistent with the requirements of the public health, safety, and welfare and the state's paramount concern for the protection of its natural resources. Economic considerations alone do not justify adversely effective actions.

**Statutory Authority:** *MS s 14.06; 103B.101; 103B.3355; 103G.2242*

**History:** *18 SR 274; L 1996 c 462 s 43; 22 SR 1877; 25 SR 152; 27 SR 135*

#### **8420.0110 DEFINITIONS.**

Subpart 1. **Scope.** The terms used in this chapter have the meanings given them in this part.

Subp. 1a. **Account or wetland bank account.** "Account" or "wetland bank account" means a record of wetland banking debits and credits established by an account holder within the state wetland banking system.

Subp. 1b. **Account holder.** "Account holder," in the state wetland banking system, is a person, corporation, government agency, or organization that is the owner of credits.

Subp. 2. **Act.** "Act," when not used in reference to a specific state or federal act, means the Wetland Conservation of 1991, Laws 1991, chapter 354, as amended.

Subp. 3. **Activity.** "Activity" means draining or filling a wetland, wholly or partially, or excavating in permanently and semipermanently flooded areas of type 3, 4, or 5 wetlands.

Subp. 4. **Agricultural land.** "Agricultural land," means land used for horticultural, row, close grown, pasture, and hayland crops; growing nursery stocks; animal feedlots; farmyards; associated building sites; and public and private drainage systems and field roads located on any of these lands. "Agricultural land" must be used principally for the cultivation or production of plants or farm animals and includes former agricultural land that is presently enrolled in conservation easements.

Subp. 5. [Repealed, 22 SR 1877]

Subp. 5a. **Applicant.** "Applicant" is a person, corporation, government agency, or organization that applies for an exemption, no-loss, wetland boundary, wetland type, replacement plan, or banking plan determination or equivalent, or someone who makes an application to withdraw wetland banking credits from the wetland bank.

Subp. 6. **Aquaculture.** "Aquaculture" means to cultivate plants and animals in water for harvest, including hydroponics and raising fish in fish farms.

Subp. 7. **Best management practices.** “Best management practices” means state-approved and published practices associated with draining, filling, or replacing wetlands that are capable of preventing and minimizing degradation of surface water and groundwater.

Subp. 8. **Board.** “Board” means the Board of Water and Soil Resources under Minnesota Statutes, section 103B.101.

Subp. 9. **City.** “City” means a home rule charter or statutory city.

Subp. 10. **Commissioner.** “Commissioner” means the commissioner of the Department of Natural Resources.

Subp. 10a. **Contractor.** “Contractor” means an individual, business, or other organization providing a product or service to a landowner or the landowner’s agent.

Subp. 11. **Creation.** “Creation” means construction of wetlands in an area that was not wetlands in the past.

Subp. 12. **Day.** “Day” means a calendar day unless specified otherwise. The day of the event shall not be used in counting any time period.

Subp. 13. [Repealed, 22 SR 1877]

Subp. 13a. **Degraded wetland.** “Degraded wetland” means a wetland that provides minimal wetland function and value due to human activities such as drainage, diversion of watershed, filling, excavating, pollutant runoff, and vegetative or adjacent upland manipulation.

Subp. 14. **Ditch.** “Ditch” means an open channel to conduct the flow of water, as defined in Minnesota Statutes, section 103E.005, subdivision 8.

Subp. 15. **Drain or drainage.** “Drain” or “drainage” means any method for removing or diverting waters from wetlands. The methods shall include, but are not limited to, excavation of an open ditch, installation of subsurface drainage tile, filling, diking, or pumping.

Subp. 16. **Drainage system.** “Drainage system” means a system of ditch or tile, or both, to drain property, including laterals, improvements, and improvements of outlets.

Subp. 17. **Excavation.** “Excavation” means the displacement or removal of substrate, sediment, or other materials by any method.

Subp. 18. **Fill.** “Fill” means any solid material added to or redeposited in a wetland that would alter its cross-section or hydrological characteristics, obstruct flow patterns, change the wetland boundary, or convert the wetland to a nonwetland. It does not include posts and pilings for linear projects such as bridges, elevated walkways, or powerline structures, or structures traditionally built on pilings such as docks and boathouses. It does include posts and pilings that result in bringing the wetland into a nonaquatic use or significantly altering the wetland’s functions and values, such as the construction of office and industrial developments, parking structures, restaurants, stores, hotels, housing projects, and similar structures. It does not include slash or woody vegetation, if the slash or woody vegetation originated from vegetation growing in the wetland and does not impair the flow or circulation of water or the reach of the wetland.

Subp. 18a. **50 to 80 percent area.** “50 to 80 percent area” means a county or watershed with at least 50 percent but less than 80 percent of the presettlement wetland acreage intact.

Subp. 19. **Floodplain wetland.** “Floodplain wetland” means a wetland located in the floodplain of a watercourse, with no well defined inlets or outlets, including tile systems, ditches, or natural watercourses. This may include the floodplain itself when it exhibits wetland characteristics.

Subp. 20. **Flow-through wetland.** “Flow-through wetland” means a wetland with both a well defined outlet and one or more well defined inlets, including tile systems, ditches, or natural watercourses.

Subp. 20a. **Greater than 80 percent area.** “Greater than 80 percent area” means a county or watershed where 80 percent or more of the presettlement wetland acreage is intact and:

- A. ten percent or more of the current total land area is wetland; or
- B. 50 percent or more of the current total land area is state or federal land.

Subp. 20b. **Hayland.** “Hayland” means an area that was mechanically harvested or that was planted with annually seeded crops in a crop rotation seeded to grasses or legumes in six of the last ten years.

Subp. 21. **Hydric soils.** “Hydric soils” means soils that are saturated, flooded, or ponded long enough during the growing season to develop anaerobic conditions in the upper part.

Subp. 22. **Hydrophytic vegetation.** “Hydrophytic vegetation” means macrophytic plant life growing in water, soil, or on a substrate that is at least periodically deficient in oxygen as a result of excessive water content.

Subp. 23. **Impact.** “Impact” means a loss in the quantity, quality, or biological diversity of a wetland caused by draining, filling, or excavating, as described in part 8420.0105.

Subp. 24. **Impacted wetland.** “Impacted wetland” means a wetland that has been partially or wholly subjected to an impact.

Subp. 25. **Infrastructure.** “Infrastructure” means public water facilities, storm water and sanitary sewer piping, outfalls, inlets, street subbase, roads, and ditches, culverts, bridges, and any other work defined specifically by a local government unit as constituting a capital improvement within the context of an approved development plan.

Subp. 26. [Repealed, 22 SR 1877]

Subp. 27. [Repealed, 22 SR 1877]

Subp. 28. **Isolated wetland.** “Isolated wetland” means a wetland without well defined inlets or outlets, including tile systems, ditches, or natural watercourses.

Subp. 29. **Landowner.** “Landowner” means a person or entity having the rights necessary to drain, excavate, or fill a wetland, or to establish and maintain a replacement or banked wetland. Typically, the landowner is a fee title owner or a holder of an easement, license, lease, or rental agreement providing the necessary rights. The right must not be limited by a lien or other encumbrance that could override the obligations assumed with the replacement or banking of a wetland.

Subp. 29a. **Less than 50 percent area.** “Less than 50 percent area” means a county or watershed with less than 50 percent of the presettlement wetland acreage intact or any county or watershed not defined as a greater than 80 percent area or 50 to 80 percent area.

Subp. 30. **Local government unit.** “Local government unit” means:

A. outside of the seven-county metropolitan area, a city council, county board of commissioners, or soil and water conservation district or their delegate;

B. in the seven-county metropolitan area, a city council, a town board, a watershed management organization under Minnesota Statutes, section 103B.205, subdivision 13, or soil and water conservation district or their delegate; and

C. in those cases where an activity or replacement will occur on state land, the agency with administrative responsibility for that land.

Subp. 30a. **Local water plan.** “Local water plan” means either a watershed plan pursuant to Minnesota Statutes, sections 103B.201 to 103B.255, a comprehensive local water management plan pursuant to Minnesota Statutes, sections 103B.301 to 103B.355, or a watershed management plan pursuant to Minnesota Statutes, section 103D.401.

Subp. 31. **Mining.** “Mining” means the removal of peat and metallic minerals as provided in Minnesota Statutes, sections 93.461 and 93.481.

Subp. 31a. **Minor watershed.** “Minor watershed” means one of the 5,600 minor watersheds established by the Minnesota Department of Natural Resources for the “1979 Watershed Mapping Project” pursuant to Laws 1977, chapter 455, section 33, subdivision 7, paragraph (a).

Subp. 31b. **Municipal.** “Municipal” means within a municipality as defined in Minnesota Statutes, section 103G.005, subdivision 12.

Subp. 31c. **New wetland credit or NWC.** “New wetland credit” or “NWC” means wetland replacement credit that can be used for any portion of wetland replacement.

Subp. 31d. **Native vegetation.** “Native vegetation” means plant species that are indigenous to Minnesota, or that expand their range into Minnesota without being intentionally or unintentionally introduced by human activity and are classified as native in the Minnesota Plant Database (Minnesota DNR, 2002).

Subp. 32. **Nondegraded wetland.** “Nondegraded wetland” means a wetland that has not been degraded by human activities.

Subp. 32a. **Noninvasive vegetation.** “Noninvasive vegetation” means plant species that do not typically invade or rapidly colonize existing, stable plant communities.

Subp. 32b. **Nonwetland.** “Nonwetland” means upland areas or previously converted areas that do not meet the criteria for classification as a jurisdictional wetland using the United States Army Corps of Engineers Wetland Delineation Manual (January 1987) and deepwater habitats identified using “Classification of Wetlands and Deepwater Habitats of the United States” (Cowardin et al., 1979 edition).

Subp. 32c. **On site.** “On site” means within or directly adjacent to a project.

Subp. 33. **Pasture.** “Pasture” means an area that was grazed by domesticated livestock or that was planted with annually seeded crops in a crop rotation seeded to grasses or legumes in six of the last ten years.

Subp. 34. **Peace officer.** “Peace officer” has the meaning given it in Minnesota Statutes, section 626.84.

Subp. 34a. **Permanently and semipermanently flooded area of a type 3, 4, or 5 wetland.** “Permanently and semipermanently flooded area of a type 3, 4, or 5 wetland” means the portion of a type 3, 4, or 5 wetland below the level where the water has been maintained for a sufficient period of time to leave evidence upon the landscape, commonly the point where the natural vegetation changes from predominantly aquatic to predominantly terrestrial.

Subp. 34b. **Presettlement wetland.** “Presettlement wetland” means a wetland or public waters wetland that existed in Minnesota at the time of statehood in 1858.

Subp. 35. **Project.** “Project” means a specific plan, contiguous activity, proposal, or design necessary to accomplish a goal as defined by the local government unit. As used in this chapter, a project may not be split into components or phases for the sole purpose of gaining additional exemptions.

Subp. 36. **Project-specific.** “Project-specific” means the applicant for the replacement plan approval will construct the replacement as part of the project, rather than obtain the replacement from a wetland bank.

Subp. 37. **Public transportation project.** “Public transportation project” means a project conducted by a public agency involving transportation facilities open to the public.

Subp. 37a. **Public value credit or PVC.** “Public value credit” or “PVC” means wetland replacement credit that can only be used for the portion of wetland replacement required above a 1:1 ratio.

Subp. 38. **Public value of wetlands.** “Public value of wetlands” means the public benefit and use of wetlands as determined based upon an assessment of the wetland functions listed in part 8420.0103.

Subp. 39. **Public waters wetlands.** “Public waters wetlands” means public waters wetlands, as defined in chapter 6115.

Subp. 39a. **Public waters.** “Public waters” means public waters as defined in part 6115.0170.

Subp. 40. **Replacement wetland.** “Replacement wetland” means a wetland restored or created or an area designated in part 8420.0541, or the equivalent, to replace wetland area or public values of wetland functions lost at an impacted wetland.

Subp. 40a. **Responsible party.** “Responsible party” means an individual, business, or other organization causing the draining, excavation, or filling of wetlands on the property of another, with or without the landowner’s permission or approval.

Subp. 41. **Restoration.** “Restoration” means reestablishment of an area that was historically wetlands or remains as a degraded wetland.

Subp. 42. **Right-of-way acreage.** “Right-of-way acreage” has the meaning given it in Minnesota Statutes, section 103E.285, subdivision 6.

Subp. 43. **Riverine wetland.** “Riverine wetland” means a wetland contained within the banks of a channel that may contain moving water or that forms a connecting link between two bodies of standing water.

Subp. 44. [Repealed, 27 SR 135]

Subp. 44a. **Shoreland wetland.** “Shoreland wetland” means a wetland located in the shoreland wetland protection zone.

Subp. 44b. **Shoreland wetland protection zone.**

A. For local government units that have a shoreland management ordinance approved under Minnesota Statutes, sections 103F.201 to 103F.221, “shoreland wetland protection zone” means:

(1) 1,000 feet from the ordinary high water level of a water basin that is a public water identified in the shoreland management ordinance or the shoreland area approved by the commissioner as provided in the shoreland management rules adopted under Minnesota Statutes, section 103F.211, whichever is less; or

(2) 300 feet from the ordinary high water level of a watercourse identified in the shoreland management ordinance or the shoreland area approved by the commissioner as provided in the shoreland management rules adopted under Minnesota Statutes, section 103F.211, whichever is less; and

B. For local government units that do not have a shoreland management ordinance approved under Minnesota Statutes, sections 103F.201 to 103F.221, “shoreland wetland protection zone” means:

(1) 1,000 feet from the ordinary high water level of a water basin that is a public water that is at least ten acres in size within municipalities and at least 25 acres in size in unincorporated areas; or

(2) 300 feet from the ordinary high water level of a watercourse identified by the public waters inventory under Minnesota Statutes, section 103G.201.

Subp. 45. **Silviculture.** “Silviculture” means the management of forest trees.

Subp. 46. **Soil and water conservation district.** “Soil and water conservation district” means a legal subdivision of state government under Minnesota Statutes, chapter 103C.

Subp. 47. [Repealed, 22 SR 1877]

Subp. 47a. **State wetland banking system, wetland bank, or bank.** “State wetland banking system,” “wetland bank,” or “bank” means a system of identifying wetlands restored or created for replacement credit, providing for, and facilitating and tracking the exchange of wetland banking credits for projects that require replacement plans or wetland mitigation required by other local, state, or federal authorities.

Subp. 47b. **Structure.** “Structure” means any object erected or placed in, under, over, or anchored or attached to, a wetland area.

Subp. 48. **Tributary wetland.** “Tributary wetland” means a wetland with a well defined outlet, including tile systems, ditches, or natural watercourses, but without a well defined inlet.

Subp. 49. **Utility.** “Utility” means a sanitary sewer, storm sewer, potable water distribution, and transmission, distribution, or furnishing, at wholesale or retail, of natural or manufactured gas, petroleum products, electricity, telephone, or radio service or communications.

Subp. 50. **Watershed.** “Watershed” means the 81 major watershed units delineated by the map “State of Minnesota Watershed Boundaries – 1979” as produced by the Minnesota Department of Natural Resources, Office of Planning and Research, Water Policy Planning Program, with funding from the Legislative–Citizen Commission on Minnesota Resources.

Subp. 51. **Watershed management organization.** “Watershed management organization” means a watershed district wholly within the metropolitan area or a joint powers entity established wholly or partly within the metropolitan area by special law or by agreement that performs some or all of the functions of a watershed district for a watershed and that has the characteristics and the authority specified under Minnesota Statutes, section 103B.211. Lake improvement or conservation districts are not watershed management organizations.

Subp. 51a. **Wetland banking credits.** “Wetland banking credits” means acres or parts of acres of restored or created wetland or adjacent upland buffer described by type and topographic setting, or areas as described in parts 8420.0540 and 8420.0541, that have been approved for deposit in the wetland bank.

Subp. 52. **Wetlands, a wetland, the wetland, or wetland area.**

A. “Wetlands” means lands transitional between terrestrial and aquatic systems where the water table is usually at or near the surface or the land is covered by shallow water.

For purposes of this subpart, wetlands must:

- (1) have a predominance of hydric soils;
- (2) be inundated or saturated by surface water or groundwater at a frequency and duration sufficient to support a prevalence of hydrophytic vegetation typically adapted for life in saturated soil conditions; and
- (3) under normal circumstances, support a prevalence of hydrophytic vegetation.

B. “A wetland” or “the wetland” means a distinct hydrologic feature with characteristics of item A, surrounded by nonwetland and including all contiguous wetland types, except those connected solely by riverine wetlands. “Wetland area” means a portion of “a wetland” or “the wetland.”

C. Wetlands does not include public waters wetlands and public waters unless reclassified as wetlands by the commissioner under Minnesota Statutes, section 103G.201.

D. The wetland size is the area within its boundary. The boundary must be determined according to the United States Army Corps of Engineers Wetland Delineation Manual (January 1987). The wetland type must be determined according to United States Fish and Wildlife Service Circular No. 39 (1971 edition). The local government unit may seek the advice of the technical evaluation panel as to the wetland size and type.

Subp. 53. **Wetlands in a cultivated field.** “Wetlands in a cultivated field” means a wetland where greater than 50 percent of its boundary abuts land that was in agricultural crop production in six of the ten years before January 1, 1991.

Subp. 54. **Wetlands located on agricultural land.** “Wetlands located on agricultural land” means a wetland where greater than 50 percent of its boundary abuts agricultural land.

Subp. 54a. **Wetland type.** “Wetland type” means a wetland type classified according to Wetlands of the United States, United States Fish and Wildlife Service Circular 39 (1956 and 1971 editions), as summarized in this subpart. “Classification of Wetlands and Deepwater Habitats of the United States” (Cowardin et al., 1979 edition) is a separate, parallel wetland typing system that may be used to characterize components of a wetland.

A. “Type 1 wetlands” are seasonally flooded basins or flats in which soil is covered with water or is waterlogged during variable seasonal periods but usually is well-drained during much of the growing season. Type 1 wetlands are located in depressions and in overflow bottomlands along watercourses, and in which vegetation varies greatly according to season and duration of flooding and includes bottomland hardwoods as well as herbaceous growths.

B. “Type 2 wetlands” are inland fresh meadows in which soil is usually without standing water during most of the growing season but is waterlogged within at least a few inches of the surface. Vegetation includes grasses, sedges, rushes, and various broad-leaved plants. Meadows may fill shallow basins, sloughs, or farmland sags, or may border shallow marshes on the landward side.

C. “Type 3 wetlands” are inland shallow fresh marshes in which soil is usually waterlogged early during a growing season and often covered with as much as six inches or



more of water. Vegetation includes grasses, bulrushes, spikerushes, and various other marsh plants such as cattails, arrowheads, pickerelweed, and smartweeds. These marshes may nearly fill shallow lake basins or sloughs, or may border deep marshes on the landward side and are also common as seep areas on irrigated lands.

D. "Type 4 wetlands" are inland deep fresh marshes in which soil is usually covered with six inches to three feet or more of water during the growing season. Vegetation includes cattails, reeds, bulrushes, spikerushes, and wild rice. In open areas, pondweeds, naiads, coontail, water milfoils, waterweeds, duckweeds, water lilies, or spatterdocks may occur. These deep marshes may completely fill shallow lake basins, potholes, limestone sinks, and sloughs, or may border open water in such depressions.

E. "Type 5 wetlands" are inland open fresh water, shallow ponds, and reservoirs in which water is usually less than ten feet deep and is fringed by a border of emergent vegetation similar to open areas of type 4 wetland.

F. "Type 6 wetlands" are shrub swamps in which soil is usually waterlogged during growing season and is often covered with as much as six inches of water. Vegetation includes alders, willows, buttonbush, dogwoods, and swamp privet. This type occurs mostly along sluggish streams and occasionally on floodplains.

G. "Type 7 wetlands" are wooded swamps in which soil is waterlogged at least to within a few inches of the surface during growing season and is often covered with as much as one foot of water. This type occurs mostly along sluggish streams, on floodplains, on flat uplands, and in shallow basins. Trees include tamarack, arborvitae, black spruce, balsam, red maple, and black ash. Northern evergreen swamps usually have a thick ground cover of mosses. Deciduous swamps frequently support beds of duckweeds and smartweeds.

H. "Type 8 wetlands" are bogs in which soil is usually waterlogged and supports a spongy covering of mosses. This type occurs mostly in shallow basins, on flat uplands, and along sluggish streams. Vegetation is woody or herbaceous or both. Typical plants are heath shrubs, sphagnum moss, and sedges. In the north, leatherleaf, Labrador-tea, cranberries, carex, and cottongrass are often present. Scattered, often stunted, black spruce and tamarack may occur.

**Statutory Authority:** *MS s 14.06; 103B.101; 103B.3355; 103G.2242*

**History:** *18 SR 274; 22 SR 1877; 25 SR 152; 27 SR 135; L 2004 c 228 art 1 s 71; L 2006 c 243 s 21*

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

This chapter incorporates by reference the following documents and any subsequent updates, addenda, or derivations related to them, as approved by the board:

A. Wetlands of the United States (United States Fish and Wildlife Service Circular No. 39, 1956 and 1971 editions).

B. United States Army Corps of Engineers Wetland Delineation Manual (January 1987).

C. Classification of Wetlands and Deepwater Habitats of the United States (Cowardin, et al., 1979 edition).

D. Criteria and Guidelines for Assessing Geologic Sensitivity of Groundwater Resources in Minnesota (Minnesota Department of Natural Resources, 1991).

E. United States Geological Survey Hydrologic Unit Map for Minnesota (1974).

F. National Wetland Inventory maps (United States Fish and Wildlife Service).

G. Growing Energy Crops on Minnesota Wetlands: The Land Use Perspective, Anderson and Craig, 1984.

H. Wetland Restoration Guide, Minnesota Board of Water and Soil Resources (December 1982).

I. Vegetation in Restored and Created Wetlands, Minnesota Board of Water and Soil Resources, September 2000.

J. Wildlife Habitat Improvements in Wetlands: Guidance for Soil and Water Conservation Districts and Local Government Units in Certifying and Approving Wetland Conservation Act Exemption Proposals, Minnesota Interagency Wetlands Group, December 2000.

K. Sustaining Minnesota Forest Resources: Voluntary Site-Level Forest Management Guidelines for Landowners, Loggers and Resource Managers. Minnesota Forest Resources Council, St. Paul, 1999.

L. Minnesota Construction Site Erosion and Sediment Control Planning Handbook. Minnesota Board of Water and Soil Resources and the Association of Metropolitan Soil and Water Conservation Districts, St. Paul, 1988.

M. Agriculture and Water Quality: Best Management Practices for Minnesota, Minnesota Pollution Control Agency, St. Paul, 1991.

N. Storm-Water and Wetlands: Planning and Evaluation Guidelines for Addressing Potential Impacts of Urban Storm-Water and Snow-Melt Runoff on Wetlands, Minnesota Storm-Water Advisory Group, 1997.

O. Minnesota Plant Database, Minnesota Department of Natural Resources, St. Paul, 2002.

These documents are available through the State Law Library, except the National Wetland Inventory maps, which are available at Minnesota soil and water conservation district offices. Except for the Minnesota Plant Database in item O, none of the documents are subject to frequent change.

**Statutory Authority:** *MS s 14.06; 103B.101; 103B.3355; 103G.2242*

**History:** *18 SR 274; 22 SR 1877; 25 SR 152; 27 SR 135*

#### 8420.0115 SCOPE OF EXEMPTION STANDARDS.

Persons proposing to conduct an exempt activity are encouraged to contact the local government unit or the local government unit's designee for advice on determining whether a proposed project is eligible for an exemption and to evaluate alternatives to avoid or minimize wetland impacts.

An activity is exempt if it qualifies for any one of the exemptions, even though it may be indicated as not exempt under another exemption.

These exemptions do not apply to calcareous fens as identified by the commissioner.

No exemptions apply to wetlands that have been previously restored or created as a result of an approved replacement plan. All such wetlands are subject to replacement on subsequent drainage, excavation, or filling.

Wetlands may not be partially drained, excavated, or filled in order to claim an exemption or no-loss determination on the remainder. Therefore, an exemption or no-loss determination may not be applied to the remaining wetland if it would not have been applicable before the impact. Exemptions may not be combined on a wetland that is impacted by a project.

A person conducting an activity in a wetland under an exemption in part 8420.0122 shall ensure that:

A. appropriate erosion control measures are taken to prevent sedimentation of the water;

B. the activity does not block fish activity in a watercourse; and

C. the activity is conducted in compliance with all other applicable federal, state, and local requirements, including best management practices as listed in part 8420.0112, and water resource protection requirements established under Minnesota Statutes, chapter 103H.

**Statutory Authority:** *MS s 14.06; 14.386; 103B.101; 103B.3355; 103G.2242*

**History:** *18 SR 274; 22 SR 1877; 25 SR 152; 27 SR 135; 32 SR 281*

8420.0120 [Repealed, 22 SR 1877]

#### 8420.0122 EXEMPTION STANDARDS.

Subpart 1. **Agricultural activities.** A replacement plan for wetlands is not required for:

A. activities in a wetland that was planted with annually seeded crops or was in a crop rotation seeding of pasture grass or legumes in six of the last ten years prior to January 1, 1991. Documentation, such as aerial photographs, United States Department of Agriculture

records, or affidavit of landowner must be required by the local government unit to show and use as evidence for this exemption. Land eligible for this exemption must be wetland types 1 and 2;

B. activities in a type 1 wetland on agricultural pasture land that remains in the same use, except for bottomland hardwood type 1 wetlands, and activities in a type 2 or type 6 wetland that is less than two acres in size and located on agricultural pasture land that remains in the same use;

C. activities in a wetland conducted as part of normal farming practices. For purposes of this item, "normal farming practices" means farming, silvicultural, grazing, and ranching activities such as plowing, seeding, cultivating, and harvesting for the production of feed, food, and fiber products, but does not include activities that result in the draining of wetlands;

D. soil and water conservation practices that do not permanently drain or fill a wetland and that are approved by the soil and water conservation district after review by the technical evaluation panel. For purposes of this item, examples of soil and water conservation practices include those identified in the State Cost Share Program Manual, available at the Board of Water and Soil Resources Web site (<http://www.bwsr.state.mn.us/cs/costshare-manual.pdf>), and federally funded demonstration, research, and cost share programs and projects;

E. aquaculture activities including pond excavation and construction and maintenance of associated access roads and dikes authorized under, and conducted in accordance with, a permit issued by the United States Army Corps of Engineers under section 404 of the federal Clean Water Act, United States Code, title 33, section 1344, but not including construction or expansion of buildings;

F. wild rice production activities, including necessary diking and other activities authorized under a permit issued by the United States Army Corps of Engineers under section 404 of the federal Clean Water Act, United States Code, title 33, section 1344; and

G. agricultural activities that are subject to federal farm program restrictions that meet minimum state standards under this chapter and Minnesota Statutes, sections 103A.202 and 103B.3355, and that have been approved by the Board of Water and Soil Resources, the commissioners of natural resources and agriculture, and the Pollution Control Agency. The approved conditions and standards shall be noticed by the board to local government units and published in the State Register. The conditions and standards shall take effect 30 days after publication and remain in effect unless superseded by subsequent statute, rule, or notice in the State Register. This exemption may be applied to agricultural land annually enrolled in the federal Farm Program as long as wetlands are not drained, excavated, or filled beyond what is:

- (1) allowed under the other exemptions in this part;
- (2) necessary to replace, maintain, or repair existing private drainage infrastructure with a capacity not to exceed that which was originally constructed; or
- (3) replaced at a ratio of 1:1 or greater under United States Department of Agriculture provisions as supported by documentation from the United States Department of Agriculture which must be included as evidence to support this exemption.

If the activity would result in loss of eligibility, the landowner cannot qualify for the exemption.

#### Subp. 2. **Drainage.**

A. For the purposes of this subpart, "public drainage system" means a drainage system as defined in Minnesota Statutes, section 103E.005, subdivision 12, and any ditch or tile lawfully connected to the drainage system.

B. A replacement plan is not required for draining of type 1 wetlands, or up to five acres of type 2 or type 6 wetlands, in an unincorporated area on land that has been assessed drainage benefits for a public drainage system, provided that:

- (1) during the 20-year period that ended January 1, 1992:
  - (a) there was an expenditure made from the drainage system account for the public drainage system;

(b) the public drainage system was repaired or maintained as approved by the drainage authority; or

(c) no repair or maintenance of the public drainage system was required under Minnesota Statutes, section 103E.705, subdivision 1, as determined by the public drainage authority; and

(2) the wetlands are not drained for conversion to:

(a) platted lots;

(b) planned unit, commercial, or industrial developments; or

(c) any development with more than one residential unit per 40 acres, except for parcels subject to local zoning standards that allow family members to establish an additional residence on the same 40 acres.

If wetlands drained under this item are converted to uses prohibited under subitem (2) during the ten-year period following drainage, the wetlands must be replaced under Minnesota Statutes, section 103G.222.

C. A replacement plan is not required for draining, excavating, or filling of wetlands, except for draining types 3, 4, and 5 wetlands that have been in existence for more than 25 years, resulting from maintenance and repair of existing public drainage systems conducted or authorized by a public drainage authority pursuant to Minnesota Statutes, chapter 103E.

D. A replacement plan is not required for draining, excavating, or filling of wetlands, except for draining wetlands that have been in existence for more than 25 years, resulting from maintenance and repair of existing drainage systems other than public drainage systems.

For items C and D, the landowner must provide documentation that the wetlands which will be partially or completely drained by the maintenance have not existed for more than 25 years. Documentation may include, but is not limited to: aerial photographs, climatological records, soil borings, vegetative analysis, elevation surveys, or sworn affidavits.

E. A replacement plan is not required for draining agricultural land that:

(1) was planted with annually seeded crops prior to July 5, except for crops that are normally planted after this date, in eight out of the ten most recent years prior to the impact;

(2) was in a crop rotation seeding of pasture grass, cover crop, or legumes or was fallow for a crop production purpose in eight out of the ten most recent years prior to the impact; or

(3) was enrolled in a state or federal land conservation program and met the requirements of subitem (1) or (2) prior to enrollment.

Documentation, such as aerial photographs, United States Department of Agriculture records, or an affidavit of the landowner or another landowner with knowledge of the subject agricultural land may be required by the local government unit as evidence for the exemption under this item.

F. The public drainage authority may, as part of the repair, install control structures, realign the ditch, construct dikes along the ditch, or make other modifications as necessary to prevent drainage of the wetland.

G. Wetlands and public waters of all types that could be drained as a part of a public drainage repair project are eligible for the permanent wetlands preserve program established under Minnesota Statutes, section 103F.516. The board shall give priority to acquisition of easements on types 3, 4, and 5 wetlands that have been in existence for more than 25 years on public drainage systems and other wetlands that have the greatest risk of drainage from a public drainage repair project.

H. Present and future owners of wetlands drained or filled without replacement under an exemption in item B or E may make no use of the wetland area after it is drained, excavated, or filled, other than as agricultural land, for at least ten years after the draining, excavating, or filling, unless it is first replaced under the requirements of Minnesota Statutes, section 103G.222. Also, for at least ten years, the wetland may not be restored for replacement credit. Except for land in public ownership, at the time of draining, excavation, or fill-

ing, the local government unit may require the landowner to record a notice of these restrictions in the office of the county recorder for the county in which the project is located. The local government unit may require recording a notice of these restrictions if it determines the wetland area drained is at risk of conversion to a nonagricultural use within ten years based on the zoning classification, proximity to a municipality or full service road, or other criteria as determined by the local government unit. In making a determination under this item, the local government unit must review the applicable comprehensive plan when evaluating the risk of conversion to a nonagricultural use and monitor and enforce the prohibition on using the area drained, filled, or excavated for a nonagricultural purpose for at least ten years. At a minimum, the recorded document must contain the name or names of the landowners, a legal description of the property to which the restrictions apply, a statement of the restrictions, the date on which the restrictions expire, the name of the local government that certified the exemption, if such occurred, the signatures of all owners, and an acknowledgment.

**Subp. 3. Federal approvals.** A replacement plan for wetlands is not required for activities authorized under section 404 of the federal Clean Water Act, United States Code, title 33, section 1344, or section 10 of the Rivers and Harbors Act of 1899, United States Code, title 33, section 403, and regulations that meet minimum state standards under this chapter and that have been approved by the Board of Water and Soil Resources, the Department of Agriculture, the Department of Natural Resources, and the Pollution Control Agency.

**Subp. 4. Wetland restoration.** A replacement plan for wetlands is not required for:

A. activities in a wetland restored or created for conservation purposes under a contract or easement providing the landowner with the right to drain the restored or created wetland. The landowner must provide a contract or easement conveyance or affidavit demonstrating that the landowner or a predecessor restored or created the wetland for conservation purposes but retained the right to subsequently drain the restored or created wetland; or

B. activities in a wetland restored or created by a landowner without any assistance or financing from public agencies or private entities other than the landowner and the wetland has not been used for wetland replacement or deposited in the state wetland bank. For purposes of this item, assistance by public agencies does not include consultation on project design or advice on the project's relationship to state or federal programs. The landowner must provide a contract, billing statements, or an affidavit demonstrating that the landowner or a predecessor restored or created the wetland without any assistance or financing from public agencies or private entities other than the landowner. The landowner must also provide sufficient information to determine that the area was not wetland prior to the restoration or creation activity.

**Subp. 5. Incidental wetlands.** A replacement plan for wetlands is not required for activities in wetland areas created solely as a result of:

- A. beaver dam construction;
- B. blockage of culverts through roadways maintained by a public or private entity;
- C. actions by public or private entities that were taken for a purpose other than creating the wetland; or
- D. any combination of items A to C.

Wetland areas created by beaver activities may be drained by removing those materials placed by beaver. Drainage is permitted by removing or moving materials blocking installed roadway culverts and related drainage structures. Additional excavation or removal of other materials is not permitted unless it can be shown by aerial photographs that the proposed activity will not drain or fill wetland that was there before the beaver dam was built or before the culvert became plugged.

Wetland areas may be drained, excavated, or filled if the landowner can show that the wetland was created solely by actions, the purpose of which was not to create the wetland.

Impoundments or excavations constructed in nonwetlands solely for the purpose of effluent treatment, storm water retention, soil and water conservation practices, and water quality improvements, and not as part of a wetland replacement process that may, over time, take on wetland characteristics, are also exempt.

**Subp. 6. Utilities; public works.**

A. A replacement plan for wetlands is not required for:

(1) new placement or maintenance, repair, enhancement, or replacement of existing utility or utility-type service, including pipelines, if:

(a) the direct and indirect impacts of the proposed project have been avoided and minimized to the extent possible; and

(b) the proposed project significantly modifies or alters less than one-half acre of wetlands;

(2) activities associated with the operation, routine maintenance, or emergency repair of existing utilities and public work structures, including pipelines, provided the activities do not result in additional wetland intrusion or additional draining or filling of a wetland either wholly or partially; or

(3) repair and updating of existing individual sewage treatment systems necessary to comply with local, state, and federal regulations.

B. For maintenance, repair, and replacement, the local government unit may issue a seasonal or annual exemption certification or the utility may proceed without local government unit certification if the utility is carrying out the work according to approved best management practices. Work of an emergency nature may proceed as necessary and any drain or fill activities shall be addressed with the local government unit after the emergency work has been completed.

**Subp. 7. Forestry.** A replacement plan for wetlands is not required for:

A. temporarily crossing or entering a wetland to perform silvicultural activities, including timber harvest as part of a forest management activity, so long as the activity limits the impact on the hydrologic and biologic characteristics of the wetland; the activity does not result in the construction of dikes, drainage ditches, tile lines, or buildings; and the timber harvesting and other silvicultural practices do not result in the drainage of the wetland or public waters; or

B. permanent access for forest roads across wetlands so long as the activity limits the impact on the hydrologic and biologic characteristics of the wetland; the construction activities do not result in the access becoming a dike, drainage ditch, or tile line; filling is avoided wherever possible; and there is no drainage of the wetland or public waters.

This exemption is for roads constructed for the primary purpose of providing access for the conduct of silvicultural activities.

**Subp. 8.** [Repealed, 32 SR 281]

**Subp. 9. De minimis.**

A. Except as provided in items B and C, a replacement plan for wetlands is not required for draining, excavating, or filling the following amounts of wetlands as part of a project:

(1) in a greater than 80 percent area, including Isanti County:

(a) 10,000 square feet of type 1, 2, 6, or 7 wetland, except for white cedar and tamarack wetland, outside of the shoreland wetland protection zone; or

(b) 400 square feet of type 1, 2, 6, or 7 wetland, except for white cedar and tamarack wetland, outside of the building setback zone, as defined in the local shoreland management ordinance, but within the shoreland wetland protection zone. This amount may be increased to 1,000 square feet by the local government unit if the wetland is isolated and determined to have no direct surficial connection to the public water;

(2) in a 50 to 80 percent area:

(a) 5,000 square feet of type 1, 2, 6, or 7 wetland, except for white cedar and tamarack wetland, outside of the shoreland wetland protection zone and outside of the 11-county metropolitan area;

(b) 2,500 square feet of type 1, 2, 6, or 7 wetland, except for white cedar and tamarack wetland, outside of the shoreland wetland protection zone and inside the 11-county metropolitan area; or

(c) 400 square feet of type 1, 2, 6, or 7 wetland, except for white cedar and tamarack wetland, outside of the building setback zone, as defined in the local shoreland management ordinance, but within the shoreland wetland protection zone;

(3) in a less than 50 percent area:

(a) 2,000 square feet of type 1, 2, or 6 wetland outside of the shoreland wetland protection zone and outside the 11-county metropolitan area;

(b) 1,000 square feet of type 1, 2, or 6 wetland outside of the shoreland wetland protection zone and inside the 11-county metropolitan area;

(c) 400 square feet of type 1, 2, or 6 wetland outside of the the building setback zone, as defined in the local shoreland management ordinance, but within the shoreland wetland protection zone; or

(d) 100 square feet of type 7 wetland outside of the building setback zone, as defined in the local shoreland management ordinance; or

(4) statewide:

(a) 100 square feet of type 3, 4, 5, 8, and white cedar and tamarack wetland outside of the building setback zone, as defined in the local shoreland management ordinance; or

(b) 20 square feet of wetland, regardless of type, inside the building setback zone, as defined in the local shoreland management ordinance.

B. The amounts listed in item A may not be combined on a project.

C. This exemption no longer applies to a landowner's portion of a wetland when the proposed project impact area and the cumulative area of the landowner's portion drained, excavated, or filled since January 1, 1992, is the greater of:

(1) the applicable area listed in item A, if the landowner owns the entire wetland;

(2) five percent of the landowner's portion of the wetland; or

(3) 400 square feet.

D. This exemption may not be combined with another exemption on a project.

E. Property may not be subdivided solely to increase the amounts listed in item A.

F. For purposes of this subpart, for wetlands greater than 40 acres, the wetland type may be determined to be the wetland type with the deepest water regime within the wetland and within 300 feet of the impact.

G. For purposes of this subpart, the 11-county metropolitan area consists of the counties of Anoka, Carver, Chisago, Dakota, Hennepin, Isanti, Ramsey, Scott, Sherburne, Washington, and Wright.

Subp. 10. **Wildlife habitat.** A replacement plan for wetlands is not required for:

A. excavation or the associated deposition of spoil within a wetland for a wildlife habitat improvement project, if:

(1) the area of deposition, and excavation if within the permanently and semi-permanently flooded areas of type 3, 4, or 5 wetlands, does not exceed five percent of the wetland area or one-half acre, whichever is less, and the spoil is stabilized and permanently seeded with native, noninvasive species to prevent erosion;

(2) the project does not have an adverse impact on any species designated as endangered or threatened under state or federal law; and

(3) the project will provide wildlife habitat improvement as certified by the soil and water conservation district or technical evaluation panel using the "Wildlife Habitat Improvements in Wetlands: Guidance for Soil and Water Conservation Districts and Local Government Units in Certifying and Approving Wetland Conservation Act Exemption Proposals, Minnesota Interagency Wetlands Group, December 2000" or similar criteria approved by the board; or

B. duck blinds.

**Statutory Authority:** *MS s 14.386; 103B.101; 103B.3355; 103G.2242*

**History:** *22 SR 1877; 25 SR 152; 27 SR 135; 32 SR 281*

## PROCEDURES

**8420.0200 DETERMINING LOCAL GOVERNMENT UNIT; DUTIES.**

Subpart 1. **Determinations of local government unit.** The local government unit responsible for making exemption, wetland type, wetland boundary, and no-loss determinations and approving replacement and wetland banking plans shall be determined according to items A to D.

A. Outside the seven-county metropolitan area, the local government unit is the county or city in which the drain or fill activity is located, or its delegate.

B. In the seven-county metropolitan area, the local government unit is the city, town, or water management organization regulating surface-water-related matters in the area in which the drain or fill activity is located, or its delegate. The watershed management plan adopted under Minnesota Statutes, section 103B.231, and related board rules will normally indicate the appropriate local government unit. Lacking an indication, the local government unit must be the city, town, or its delegate.

C. If the activity in a wetland is located in two jurisdictions, the local government unit is the one exercising zoning authority over the project or if both have zoning authority, the one in which most of the wetland loss will occur. If no zoning permits are required, the local government unit is the one in which most of the wetland loss will occur. If an activity will affect wetlands in more than one local government unit, the board will coordinate the project review to ensure consistency and consensus among the local government units involved.

D. In those cases where an activity will occur on state land, the local government unit is the state agency, or the agency's designee, with administrative responsibility for that land.

The board will resolve all questions as to which government entity is the responsible authority, applying the guidelines in items A to D.

Notwithstanding items A to D, the Department of Natural Resources shall be the approving authority for activities associated with projects requiring permits to mine under Minnesota Statutes, section 93.481, and for projects affecting calcareous fens.

**Subp. 2. Local government unit duties.**

A. A local government unit must provide knowledgeable and trained staff to manage the program or secure a qualified delegate. Otherwise, the board may declare a moratorium as prescribed in part 8420.0260 or take other appropriate legal action to assure proper implementation and compliance with this chapter. The board may establish standards and requirements for training, experience, and certification.

B. The local government unit may place the decision authority for exemption, no-loss, wetland boundary and type, replacement plan, and wetland banking determinations with local government unit staff according to procedures it establishes. For final determinations made by staff, the local government unit must establish a local appeal process that includes a public hearing before appointed or elected officials. The determination of staff becomes final if not appealed to the local government unit within 30 days after the date on which the decision is mailed to those required to receive notice of the decision. Notwithstanding the time frames of Minnesota Statutes, section 15.99, or any other law to the contrary, the local government unit must make a ruling within 30 days from the date of the filing of the appeal, unless the appellant and local government unit mutually agree, in writing, to an extension of time beyond the 30 days. Appeal of a final determination made by staff may be made by the landowner, by any of those required to receive notice of the decision, or by 100 residents of the county in which a majority of the wetland is located.

C. The notice of decision mailed by the local government unit must include information on the process and time frames to appeal the decision of the local government unit.

D. The local government unit and soil and water conservation district may charge processing fees in amounts not greater than are necessary to cover the reasonable costs of



implementing this chapter and for technical and administrative assistance to landowners in processing other applications for projects affecting wetlands.

**Statutory Authority:** *MS s 14.06; 14.386; 103B.101; 103B.3355; 103G.2242*

**History:** *18 SR 274; 22 SR 1877; 25 SR 152; 27 SR 135; 32 SR 281*

#### **8420.0210 EXEMPTION DETERMINATIONS.**

A landowner intending to drain or fill a wetland without replacement, claiming exemption under part 8420.0122, may contact the local government unit before beginning draining or filling activities for determination whether or not the activity is exempt. A landowner who does not request a determination may be subject to the enforcement provisions in part 8420.0290 and Minnesota Statutes, section 103G.2372. The local government unit must keep on file all documentation and findings of fact concerning exemption determinations for a period of ten years.

An exemption may apply whether or not the local government unit has made an exemption determination. If the landowner requests an exemption determination, then the local government unit must make one.

The landowner applying for exemption is responsible for submitting the proof necessary to show qualification for the particular exemption claimed, including proof of the requisite property rights to do the activity. The local government unit may evaluate evidence for an exemption without making a determination.

The local government unit decision shall be based on the exemptions standards in part 8420.0122. If the decision requires a finding of wetland size or type, the local government unit should seek the advice of the technical panel as described in part 8420.0240. The local government unit decision must be made in compliance with Minnesota Statutes, section 15.99. The local government unit decision must be sent to the landowner, members of the technical evaluation panel, the watershed district or water management organization if there is one, the commissioner of natural resources, and individual members of the public who request a copy within ten working days of the decision.

**Statutory Authority:** *MS s 14.06; 103B.101; 103B.3355; 103G.2242*

**History:** *18 SR 274; 22 SR 1877; 25 SR 152; 27 SR 135*

#### **8420.0220 NO-LOSS DETERMINATIONS.**

A landowner unsure if proposed work will result in a loss of wetland may apply to the local government unit for a determination. A landowner who does not request a determination may be subject to the enforcement provisions in part 8420.0290 and Minnesota Statutes, section 103G.2372. The local government unit must keep on file all documentation and findings of fact concerning no-loss determinations for a period of ten years.

The landowner applying for a no-loss determination is responsible for submitting the proof necessary to show qualification for the claim, including proof of the requisite property rights to do the activity. The local government unit may evaluate evidence for a no-loss claim without making a determination.

The local government unit decision must be made in compliance with Minnesota Statutes, section 15.99. The local government unit decision must be sent to the landowner, members of the technical evaluation panel, the watershed district or water management organization if there is one, the commissioner of natural resources, and individual members of the public who request a copy within ten working days of the decision.

The local government unit shall make a no-loss determination if the landowner requests and if either:

- A. the work will not impact a wetland;
- B. the excavation work is limited to removal of debris such as trees, logs, stumps, and trash, provided the removal does not alter the original cross-section of the wetland;
- C. temporary or seasonal water level management activities will not result in the conversion of a wetland;
- D. the activities are in a surface impoundment for containment of waste material or water treatment;

E. the activity is being conducted as part of an approved replacement or banking plan or is conducted or authorized by public agencies for the purpose of wetland restoration, fish and wildlife habitat restoration or improvement using guidance in part 8420.0112, item J, or repair and maintenance of earthen containment structures;

F. the activity is limited to excavation and removal of deposited sediment in constructed stormwater management basins or wetlands that are presently utilized as stormwater management basins, or to excavation and removal of contaminated substrate, and the excavated area is stabilized so as to prevent water quality degradation and the excavation is limited to the minimum dimensions necessary for achieving the desired purpose; or

G. the project is an impact rectification activity listed in part 8420.0520, subpart 5.

**Statutory Authority:** *MS s 14.06; 103B.101; 103B.3355; 103G.2242*

**History:** *18 SR 274; 22 SR 1877; 25 SR 152; 27 SR 135*

#### 8420.0225 WETLAND BOUNDARY OR TYPE DETERMINATIONS.

A. A landowner may apply for a wetland boundary or type determination from the local government unit. The landowner applying for the determination is responsible for submitting proof necessary to make the determination, including, but not limited to, wetland delineation field data, observation well data, topographic mapping, survey mapping, and information regarding soils, vegetation, hydrology, and groundwater both within and outside of the proposed wetland boundary.

B. A local government unit that receives an application under item A may seek the advice of the technical evaluation panel and, if necessary, expand the technical evaluation panel.

C. The local government unit decision must be made in compliance with Minnesota Statutes, section 15.99. Within ten working days of the decision, the local government unit decision must be sent to the landowner, members of the technical evaluation panel, the watershed district or watershed management organization if there is one, the commissioner of natural resources, and individual members of the public who request a copy.

D. The local government unit decision is valid for three years unless the technical evaluation panel determines that natural or artificial changes to the hydrology, vegetation, or soils of the area have been sufficient to alter the wetland boundary or type.

**Statutory Authority:** *MS s 14.386; L 2000 c 382 s 20; 103B.3355; 103G.2242*

**History:** *25 SR 152; 27 SR 135*

#### 8420.0230 REPLACEMENT PLAN DETERMINATIONS.

Subpart 1. **Application.** A landowner intending to drain, excavate, or fill a wetland who does not qualify for an exemption or no-loss determination shall obtain approval of a replacement plan from the local government unit before beginning draining or filling. A person who does not do so is subject to the enforcement provisions in this chapter and Minnesota Statutes, section 103G.2372.

Within ten days of receipt of an application for an activity affecting less than 10,000 square feet of wetland, the local government unit must send a summary of the application, which includes information to identify the applicant and the location and scope of the project, to members of the technical evaluation panel, the commissioner of natural resources, and individual members of the public who have requested a copy. The project notification must state when the comment period ends.

Within ten working days of receipt of an application for approval of a replacement plan for an activity affecting 10,000 square feet or more of total wetland impacts, the local government unit must send a copy of the application and an invitation to submit comments to members of the technical evaluation panel; the watershed district or water management organization if there is one; the commissioner of natural resources and individual members of the public who request a copy. Individual members of the public who request a copy must be sent a summary of the application that includes information to identify the applicant and the location and scope of the project. The comment period must be 15 days or more. The project notification must state when the comment period ends.

An application for approval of a replacement plan includes a revised application for replacement plan approval and an application for a revision to an approved replacement plan if:

A. the wetland area to be drained or filled under the revised replacement plan is more than ten percent larger than the area to be drained or filled under the original replacement plan; or

B. the wetland area to be drained or filled under the revised replacement plan is located more than 500 feet from the area to be drained or filled under the original replacement plan.

Subp. 2. **Decision.** The local government unit decision shall be based on the replacement standards in parts 8420.0500 to 8420.0630, and on the technical evaluation panel's determination, if there is one, concerning the wetland function and resulting public values, location, size, and type of the wetland being altered. The local government unit decision must be made in compliance with Minnesota Statutes, section 15.99. The local government unit shall consider and include the technical evaluation panel's recommendation, if there is one, to approve, modify, or reject the proposed replacement plan. The local government unit decision must be sent to the landowner within ten working days of the decision. A summary of the local government unit decision must be sent within ten working days of the decision to those required to receive notice of the application.

For wetland replacement plans involving more than one local government unit, approval of all local government units involved or as specified in part 8420.0200 shall constitute final approval of the replacement plan and is required before the project may proceed. The local government unit with jurisdiction for the impact site must approve all components of the replacement plan, following the procedures in parts 8420.0500 to 8420.0630. The local government unit with jurisdiction for the replacement site shall limit the review to evaluation of the replacement site as in parts 8420.0540 to 8420.0630 and make a decision accordingly.

As part of the approval of the replacement plan, the local government unit with jurisdiction for the replacement site assumes responsibility for ensuring compliance with monitoring provisions according to parts 8420.0600 to 8420.0630. The local government unit with jurisdiction for the replacement site may enter into joint powers agreements with a local government unit with jurisdiction for the impact site, assess fees, or develop other procedures considered necessary to facilitate the process.

**Statutory Authority:** *MS s 14.06; 103B.101; 103B.3355; 103G.2242*

**History:** *18 SR 274; 22 SR 1877; 27 SR 135*

**8420.0235** [Repealed, 27 SR 135]

#### **8420.0240 TECHNICAL EVALUATION PANEL PROCEDURES.**

For each local government unit, there is a technical evaluation panel of at least three persons: a technical professional employee of the board, a technical professional employee of the soil and water conservation district of the county in which the activity is occurring, and a technical professional with expertise in wetland management appointed by the local government unit. For projects affecting public waters or public waters wetlands or affecting wetlands adjacent to the public waters or public waters wetlands, the technical evaluation panel shall also include a technical professional employee of the Department of Natural Resources. For purposes of this section, "adjacent" means within the shoreland wetland protection zone or 1,000 feet, whichever is less. The local government unit shall coordinate the panel. Two members of the panel must be knowledgeable and trained in applying methodologies of the "United States Army Corps of Engineers Wetland Delineation Manual" (January 1987), "Wetlands of the United States" (United States Fish and Wildlife Service Circular 39, 1971 edition), and "Classification of Wetlands and Deepwater Habitats of the United States" (Cowardin, et al., 1979 edition), including updates, supplementary guidance, or replacements of these methods provided by the board. The panel shall also be knowledgeable and trained in evaluation of wetland functions and the resulting public values. The technical evaluation panel may invite additional expertise to help the panel in its work.

The panel shall make technical findings and recommendations regarding wetland functions and the resulting public values, location, size, and type for replacement plans, and wetland banking plans and exemption, no-loss, wetland boundary or type, and sequencing re-

quests, and for comprehensive wetland protection and management plans and wetland ordinances, if requested to do so by the local government unit, the landowner, or a member of the technical evaluation panel. The panel may review replacement plans and wetland banking plans and exemption, no-loss, wetland boundary or type, and sequencing requests, and recommend to the local government unit either approval, approval with changes or conditions, or rejection. When a technical evaluation panel makes a recommendation, the local government unit must consider the recommendation of the technical evaluation panel in its approval or denial of a plan or determination. The panel shall make no findings or recommendations without at least one member having made an on-site inspection. Panel findings and recommendations must be documented and endorsed by a majority of the members. If the local government unit does not agree with the technical evaluation panel's findings and recommendation, the reasons for the disagreement must be part of the local government unit's record of decision.

Applicants for replacement plans, wetland banking plans and exemption, no-loss, and wetland boundary or type, and sequencing determinations must cooperate in providing local government unit staff and members of the technical evaluation panel and their designated experts with access to proposed project sites for investigation. Such investigations shall be preceded by notice to the landowner or designated agent, unless prior approval has been granted. If an applicant refuses to allow access, the local government unit may deny an application.

If the local government unit has a comprehensive wetland protection and management plan that delineates location, size, and type for all wetlands, approved by the technical evaluation panel, and subsequently incorporated into local ordinance, then the local government unit can make determinations without a recommendation from the technical evaluation panel.

If requested by the local government unit, the landowner, or a member of the technical evaluation panel, the panel shall answer technical questions or participate in the monitoring of replacement wetlands according to parts 8420.0600 to 8420.0630, and shall similarly participate in the monitoring of banked wetlands according to parts 8420.0700 to 8420.0760.

**Statutory Authority:** *MS s 14.06; 103B.101; 103B.3355; 103G.2242*

**History:** *18 SR 274; 22 SR 1877; 25 SR 152; 27 SR 135*

#### **8420.0245 OTHER LOCAL GOVERNMENT UNIT WETLAND RULES AND ORDINANCES.**

This chapter and the act provide minimum standards. Local government units may require more procedures and more wetland protection, but not less.

**Statutory Authority:** *MS s 14.06; 103B.101; 103B.3355*

**History:** *18 SR 274*

#### **8420.0250 APPEALS.**

**Subpart 1. Appeal of local government unit decisions.** The decision of a local government unit to approve, approve with conditions, or reject a replacement plan, banking plan, public road project notice, exemption, no-loss, or wetland boundary or type request becomes final if not appealed to the board within 30 days after the date on which the decision is mailed to those required to receive notice of the decision. Appeals of decisions made by local government staff must be made to the local government unit as provided for in part 8420.0200, subpart 2, item B. This subpart applies to those determinations which are made under comprehensive wetland protection and management plans.

Appeal may be made by the landowner, by any of those required to receive notice of the decision, or by 100 residents of the county in which a majority of the wetland is located.

Appeal is effective upon mailing of the petition and payment of a nonrefundable filing fee of \$200, or an amount otherwise determined by the board not to exceed \$1,000, to the board with evidence that a copy of the petition has been mailed to the local government unit. The filing fee is not required for appeals petitioned by state agencies or members of the technical evaluation panel. Another filing fee is not required for appeals that have been remanded if the filing fee was paid and the same party appeals the new decision made under remand.

Subp. 2. [Repealed, 22 SR 1877]

Subp. 3. **Board appeal procedures.** Within 30 days after receiving the petition, the board or its dispute resolution committee or executive director shall decide whether to grant the petition and hear the appeal. The board or its executive director shall grant the petition unless the appeal is deemed meritless, trivial, or brought solely for the purposes of delay; that the petitioner has not exhausted all local administrative remedies; or that the petitioner has not posted a letter of credit, cashier's check, or cash if required by the local government unit.

The board or its executive director may stay the local government unit decision until the appeal is resolved.

The board or its executive director may remand the appealed decision back to the local government unit if the petitioner has not exhausted all local administrative remedies such as a local government unit public hearing, if expanded technical review is needed, or if the local government unit's record is not adequate. If an appeal is remanded, the local government unit must make a decision within 60 days unless the remand order, or a subsequent order, specifies a longer period.

After granting the petition, the appeal shall be heard by the dispute resolution committee and decided by the board within 60 days after the filing of the local government unit's record, submittal of the written briefs for the appeal, and the hearing by the dispute resolution committee. Parties to the appeal are the appellant, the landowner, the local government unit, and those required to receive notice of the local government unit decision.

The board or its executive director may elect to combine related appeals and process as one decision, either multiple appeals on the same project or appeals of different local government unit decisions on the same project.

Upon appeal, the local government unit shall forward to the board the record on which it based its decision. The board will make its decision on the appeal after hearing. Thirty days' notice of the hearing shall be given by the board to the parties. The parties may present written and oral argument. When the local government unit has made formal findings contemporaneously with its decision and there is an accurate verbatim transcript of the proceedings and the proceedings were fairly conducted, the board will base its review on the record. Otherwise it may take additional evidence, or remand the matter.

The board will affirm the local government unit's decision if the local government unit's findings of fact are not clearly erroneous; if the local government unit correctly applied the law to the facts, including this chapter; and if the local government unit made no procedural errors prejudicial to a party. Otherwise, the board will reverse the decision, amend it, or remand it with instructions for further proceedings.

Subp. 4. **County or watershed reclassification.**

A. A local government unit may request the board to reclassify a county or watershed on the basis of its percentage of presettlement wetlands remaining. After receipt of satisfactory documentation from the local government, the board shall change the classification of a county or watershed. If requested by the local government unit, the board must assist in developing the documentation. Within 30 days of its action to approve a change of wetland classifications, the board shall publish a notice of the change in the Environmental Quality Board Monitor.

B. One hundred citizens who reside within the jurisdiction of the local government unit may request the local government unit to reclassify a county or watershed on the basis of its percentage of presettlement wetlands remaining. In support of their petition, the citizens shall provide satisfactory documentation to the local government unit. The local government unit shall consider the petition and forward the request to the board or provide a reason why the petition is denied.

Subp. 5. [Repealed, 27 SR 135]

**Statutory Authority:** *MS s 14.06; 14.386; 103B.101; 103B.3355; 103G.2242*

**History:** *18 SR 274; 22 SR 1877; 25 SR 152; 27 SR 135; 32 SR 281*

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

A. Each local government unit of the state, except tribal lands, shall acknowledge, in writing, to the board that it is assuming its responsibilities under this chapter and the act. Local government units from which an affirmative response is not received shall be given written notice by the board that there is a 60-day moratorium in the local government unit's jurisdiction on exemption, wetland boundary, wetland type, no-loss, replacement plan, and banking determinations. The board shall end the moratorium within the 60 days upon written agreement by the local government unit that it will assume its duties under this chapter and the act. If at the end of the initial 60-day moratorium a written agreement has not been made for the local government unit to apply the law, the board can extend the moratorium until the local government unit agrees to apply the law.

B. If the board has information that a local government unit is not following this chapter or the act in making exemption, no-loss, replacement plan, public road project notice reviews, wetland boundary, wetland type, or banking determinations, or if the local government unit does not have knowledgeable and trained staff with experience in wetland management, the board shall notify the local government unit in writing of its concerns. The local government unit shall respond in writing within 60 days of being notified by the board. If not satisfied with the local government unit's written response, or none is received, the board shall ask the local government unit to appear at a hearing before the board to discuss the matter. The board may invite comments from other local governments or state and federal agencies. If the board determines at the hearing, that corrective action is necessary, the board shall write the local government unit directing specific corrective action to occur within 60 days of receiving the board's decision. The notice shall explain the reason for the action.

C. If, after the 60-day period described in this part the local government unit has not corrected the problem to the satisfaction of the board, the board shall declare a moratorium as prescribed in item A or take other appropriate legal action to ensure compliance.

**Statutory Authority:** *MS s 14.06; 103B.101; 103B.3355; 103G.2242*

**History:** *18 SR 274; 22 SR 1877; 25 SR 152; 27 SR 135*

**8420.0268 COMPENSATION CLAIMS AGAINST LOCAL GOVERNMENT UNITS.**

Subpart 1. **Intervention.** At the request of a local government unit against which a compensation action is brought based at least in part on the local government unit's application of Minnesota Statutes, section 103G.222, 103G.2241, 103G.2242, 103G.237, or 103G.2372, or rules adopted by the board to implement these sections, the state, through the attorney general, shall intervene in the action on behalf of the local government unit and shall thereafter be considered a defendant in the action. A local government unit making a request under this subpart shall provide the attorney general with a copy of the complaint as soon as possible after being served. If requested by the attorney general, the court shall grant additional time to file an answer equal to the time between service of the complaint on the local government unit and receipt of the complaint by the attorney general.

Subp. 2. **Liability of state for certain costs.** The state is liable for costs, damages, fees, and compensation awarded in the action based on the local government unit's adoption or implementation of standards that are required by state law, as determined by the court. The local government unit is liable for costs, damages, fees, and compensation awarded in the action based on local standards that are more restrictive than state law and rules.

Subp. 3. **Definition.** For purposes of this part, "compensation action" means an action in which the plaintiff seeks compensation for taking private property under the state or federal constitution.

**Statutory Authority:** *MS s 103B.101; 103B.3355; 103G.2242*

**History:** *22 SR 1877*

**8420.0270 COMPENSATION.**

Replacement plan applicants who have completed the local government unit process and the board appeal process, and the plan has not been approved as submitted, may apply to the board for compensation under Minnesota Statutes, section 103G.237.

The application must identify the applicant, locate the wetland, and refer the board to its appeal file in the matter.

The application must include an agreement that in exchange for compensation the applicant will convey to the state a perpetual conservation easement in the form required by Minnesota Statutes, section 103F.516. The applicant must provide an abstract of title demonstrating the ability to convey the easement free of any prior title, lien, or encumbrance. Failure to provide marketable title negates the state's obligation to compensate.

The applicant must submit official documentation from the United States Army Corps of Engineers, the Minnesota Pollution Control Agency, the watershed district or water management organization if any, the county, and the town or city, as applicable, that the proposed drain or fill activity and the proposed subsequent use of the wetland are lawful under their respective legal requirements.

The landowner must demonstrate that the proposed drain or fill is a feasible and prudent project and that the replacement plan as proposed is a reasonable good faith effort to fulfill the replacement requirements of parts 8420.0500 to 8420.0630 and the act.

If the plan was approved, but with conditions or modifications, the applicant must show that the conditions or modifications make the replacement unworkable or not feasible. A plan is unworkable or not feasible if the replacement must be on land that the applicant does not own, the applicant has made good faith efforts to acquire a replacement site and not succeeded, and there is not a qualifying replacement available in a wetland bank. A plan is also unworkable or not feasible if it is not possible to carry out for engineering reasons. The applicant must show that not going ahead with the proposed project will cause the applicant damages and that disallowing the proposed use will enhance the public values of the wetland.

The applicant must submit the requirements in this part in writing, by certified mail, to the board. If the applicant wants to make oral argument to the board, it must be indicated as part of the application. The board may require that the applicant appear before the board.

If the board finds that the applicant has submitted a complete application and proved the requirements in this part, the board shall compensate the applicant as required by law within 90 days after the board received a completed application, provided that within the same time period the applicant must convey to the board a conservation easement in the form required by Minnesota Statutes, section 103F.516. If the board does not provide the required compensation in exchange for the conservation easement, the applicant may drain or fill the wetland in the manner proposed, without replacement.

**Statutory Authority:** *MS s 14.06; 103B.101; 103B.3355*

**History:** *18 SR 274*

#### **8420.0280 APPEAL FROM BOARD DECISIONS.**

An appeal of a board decision is taken to the state court of appeals and must be considered an appeal from a contested case decision for purposes of judicial review under Minnesota Statutes, sections 14.63 to 14.69.

**Statutory Authority:** *MS s 14.06; 103B.101; 103B.3355*

**History:** *18 SR 274*

#### **8420.0290 ENFORCEMENT PROCEDURES.**

Subpart 1. **Enforcement authorities.** The commissioner, conservation officers, and other peace officers may issue cease and desist orders and restoration and replacement orders.

Subp. 2. **Cease and desist orders.** Cease and desist orders may be issued when the enforcement authority has probable cause that a drain, excavation, or fill activity is being or has been conducted in a wetland and does not qualify for an exemption or a no-loss determination under parts 8420.0210 and 8420.0220 and is being or has been conducted without prior approval of a replacement plan by a local government unit under part 8420.0230 or involving a determination stayed by the board pursuant to part 8420.0250.

A cease and desist order must not be issued if the landowner has a valid exemption, no-loss, or replacement plan determination from the local government unit or a completed and

submitted public road project notification that has not been stayed, remanded, or reversed on appeal under provisions of part 8420.0250, or has sufficient evidence to support an exemption or no-loss determination.

The enforcement authority shall advise the landowner that the landowner's written application, if any, for an exemption, no-loss, or replacement plan determination, should be made immediately to the local government unit and that whatever drain, excavation, or fill work that has been done may require restoration if the application for exemption, no-loss, or replacement plan determination is denied or reversed on appeal.

The enforcement authority issuing a cease and desist order shall promptly submit copies to the soil and water conservation district, local government unit, and Department of Natural Resources.

If an application for an exemption, no-loss, or replacement plan determination is triggered by a cease and desist order, the local government unit shall make the determination in accordance with parts 8420.0210 to 8420.0230.

In cases where the cease and desist order has been issued to a local government unit, the determination of exemption or no-loss shall be made by the board.

If the determination is that the activity is exempt or results in no loss of wetland, the decision maker shall request that the enforcement authority rescind the cease and desist order, pending the outcome of any appeal, and notify the soil and water conservation district, the enforcement authority, and the landowner.

If the application is denied, the decision-maker shall immediately notify the soil and water conservation district, the enforcement authority, and the landowner.

**Subp. 3. Restoration and replacement orders.** The enforcement authority shall issue a restoration order or replacement order when:

A. the drain, excavation, or fill has already been completed when discovered, or after a cease and desist order has been issued and the landowner does not apply for an exemption, replacement plan, or no-loss determination within three weeks;

B. the local government unit grants the application but it is reversed on appeal; or

C. the local government unit denies the application.

Promptly upon being informed by the enforcement authority of the need, the soil and water conservation district staff person shall inspect the site and prepare a plan in consultation with the local government unit for restoring the site to its prealtered condition. Restoration shall be ordered unless the soil and water conservation district, with the concurrence of the technical evaluation panel and the enforcement authority, concludes that restoration is not possible or prudent. The soil and water conservation district shall incorporate its plan into a restoration or replacement order and send it to the enforcement authority for service in person or by certified mail to the landowner or responsible party.

**Subp. 3a. Contents of order.** A restoration order must specify dates by which the landowner or responsible party must either:

A. restore the wetland according to the soil and water conservation district plan and obtain a certificate of satisfactory restoration from the soil and water conservation district; or

B. submit a complete replacement plan application to the local government unit.

If the replacement plan application is denied, the landowner or responsible party shall restore the wetland as specified in the order.

The restoration order shall be rescinded if the landowner or responsible party obtains an after-the-fact replacement plan, exemption, or no-loss determination from the local government unit that is not reversed on appeal.

A replacement order must specify a date by which the landowner or responsible party must submit a replacement plan to the local government unit and a subsequent date by which the landowner or responsible party must replace the wetland according to the approved replacement plan and obtain a certificate of satisfactory replacement from the soil and water conservation district.

**Subp. 3b. Enforcement authority orders.** If the soil and water conservation district, with the concurrence of the technical evaluation panel and the enforcement authority, deter-



mines that restoration will not restore all the loss caused by the drain, excavation, or fill activity, the enforcement authority may order a combination of restoration and replacement, or may order replacement rather than restoration. The order must direct the landowner or responsible party to obtain replacement plan approval from the local government unit. The order must specify that if replacement plan approval is not obtained, the landowner or responsible party must restore the wetland as ordered.

Each cease and desist, restoration, and replacement order shall state that violation of the order is a misdemeanor.

If, as part of a misdemeanor proceeding, the court orders restoration or replacement, the soil and water conservation district, with the concurrence of the technical evaluation panel and the enforcement authority, shall determine which is appropriate, and if it is restoration, the method of restoration. If the court orders replacement, the landowner or responsible party must follow the replacement plan process in subpart 4 and parts 8420.0500 to 8420.0630.

**Subp. 3c. Appeals of replacement and restoration orders.** A landowner or responsible party may appeal the terms and conditions of a restoration or replacement order issued pursuant to subpart 3 to the board's executive director within 30 days of receipt of written notice by filing a written request for review and paying a nonrefundable filing fee to the board. The filing fee is \$200, or an amount otherwise determined by the board not to exceed \$1,000. If the written request is not submitted within 30 days, the restoration or replacement order becomes final. The executive director shall review the request and supporting evidence and render a decision within 60 days of the request for review. The executive director may stay the restoration or replacement order until the appeal is resolved.

**Subp. 4. After-the-fact replacement.** If a landowner or responsible party seeks approval of a replacement plan after the proposed project has already impacted the wetland, the local government unit shall require the landowner or responsible party to replace the impacted wetland at a ratio twice the replacement ratio otherwise required, unless the local government unit and enforcement authority concur that an increased ratio is not required.

**Subp. 5. Misdemeanor.** A violation of an order issued under this part is a misdemeanor and must be prosecuted by the county attorney where the wetland is located or the illegal activity occurred.

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

A. An agent or employee of another may not drain, excavate, or fill a wetland, wholly or partially, unless the agent or employee has:

(1) obtained a signed statement from the landowner stating that the wetland replacement plan required for the work has been obtained or that a replacement plan is not required; and

(2) mailed a copy of the statement to the local government unit with jurisdiction over the wetland.

B. Work in violation of this part is a misdemeanor.

C. The board shall develop a form to be distributed to contractor's associations, local government units, and soil and water conservation districts to comply with this part. The form must include:

(1) a listing of the activities for which a replacement plan is required;

(2) a description of the penalties for violating Minnesota Statutes, sections 103G.2212 to 103G.237;

(3) the telephone number for information on the responsible local government unit;

(4) a statement that national wetland inventory maps are on file with the soil and water conservation district office; and

(5) spaces for a description of the work and the names, mailing addresses, and telephone numbers of the person authorizing the work and the agent or employee proposing to undertake it.

**Statutory Authority:** *MS s 14.06; 14.386; 103B.101; 103B.3355; 103G.2242*

**History:** *18 SR 274; 22 SR 1877; 25 SR 152; 27 SR 135; 32 SR 281*

## MINING

**8420.0300 MINING.**

Wetlands may not be drained, excavated, or filled as part of a project for which a permit to mine is required by Minnesota Statutes, section 93.481, except as approved by the commissioner. Draining, excavating, or filling of wetlands created by pits, stockpiles, or tailing basins by actions whose purpose was not to create the wetland are exempt under part 8420.0122.

A. For new mining operations that are permitted and initiated after July 1, 1993:

(1) mining shall not be conducted without first receiving a permit to mine issued under chapter 6130 for iron ore and taconite or chapter 6132 for nonferrous metallic minerals; and

(2) the mining and reclamation operating plans or annual reports submitted by the applicant as required in the permit to mine shall include an approved wetland replacement plan that meets the same principles and standards for replacing wetlands under parts 8420.0500 to 8420.0630.

B. For mining operations in existence before July 1, 1993, and operated on or after that date under a permit to mine issued under chapter 6130 for iron ore and taconite or chapter 6132 for nonferrous metallic minerals:

(1) no draining, excavating, or filling activities shall be conducted within wetlands for which these activities were approved but not initiated before July 1, 1993, until the operating plan or annual report as required in the permit to mine includes an approved wetland replacement plan for the undisturbed wetlands. The wetland replacement plan shall meet the same principles and standards for replacing wetlands under parts 8420.0500 to 8420.0630;

(2) for filling activities that were approved and initiated before July 1, 1993, the placement of fill atop a stockpile, roadway, or other mining-related facility that occupies a wetland filled before July 1, 1993, shall be allowed to continue within the areal extent, as it existed on July 1, 1993, of the stockpile, roadway, or other mining-related facility without the requirement of a replacement plan or amendment of the permit to mine. An expansion of the areal extent of the fill in the wetland requires an approved replacement plan in the operating plan or annual report as required in the permit to mine, according to subitem (1);

(3) for draining activities that were approved and initiated before July 1, 1993, the draining of a wetland to facilitate mining, using ditches and other drainage facilities that existed on July 1, 1993, shall be allowed to continue without the requirement of a replacement plan or amendment of the permit to mine. Maintenance of the ditches and structures shall be allowed without the requirement of a replacement plan or amendment of the permit to mine, provided that as a result of the maintenance, wetlands are not drained beyond the extent that existed as of July 1, 1993. Otherwise, the permit to mine must be amended to provide for replacement according to subitem (1).

C. Applicable procedures are those required for permits to mine.

D. This part shall not apply to peat mining as defined under Minnesota Statutes, section 93.461, that is subject to the mine permit and reclamation requirements under Minnesota Statutes, sections 93.44 to 93.51, and the rules of the commissioner adopted under those sections.

**Statutory Authority:** *MS s 14.06; 103B.101; 103B.3355; 103G.2242*

**History:** *18 SR 274; 22 SR 1877; 25 SR 152; 27 SR 135*

**HIGH PRIORITY REGIONS AND AREAS****8420.0350 HIGH PRIORITY REGIONS AND AREAS.**

Subpart 1. **High priority regions.** Parts of the state that are high priority regions for preservation, enhancement, restoration, and establishment of wetlands include all of the counties that have lost 50 percent or more of their presettlement wetland base, which are those listed in part 8420.0540, subpart 5, item B.

In all other counties of the state, high priority regions are high priority areas approved as such by the board according to subpart 2.

**Subp. 2. High priority areas.**

A. Water management plans prepared by water management organizations in the metropolitan area under Minnesota Statutes, section 103B.231, by counties outside the metropolitan area under Minnesota Statutes, section 103B.311, and by watershed districts outside the metropolitan area under Minnesota Statutes, sections 103D.401 and 103D.405, must identify those areas that qualify as high priority areas for wetland preservation, enhancement, restoration, and establishment. These priority areas shall be included in the next scheduled water management plan update.

B. Plans should give strong consideration to identifying as high priority areas minor watersheds having less than 50 percent of their original wetland acreages, and intact wetlands, diminished wetlands, and the areas once occupied by wetlands that have been diminished or eliminated and could feasibly be restored taking into account the present hydrology and use of the area. Plans should give strong consideration to identifying as high priority areas all type 1 or 2 wetlands, and other wetlands at risk of being lost by permanent conversion to other uses. When individual wetlands are identified as high priority for preservation and restoration, the high priority area shall include the wetland and an adjacent buffer strip not less than 16.5 feet wide around the perimeter of the wetland and may include up to four acres of upland for each wetland acre.

C. In all counties, plans may identify additional high priority areas where preservation, enhancement, restoration, and establishment of wetlands would have high public value by providing benefits for water quality, flood water retention, public recreation, commercial use, and other public uses. High priority areas should be delineated by minor or major watershed. For the purposes of this part, "watershed" means major or minor watershed or subwatershed. To identify high priority areas, the local government unit shall consider at a minimum those items listed in part 8420.0103.

D. The board shall review the inclusion of high priority areas in plans as part of the standard process for plan review established in statute. High priority areas approved by the board that are not in a high priority region listed in subpart 1 become high priority regions with board approval.

**Statutory Authority:** *MS s 14.06; 103B.101; 103B.3355; 103G.2242*

**History:** *18 SR 274; 22 SR 1877; 25 SR 152; 27 SR 135*

## WETLAND PRESERVATION AREAS

### 8420.0400 WETLAND PRESERVATION AREAS.

Subpart 1. **Purpose.** Wetlands located in areas that are both high priority regions and high priority areas as identified in part 8420.0350 are eligible for enrollment as wetland preservation areas. A wetland so enrolled is exempt from property tax.

Subp. 2. **Landowner application for wetland preservation area.** A landowner may apply to the county or watershed district, if the county or watershed district chooses to accept wetland preservation areas, for designation of a wetland as a wetland preservation area on forms provided by the board. The applicant must include a strip of upland 16.5 feet wide around the perimeter of the wetland. The applicant may include up to four acres of upland for each acre of wetland.

The application must be accompanied by a restrictive covenant on a form provided by the board. The covenant will contain the same limitations on use that are provided in Minnesota Statutes, section 103F.515, subdivision 4, including a covenant that the enrolled upland area will be vegetated by the landowner to permanent vegetation other than noxious weeds. The covenant must be signed, acknowledged, and ready for recording.

Subp. 3. **County or watershed district review of application.** The county or watershed district may accept the application if the wetland is in a high priority region and high priority area, if it includes the 16.5 foot strip, and is accompanied by the proper covenant.

The county or watershed district may limit or reject additional upland proposed to be included according to standards the county establishes.

The county or watershed district may reject the application if the application does not qualify, or send it back for modification and resubmittal if that is appropriate. If the application qualifies, the county or watershed district may approve it and mark the date of approval on the application. The county or watershed district shall notify the landowner of the acceptance or denial of the application within 60 days from the date of the application.

Within five working days of approval of the application, the county or watershed district shall forward it to the county recorder for recording of the restrictive covenant or memorialization of the application on the certificate of title. The county or watershed district shall also send a copy of the approved application to the county assessor for entry in the assessor's records as a wetland preservation area. The county or watershed district shall also send copies of the approved application to the soil and water conservation district, the local government unit, and the board.

**Subp. 4. Applicable statutes.** In addition to this chapter, wetland preservation areas are subject to Minnesota Statutes, sections 103F.612 to 103F.616, and the property tax provisions of Minnesota Statutes, section 272.02, subdivision 11.

**Subp. 5. Commencement of wetland preservation area.** The wetland is a wetland preservation area commencing 30 days from the date the county notifies the landowner of acceptance of the application under subpart 3.

**Subp. 6. Fee.** The county or watershed district may require an application fee to defray administrative costs of the program.

**Subp. 7. Maps.** The county shall maintain wetland preservation area maps illustrating land covenanted as wetland preservation areas.

**Statutory Authority:** *MS s 14.06; 103B.101; 103B.3355; 103G.2242*

**History:** *18 SR 274; 22 SR 1877; 27 SR 135*

#### STANDARDS AND PROCEDURES FOR EVALUATING WETLAND REPLACEMENT PLANS

##### 8420.0500 PURPOSE.

Parts 8420.0500 to 8420.0630 specify the procedures and criteria for avoiding and minimizing wetland impacts and for ensuring adequate replacement of lost public values for unavoidable wetland impacts.

**Statutory Authority:** *MS s 14.06; 103B.101; 103B.3355*

**History:** *18 SR 274*

##### 8420.0505 PREVIOUSLY APPROVED DETERMINATIONS.

Replacement plan, banking plans exemption, public road project notification, wetland boundary, wetland type, and no-loss determinations may be completed under the laws, rules, conditions, and guidelines in effect when they were approved.

**Statutory Authority:** *MS s 14.06; 103B.101; 103B.3355; 103G.2242*

**History:** *18 SR 274; 22 SR 1877; 25 SR 152; 27 SR 135*

##### 8420.0510 REPLACEMENT PLAN PROCEDURES.

**Subpart 1. Generally.** No person shall drain, excavate in the permanent or semipermanently flooded areas of type 3, 4, or 5 wetlands, or fill a wetland, wholly or partially, or otherwise impact wetlands without first having a wetland replacement plan or other determination approved by the local government unit.

**Subp. 2. Preapplication conference and site visit.** Before preparation of a wetland value replacement plan, it is recommended that the landowner meet with the local government unit for a preapplication conference and site visit. The local government unit is encouraged to inform the landowner of all sequencing requirements and the criteria used to evaluate replacement plans. A landowner may submit the information required in part 8420.0520 and request a determination of compliance with the sequencing requirements from the local government unit before preparing a replacement plan.

Subp. 3. **Evaluation.** As provided for in part 8420.0240, technical questions concerning the public value, location, size, and type of wetland shall be submitted to the technical evaluation panel. The local government unit may use a technical evaluation panel to predetermine public value, location, size, or type of wetlands under its jurisdiction and use this determination in administering the act. Wetland boundaries must be determined using the methodologies in the United States Army Corps of Engineers Wetland Delineation Manual (January 1987). Wetland type must be identified according to Classification of Wetlands and Deepwater Habitats of the United States (Cowardin, et al., 1979), United States Fish and Wildlife Service Circular No. 39 (1971 edition) "Wetlands of the United States," or Wetland Plants and Plant Communities of Minnesota and Wisconsin (S. Eggers and D. Reed, 1997), as modified by the Board of Water and Soil Resources—United States Army Corps of Engineers Wetland Mitigation Memorandum of Understanding (May 2007). The documents referenced under this subpart are incorporated by reference, are not subject to frequent change, and are available through the Minitex interlibrary loan system or on the board's Web site at <http://www.bwsr.state.mn.us>. The technical evaluation panel shall provide its determinations to the local government unit for consideration.

**Statutory Authority:** *MS s 14.06; 14.386; 103B.101; 103B.3355; 103G.2242*

**History:** *18 SR 274; 22 SR 1877; 25 SR 152; 27 SR 135; 32 SR 281*

### 8420.0520 SEQUENCING.

Subpart 1. **Requirement.** The local government unit may not consider or approve a wetland replacement plan unless the local government unit finds that the applicant has demonstrated that the activity impacting a wetland has complied with all of the following principles in descending order or priority:

A. avoids direct or indirect impacts to the wetland that may destroy or diminish the wetland under the criteria in subpart 3;

B. minimizes the impact to the wetland by limiting the degree or magnitude of the wetland activity and its implementation under the criteria in subpart 4;

C. rectifies the impact by repairing, rehabilitating, or restoring the affected wetland under the criteria in subpart 5;

D. reduces or eliminates the impact to the wetland over time by preservation and maintenance operations under the criteria in subpart 6; and

E. replaces unavoidable impacts to the wetland by restoring or, if wetland restoration opportunities are not reasonably available, creating substitute wetland areas having equal or greater public value as provided for in parts 8420.0530 to 8420.0760.

Exceptions to this part include wetlands located in cultivated fields that are subject to subpart 8, and calcareous fens that are subject to subpart 9.

Subp. 2. **Application options.** An applicant may either submit the information required for sequencing analysis as part of a replacement plan application or apply for a preliminary sequencing determination from the local government unit before preparing a replacement plan. The local government unit may request additional information needed to make a determination. For projects impacting wetland areas less than 10,000 square feet more than the de minimis amount listed in part 8420.0122, subpart 9, item A, the local government unit may provide an on-site sequencing determination without written documentation from the applicant.

#### Subp. 3. **Determination of impact avoidance.**

A. Avoidance must be required when indicated by part 8420.0548.

B. Wetland dependence determination:

(1) Based on information provided by the applicant, the local government unit shall determine if the proposed project is wetland dependent. A project is wetland dependent if wetland features, functions, or values are essential to fulfill the basic purpose of the project. A wetland present at the site of a proposed project does not make that project wetland dependent.

(2) A project that has been determined by the local government unit to be wetland dependent is exempt from the analysis of avoidance alternatives in item C.

## C. Alternatives analysis:

(1) The applicant shall provide the local government unit with documentation describing at least two alternatives in addition to the proposed project to avoid wetland impacts. One may be the no-build alternative, that would avoid impacts to wetlands. For projects that repair or rehabilitate existing infrastructure, only one alternative is required. The alternatives may include consideration of alternate sites or alternative project configurations on the proposed site. The alternatives must be judged by the local government unit as good faith efforts, or the local government unit may require the applicant to redraft them for reconsideration.

(2) The local government unit shall determine whether any proposed feasible and prudent alternatives are available that would avoid impacts to wetlands. An alternative shall be considered feasible and prudent if it meets all of the following requirements:

- (a) it is capable of being done from an engineering point of view;
- (b) it is in accordance with accepted engineering standards and practices;
- (c) it is consistent with reasonable requirements of the public health, safety, and welfare;
- (d) it is an environmentally preferable alternative based on a review of social, economic, and environmental impacts; and
- (e) it would create no truly unusual problems.

(3) For projects proposing impacts to type 3, 4, or 5 wetlands, the local government unit shall also determine that there are no environmentally preferable alternatives that would avoid the impact.

(4) The local government unit shall consider the following in evaluating alternatives as applicable:

- (a) whether the basic project purpose can be reasonably accomplished using one or more other sites in the same general area that would avoid wetland impacts. An alternate site may not be excluded from consideration only because it includes or requires an area not owned by the applicant that could reasonably be obtained, used, expanded, or managed to fulfill the basic purpose of the proposed project;
- (b) the general suitability of alternate sites considered by the applicant;
- (c) whether reasonable modification of the size, scope configuration, or density of the project would avoid impacts to wetlands;
- (d) efforts by the applicant to accommodate or remove constraints on alternatives imposed by zoning standards or infrastructure, including requests for conditional use permits, variances, or planned unit developments; and
- (e) the physical, economic, and demographic requirements of the project. Economic considerations alone do not make an alternative not feasible and prudent.

(5) If the local government unit determines that a feasible and prudent alternative exists that would avoid impacts to wetlands, it shall deny the replacement plan. If no feasible and prudent alternative is available that would avoid impacts to wetlands, the local government unit shall evaluate the replacement plan for compliance with subparts 4 to 8.

**Subp. 4. Determination of impact minimization.**

A. The applicant shall demonstrate to the local government unit's satisfaction that the activity will minimize impacts to wetlands. In reviewing the sufficiency of the applicant's efforts to minimize wetland impacts, the local government unit must consider:

- (1) the spatial requirements of the project;
- (2) the location of existing structural or natural features that may dictate the placement or configuration of the project;
- (3) the purpose of the project and how the purpose relates to placement, configuration, or density;
- (4) the sensitivity of the site design to the natural features of the site, including topography, hydrology, and existing vegetation;
- (5) the value, function, and spatial distribution of the wetlands on the site;

(6) individual and cumulative impacts; and

(7) an applicant's efforts to:

(a) modify the size, scope, configuration, or density of the project;

(b) remove or accommodate site constraints including zoning, infrastructure, access, or natural features;

(c) confine impacts to the fringe or periphery of the wetland; and

(d) otherwise minimize impacts.

B. If the local government unit finds that an applicant has not complied with the requirements to minimize wetland impacts, the local government unit shall list, in writing, its objections to the project. If, within 30 days, the applicant does not withdraw the project proposal or indicate intent to submit an amended project proposal satisfying the local government unit's objections, the statement of objections shall constitute a denial.

Subp. 5. **Determination of impact rectification.** Temporary impacts to a wetland must be rectified by repairing, rehabilitating, or restoring the affected wetland.

A. Activities may qualify for a no-loss determination in part 8420.0220 by meeting all of the following conditions:

(1) the physical characteristics of the affected wetland, including ground elevations, contours, inlet dimensions, outlet dimensions, substrate, plant communities, and hydrologic regime, are restored to preproject conditions sufficient to ensure that all preproject functions and values are restored;

(2) the activity is completed and the physical characteristics of the wetland are restored within six months of the start of the activity; and

(3) the party responsible for the activity provides a performance bond to the local government unit for an amount sufficient to cover the estimated cost to restore the wetland to preproject conditions. The local government unit shall return the performance bond to the responsible party upon a determination by the local government unit that the conditions in this item and item B have been met.

B. An applicant shall be granted a no-loss determination under the criteria in item A once in a ten-year period for a particular site within a wetland, except that repairs to the original project shall be allowed under the no-loss determination, if the local government unit determines the request to be necessary and reasonable.

C. Wetland impacts that do not qualify for a no-loss determination according to the criteria in item A are subject to replacement under the criteria in parts 8420.0530 to 8420.0630.

Subp. 6. **Determination of reduction or elimination of impacts over time.** After an activity is completed, further wetland impacts from the draining or filling must be reduced or eliminated by maintaining, operating, and managing the project in a manner that preserves and maintains remaining wetland functions and values. The local government unit must require applicants to implement best management practices to protect wetland functions and values.

Subp. 7. **Unavoidable impacts.** Unavoidable wetland impacts that remain after efforts to minimize, rectify, or reduce or eliminate them must be replaced according to parts 8420.0530 to 8420.0630.

Subp. 7a. **Sequencing flexibility.**

A. Sequencing flexibility cannot be implemented unless alternatives have been considered and unless the proposed replacement wetland is certain to provide equal or greater functions and public values as determined based on a functional assessment reviewed by the technical evaluation panel using a methodology approved by the board. The project sponsor must provide the necessary information and the local government unit must document the application of sequencing flexibility in the replacement plan approval.

B. Flexibility in application of the sequencing steps may be applied, subject to the conditions in item A, as determined by the local government unit if:

(1) the wetland to be impacted has been degraded to the point where replacement of it would result in a certain gain in function and public value;

(2) preservation of a wetland would result in severe degradation of the wetland's ability to function and provide public values, for example, because of surrounding land uses and the wetland's ability to function and provide public values cannot reasonably be maintained through other land use controls or mechanisms;

(3) the only feasible and prudent upland site available for wetland replacement or development has greater ecosystem function and public value than the wetland. Although this is a rare circumstance since there will usually be several options for siting the replacement wetland or development, it may be appropriate if the project sponsor:

- (a) demonstrates impact minimization to the wetland;
- (b) agrees to perpetually preserve the designated upland site; and
- (c) completely replaces the impacted wetland's functions and public

values; or

(4) the wetland is a site where human health and safety is a factor.

**Subp. 8. Wetlands on cultivated fields.** If the wetland is located on a cultivated field and will be replaced through restoration, then the priority order for sequencing in subpart 1 is not required. A wetland drained or filled under this provision must not be converted to non-agricultural land for ten years. The landowner must execute and record a notice of this requirement in the office of the county recorder for the county in which the property is located.

**Subp. 9. Calcareous fens.** Calcareous fens, as identified by the commissioner, may not be filled, drained, or otherwise degraded, wholly or partially, by any action, unless the commissioner, under an approved management plan, decides some alteration is necessary, as provided in part 8420.1010.

**Statutory Authority:** *MS s 14.06; 14.386; 103B.101; 103B.3355; 103G.2242*

**History:** *18 SR 274; 22 SR 1877; 25 SR 152; 27 SR 135; 32 SR 281*

#### 8420.0530 REPLACEMENT PLAN COMPONENTS.

On an application form approved by the board in consultation with the commissioner of natural resources, provided through the local government unit, and with required attachments supplied by the applicant, the following documentation must be provided, except that for replacement plans utilizing the wetland bank in parts 8420.0700 to 8420.0760, items B, subitem (1); and D, do not apply; instead the applicant shall submit the wetland banking credit withdrawal form prescribed in part 8420.0740, subpart 2, item E:

A. generally, organizational information, including but not limited to the following:

- (1) the post office address of the applicant;
- (2) for corporations, the principal officers of the corporation, any parent companies, owners, partners, and joint venturers, and a designated contact person; and
- (3) managing agents, subsidiaries, or consultants that are or may be involved with the wetland draining or filling project;

B. either:

- (1) a signed statement confirming that the wetland acres and values will be replaced in advance of or concurrent with the actual draining or filling of a wetland; or
- (2) an irrevocable bank letter of credit, a performance bond, or other security acceptable to the local government unit in an amount sufficient to guarantee the successful completion of the wetland replacement;

C. for the impacted wetland:

- (1) a recent aerial photograph or accurate map of the impacted wetland area;
- (2) the location of the wetland;
- (3) the size of the wetland;
- (4) the type of the wetland;
- (5) a list of the dominant vegetation in the impacted wetland area, if known;
- (6) a soils map of the site showing soil type and substrate, where available;
- (7) the locations of any surface inlets or outlets, natural or otherwise, draining into or out of the wetlands, and if the wetland is within the shoreland wetland protection zone



or floodplain of a stream, river, or other watercourse, the distance and direction to the watercourse;

(8) the nature of the proposed project, its areal extent, and the impact on the wetland must be described in sufficient detail to allow the local government unit to determine the amount and types of wetland to be impacted and to demonstrate compliance with the replacement sequencing criteria in part 8420.0520, if applicable;

(9) evidence of ownership or property rights to the affected areas; and

(10) a list of all other local, state, and federal permits and approvals required for the activity, if known;

D. for the replacement wetland, item C, subitems (1) to (7), (9), and (10), and:

(1) an explanation of the size and type of wetland that will result from successful completion of the replacement plan;

(2) scale drawings showing plan and profile views of the replacement wetland;

(3) how the replacement wetland shall be constructed, for example, excavation or restoration by blocking an existing tile; the type, size, and specifications of outlet structures; elevations, relative to Mean Sea Level or established bench mark, of key features, for example, sill, emergency overflow, and structure height; and best management practices that will be implemented to prevent erosion or site degradation;

(4) for created wetlands only, additional soils information sufficient to determine the capability of the site to produce and maintain wetland characteristics;

(5) a timetable that clearly states how and when implementation of the replacement plan shall proceed, and when construction of the replacement wetland shall be finalized;

(6) a notice in a form provided by the board attached to and recorded with the deed for lands containing a replacement wetland, specifying the following:

(a) the location of the replacement wetland;

(b) that the wetland is subject to the act;

(c) that the fee title owner is responsible for the costs of repairs or reconstruction and management, if necessary, or for replacement costs;

(d) that reasonable access to the replacement wetland shall be granted to the proper authorities for inspection, monitoring, and enforcement purposes;

(e) that costs of title review and document recording is the responsibility of the fee title owner; and

(f) that the local government unit or board can require necessary repairs or reconstruction and revegetation work to return the wetland to the specifications of the approved replacement plan and require reimbursement of reasonable costs from the wetland owner, or can require replacement of the wetland according to the act;

(7) an affidavit that the replacement wetland was not previously restored or created under a prior approved replacement plan;

(8) a statement that the replacement wetland was not drained or filled under an exemption during the previous ten years;

(9) a statement that the replacement wetland was not restored with financial assistance from public conservation programs, or was not restored for other unrelated regulatory purposes;

(10) a statement that the replacement wetland was not restored using private funds other than those of the landowner unless the funds are paid back with interest to the individual or organization that funded the restoration and the individual or organization notifies the local government unit in writing that the restored wetland may be considered for replacement;

(11) a statement by the applicant that monitoring will occur in accordance with parts 8420.0610 and 8420.0620 unless the local government unit will be conducting the monitoring of the wetland replacement area;

(12) evidence that a person proposing to create or restore a wetland within the easement of a pipeline as defined in Minnesota Statutes, section 299J.02, subdivision 11, has

first notified the easement holder and the director of the Office of Pipeline Safety in writing. The person may not create or restore the wetland if, within 90 days after receiving the required notice, the easement holder or the director of the of Pipeline Safety provides to the person a written notice of objection that includes the reasons for the objection;

(13) evidence that any drainage or property rights potentially detrimental to the replacement wetland have been acquired, subordinated, or otherwise eliminated; and

(14) a five-year vegetation establishment and management plan, including seeding rates, planting methods, seed and plant mixes, herbicide treatments, and control of noxious weeds and invasive or nonnative species;

E. other information considered necessary for evaluation of the project by the local government unit; and

F. information known to the applicant or readily available concerning the special considerations criteria in part 8420.0540, subpart 9.

**Statutory Authority:** *MS s 14.06; 14.386; 103B.101; 103B.3355; 103G.2242*

**History:** *18 SR 274; 22 SR 1877; 25 SR 152; 27 SR 135; 32 SR 281*

#### 8420.0540 REPLACEMENT PLAN EVALUATION CRITERIA.

Subpart 1. **Sequencing.** Before consideration or approval of a replacement plan, the local government unit must ensure that the applicant has exhausted all possibilities to avoid and minimize adverse wetland impacts according to sequencing in part 8420.0520.

The applicant must demonstrate to the local government unit that the replacement plan complies with this part and part 8420.0550.

##### Subp. 2. **Type of replacement.**

A. The preference for the method of replacement is that which is most likely to result in a wetland area that functions wholly, perpetually, and naturally. Wetland restoration is generally preferred over creation and restoration of completely impacted wetlands is generally preferred over other methods of replacement.

B. Modification or conversion of nondegraded wetlands from one wetland type to another by damming, diking, impounding, or excavating does not constitute replacement credit.

C. Wetlands drained or filled under an exemption may not be restored for replacement credit for ten years after draining or filling.

D. [Renumbered, 8420.0541, subps 1,6,7]

E. [Repealed by amendment, 27 SR 135]

Subp. 3. [Renumbered 8420.0542]

Subp. 4. [Renumbered 8420.0543]

Subp. 5. [Renumbered 8420.0544]

Subp. 5a. [Renumbered 8420.0545]

Subp. 6. [Renumbered 8420.0546]

Subp. 7. [Renumbered 8420.0547, subpart 1]

Subp. 8. [Renumbered 8420.0547, subp 2]

Subp. 9. [Renumbered 8420.0548, subps 1 to 10]

Subp. 10. [Renumbered 8420.0549, subps 1 to 8]

**Statutory Authority:** *MS s 14.06; 103B.101; 103B.3355; 103G.2242*

**History:** *18 SR 274; 22 SR 1877; 25 SR 152; 27 SR 135*

#### 8420.0541 ACTIONS ELIGIBLE FOR CREDIT.

Subpart 1. **Scope.** The actions in this part are eligible for replacement credit or wetland banking credit as determined by the local government unit in parts 8420.0500 to 8420.0760.

Subp. 2. **Restoration of completely drained wetland areas.** Restoration of the natural hydrology regime and vegetation on completely drained or filled wetlands may receive new

wetland credit in an amount not to exceed 100 percent of the total wetland area hydrologically restored.

**Subp. 3. Restoration of partially drained wetland areas.** Restoration of the natural hydrology regime and vegetation of jurisdictional wetlands that have been degraded by prior drainage, diversion of the natural watershed, or filling may:

A. in a less than 80 percent area, receive public value credit in an amount up to 50 percent of the degraded wetland area or receive new wetland credit in an amount not to exceed 25 percent of the total wetland area hydrologically restored, provided that permanent native, noninvasive vegetation is established within the restored wetland area and on an upland buffer, which may receive replacement credit according to subpart 6; and

B. in a greater than 80 percent area, receive new wetland credit in an amount not to exceed 25 percent of the total wetland area hydrologically restored.

**Subp. 4. Exceptional natural resource value projects.** Projects that restore exceptional natural resource values of wetlands may receive either public value or new wetland replacement credit solely or in combination as determined by the local government unit with concurrence of the technical evaluation panel. The amount and type of credit allowed shall be based on a functional assessment that documents the restoration of these values.

**Subp. 5. Restoration of farmed wetlands.** Reestablishment of permanent native, noninvasive vegetative cover on a wetland that was planted with annually seeded crops, was in a crop rotation seeded to pasture grasses or legumes, or was required to be set aside to receive price supports or equivalent payments in six of the last 20 years prior to the date of application for a replacement plan or bank plan may receive credit in accordance with one of the following considerations:

A. if the wetland was annually seeded, in rotation, or set aside for six or more of the last 20 years, the wetland is eligible for public value credit not to exceed 50 percent of the wetland area; or

B. if the wetland was annually seeded, in rotation, or set aside for ten or more of the last 20 years, the wetland is eligible for new wetland credit based on the percent of the time the wetland area was annually seeded, in rotation, or set aside during the prior 20-year period.

**Subp. 6. Upland buffer areas.** Buffer areas of permanent native and noninvasive dominated vegetative cover established or preserved on upland adjacent and contiguous to replacement wetlands may receive credit, provided that the upland buffer must have an average width of at least 50 feet for wetlands in nonmunicipal areas and an average width of at least 25 feet for wetlands in a municipal area and the buffer vegetative establishment or preservation plan must be approved by the technical evaluation panel. Replacement credit for the buffer may not exceed 100 percent of the replacement wetland area and may only be used as public value credits for replacement above a 1:1 ratio.

**Subp. 7. Wetlands previously restored via conservation easements.** Wetland areas previously restored for conservation purposes under terminated easements or contracts are eligible for up to 75 percent new wetland credit and adjacent upland buffer areas reestablished to permanent native, noninvasive vegetative cover are eligible for public value credit above a 1:1 ratio in an amount not to exceed 25 percent of the restored wetland area.

**Subp. 8. Restoration of wetland vegetation.** Reestablishment and maintenance of permanent native, noninvasive vegetation cover on a wetland that is dominated by invasive or exotic species may receive public value credit. Replacement credit may not exceed 25 percent of the total wetland area vegetatively restored and the vegetative restoration and maintenance plan must be approved by the technical evaluation panel. The technical evaluation panel may require a monitoring period in excess of 12 months after the vegetative restoration is completed before approving the site for replacement credit.

**Subp. 9. Wetlands established via mineral extraction site reclamation.** Wetland areas established in nonwetland areas due to mineral extraction activities may receive new wetland credits if all of the following criteria are met:

A. application for replacement credit is made within ten years after the last day that extraction activities have taken place;

B. a wetland establishment and management plan has been approved by the technical evaluation panel and implemented by the landowner or authorized agent;

C. the wetland area meets the criteria in part 8420.0550; and

D. if the land is not state-owned, a conservation easement in favor of the state has been accepted by the state and recorded in the county recorder's office, or if the land is state-owned, covenants and restrictions are recorded that identify that the wetland area is a replacement wetland subject to this chapter.

**Subp. 10. Water quality treatment areas.**

A. New wetland credit of up to 100 percent for wetland areas constructed as part of water quality treatment systems may be granted by the local government unit with the concurrence of the technical evaluation panel, provided that:

(1) the local government unit has an approved and active stormwater management plan;

(2) the water quality treatment system design includes pretreatment of runoff before discharge to the wetland area receiving credit;

(3) the wetland area receiving credit is constructed in nonwetland areas;

(4) the water quality treatment system is associated with an ongoing or proposed project that will impact a wetland or public waters;

(5) the wetland area receiving credit is separated from the water quality treatment system that pretreats runoff before discharge to the wetland area receiving credit;

(6) the wetland area receiving credit is designed for a maximum 24-inch rise in water level for the ten-year critical storm event;

(7) the standards in part 8420.0550 are followed; and

(8) the wetland area receiving credit is a functioning wetland.

B. Stormwater detention basins allowed for replacement are not eligible for the exemptions in part 8420.0122 and are subject to parts 8420.0500 to 8420.0630.

**Subp. 11. Wetland creations.** All other wetland creation sites may receive new wetland credit in an amount not to exceed 100 percent of the total wetland area created. Except for public projects, a performance bond or other surety shall be secured and held until the local government unit has determined that the design goal for the wetland replacement site, as approved in the replacement plan, is fully achieved.

**Statutory Authority:** *MS s 14.06; 14.386; 103B.101; 103B.3355; 103G.2242*

**History:** *18 SR 274; 22 SR 1877; 25 SR 152; 27 SR 135; 32 SR 281*

**8420.0542 TIMING OF REPLACEMENT.**

Replacement of wetland functions and values must be completed in advance of or concurrent with the actual draining, excavation, or filling of a wetland, unless an irrevocable bank letter of credit or other security acceptable to the local government unit is submitted to the local government unit to guarantee successful completion of the replacement. Local government units may require performance bonds or similar instruments to assure that the replacement wetland is successfully established. All wetlands to be restored or created for replacement must be designated for replacement before restoration or creation. Submission to the local government unit of the information required in part 8420.0530 and subsequent approval shall be considered evidence of designation for replacement, provided the information is submitted before the actual restoration or creation. The exceptions contained in part 8420.0544 do not apply to replacement completed using wetland banking credits established by a person who submitted a complete wetland banking application to a local government unit by April 1, 1996.

**Statutory Authority:** *MS s 14.06; 14.386; 103B.101; 103B.3355; 103G.2242*

**History:** *18 SR 274; 22 SR 1877; 25 SR 152; 27 SR 135; 32 SR 281*

**8420.0543 WETLAND REPLACEMENT SITING.**

A. Siting wetland replacement must follow this priority order:

(1) on site or in the same minor watershed as the affected wetland;

(2) in the same watershed as the affected wetland;

(3) in the same county as the affected wetland;

(4) for replacement by wetland banking, in the same wetland bank service area as the impacted wetland, except that impacts in a 50 to 80 percent area must be replaced in a 50 to 80 percent area and impacts in a less than 50 percent area must be replaced in a less than a 50 percent area;

(5) for project specific replacement, in an adjacent watershed to the affected wetland or, for replacement by wetland banking, in an adjacent wetland bank service area, except that impacts in a 50 to 80 percent area must be replaced in a 50 to 80 percent area and impacts in a less than 50 percent area must be replaced in a less than 50 percent area;

(6) notwithstanding subitems (1) to (5), public transportation projects may be replaced statewide, except that wetlands affected in less than 50 percent areas must be replaced in less than 50 percent areas, and wetlands affected in the seven-county metropolitan area must be replaced at a ratio of two-to-one in:

(a) the affected county;

(b) if no restoration opportunities exist in the affected county, in another seven-county metropolitan area county; or

(c) in one of the major watersheds that are wholly or partially within the seven-county metropolitan area, but at least one-to-one must be replaced within the seven-county metropolitan area;

(7) notwithstanding subitems (1) to (5), siting wetland replacement in greater than 80 percent areas may follow the priority order under this subitem:

(a) by wetland banking after evaluating on-site replacement and replacement within the watershed;

(b) replaced in an adjacent wetland bank service area if wetland bank credits are not reasonably available in the same wetland bank service area as the affected wetland, as determined by a comprehensive inventory approved by the board; or

(c) statewide; or

(8) notwithstanding subitems (1) to (5), siting wetland replacement in the seven-county metropolitan area must follow the priority order under this subitem:

(a) in the affected county;

(b) in another of the seven metropolitan counties; or

(c) in one of the major watersheds that are wholly or partially within the seven-county metropolitan area, but at least one-to-one must be replaced within the seven-county metropolitan area.

B. Until December 31, 2012, existing wetland bank account holders outside of the seven-county metropolitan area, but within a major watershed that is wholly or partially within the seven-county metropolitan area, may withdraw wetland credits according to part 8420.0541 that was in effect at the time of the deposit of the public value credit or new wetland credits.

C. Until December 31, 2012, local government units may approve wetland replacement plans that propose replacement via wetland banking, using credits established according to the replacement siting rule in effect on August 5, 2007.

D. When reasonable, practicable, and environmentally beneficial replacement opportunities are not available in siting priorities listed in item A, the applicant may seek opportunities at the next level.

E. For the purposes of item D, "reasonable, practicable, and environmentally beneficial replacement opportunities" means opportunities that:

(1) take advantage of naturally occurring hydrogeomorphological conditions and require minimal landscape alteration;

(2) have a high likelihood of becoming a functional wetland that will continue in perpetuity;

(3) do not adversely affect other habitat types or ecological communities that are important in maintaining the overall biological diversity of the area; and

(4) are available and capable of being done after taking into consideration cost, existing technology, and logistics consistent with overall project purposes.

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

**Statutory Authority:** *MS s 14.06; 14.386; 103B.101; 103B.3355; 103G.2242*

**History:** *18 SR 274; 22 SR 1877; 25 SR 152; 27 SR 135; 32 SR 281*

#### 8420.0544 REPLACEMENT FOR PUBLIC TRANSPORTATION PROJECTS.

A. Wetlands impacted by public transportation projects may be replaced state-wide, only for wetlands affected in greater than 80 percent areas and for public transportation projects, except that wetlands affected in less than 50 percent areas must be replaced in less than 50 percent areas, and wetlands affected in the seven-county metropolitan area must be replaced at a ratio of two-to-one in:

- (1) the affected county;
- (2) in another of the seven metropolitan counties; or
- (3) in one of the major watersheds that are wholly or partially within the seven-county metropolitan area, but at least one-to-one must be replaced within the seven-county metropolitan area.

Part 8420.0543, item A, subitem (6), does not apply to replacement completed using wetlands banking credits established by an applicant who submitted a complete wetland banking application to a local government unit by April 1, 1996.

B. Replacement of wetlands may be accomplished under the rules for wetland banking as provided for in parts 8420.0700 to 8420.0760.

C. For projects involving draining or filling of wetlands associated with a new public transportation project, and for projects expanded solely for additional traffic capacity, public transportation authorities may purchase credits from the board at the cost to the board to establish credits.

D. A replacement plan for wetlands is not required for individual public road projects that result in the draining, excavating, or filling of wetlands for the repair, rehabilitation, reconstruction, or replacement of a currently serviceable existing state, city, county, or town public road necessary, as determined by the public road authority, to meet state or federal design or safety standards or requirements, excluding new roads or roads expanded solely for additional traffic capacity lanes. This item only applies to authorities for public road projects that:

(1) minimize the amount of wetland draining, excavating, or filling associated with the project and consider mitigating important site-specific wetland functions on site; and

(2)(a) submit, at least 30 days prior to construction, project-specific reports, and any changes or addenda, to the board, the technical evaluation panel, the commissioner of natural resources, and members of the public requesting a copy that indicate the location, amount, and type of wetlands drained, excavated, or filled by the project;

(b) convene an annual meeting of the parties required to receive notice to review projects to be commenced during the upcoming year; or

(c) for minor and emergency maintenance work impacting less than 10,000 square feet, the public road authority may submit project-specific reports, within 30 days of commencing the activity, to the board and the technical evaluation panel that indicate the location, amount, and type of wetlands that have been drained, excavated, or filled.

E. The technical evaluation panel shall review minimization and delineation decisions made by the public road authority and provide recommendations regarding on-site mitigation if requested to do so by the local government unit, a contiguous landowner, or a member of the technical evaluation panel.

F. Those required to receive notice of public road projects may appeal minimization, delineation, and on-site mitigation decisions made by the public road authority to the board according to part 8420.0250.

G. Changes to wetland impacts proposed by local road authorities in item D shall be reported to the board within six months from the date of the change being finalized.

H. Except for state public transportation projects, for which the state Department of Transportation is responsible, the board must replace public road project impacts to wetlands and wetland areas of public waters if authorized by the commissioner or a delegated authority, that are drained, excavated, or filled by local government projects on existing roads. Replacement of the wetlands must occur in critical rural and urban watersheds.

I. Public road authorities at their discretion may deviate from federal and state design standards on existing road projects when practical and reasonable to avoid wetland filling or draining, provided that public safety is not unreasonably compromised. The local road authority and its officers and employees are exempt from liability for any tort claim for injury to persons or property arising from travel on the highway and related to the deviation from the design standards for construction or reconstruction under this item. This item does not preclude an action for damages arising from negligence in construction or maintenance on a highway.

**Statutory Authority:** *MS s 14.06; 14.386; 103B.101; 103B.3355; 103G.2242*

**History:** *18 SR 274; 22 SR 1877; 25 SR 152; 27 SR 135; L 2004 c 228 art 1 s 71; 32 SR 281*

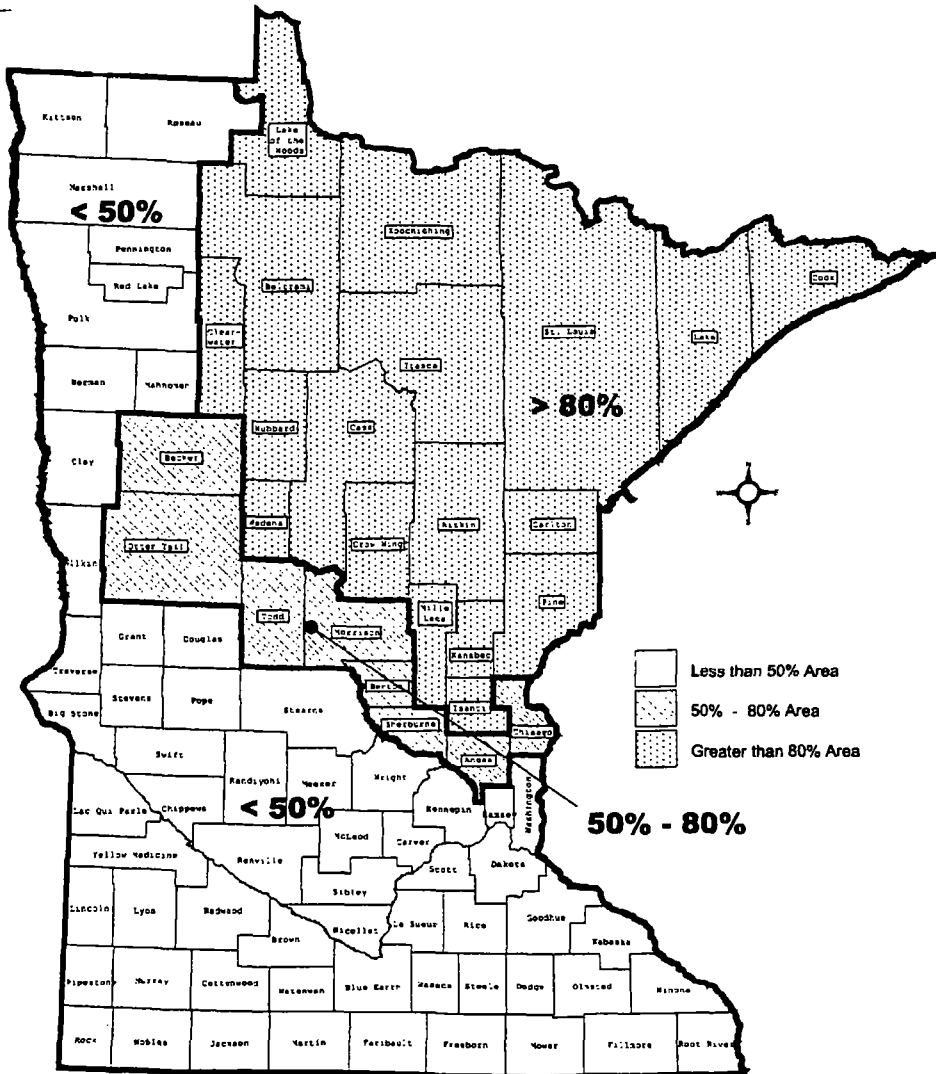
#### **8420.0545 PRESETTLEMENT WETLAND ACRES AND AREAS.**

A. For purposes of parts 8420.0540 to 8420.0549, the following counties are greater than 80 percent areas: Aitkin; Beltrami; Carlton; Cass; Clearwater; Cook; Crow Wing; Hubbard; Isanti; Itasca; Kanabec; Koochiching; Lake; Lake of the Woods; Mille Lacs; Pine; St. Louis; and Wadena.

B. For purposes of parts 8420.0540 to 8420.0549, the following counties are less than 50 percent areas: Big Stone; Blue Earth; Brown; Carver; Chippewa; Clay; Cottonwood; Dakota; Dodge; Douglas; Faribault; Fillmore; Freeborn; Goodhue; Grant; Hennepin; Houston; Jackson; Kandiyohi; Kittson; Lac Qui Parle; Le Sueur; Lincoln; Lyon; Mahnomon; Marshall; Martin; McLeod; Meeker; Mower; Murray; Nicollet; Nobles; Norman; Olmsted; Pennington; Pipestone; Polk; Pope; Ramsey; Red Lake; Redwood; Renville; Rice; Rock; Roseau; Scott; Sibley; Stearns; Steele; Stevens; Swift; Traverse; Wabasha; Waseca; Washington; Watonwan; Wilkin; Winona; Wright; and Yellow Medicine.

C. For purposes of parts 8420.0540 to 8420.0549, the following counties are 50 to 80 percent areas: Anoka; Becker; Benton; Chisago; Morrison; Otter Tail; Sherburne; and Todd.

WETLAND AREAS  
**Minnesota Wetland Conservation Act**  
 Pre - Statehood Wetland Areas



**Statutory Authority:** *MS s 14.06; 103B.101; 103B.3355; 103G.2242*

**History:** *18 SR 274; 22 SR 1877; 25 SR 152; 27 SR 135*

**8420.0546 SIZE OF REPLACEMENT WETLANDS.**

Replacement wetlands must be of a size sufficient to ensure that they provide equal or greater public value than the wetland that was drained or filled. The minimum amount of replacement wetland that must be provided is shown in part 8420.0549, subpart 4c. For a wetland located on nonagricultural land in a 50 to 80 percent area or a less than 50 percent area, the minimum size of the replacement wetland must be in the ratio of two acres of replaced wetland for each acre of drained or filled wetland. For a wetland located on agricultural land, or in greater than 80 percent areas, the minimum size of the replacement wetland must be in the ratio of one acre of replaced wetland for each acre of drained or filled wetland. The actual



replacement ratios required for a replacement wetland may be more than the minimum, subject to the evaluation of wetland functions and values in part 8420.0549.

For wetlands located in a 50 to 80 percent area or a less than 50 percent area, future owners may make no use of the wetland after it is altered, other than as agricultural land for a period of ten years unless future replacement to achieve a ratio equaling or exceeding the appropriate ratio in part 8420.0549, subpart 4c, occurs. The landowner shall record a notice of this restriction in the office of the county recorder in which the project is located.

**Statutory Authority:** *MS s 14.06; 14.386; 103B.101; 103B.3355; 103G.2242*

**History:** *18 SR 274; 22 SR 1877; 25 SR 152; 27 SR 135; 32 SR 281*

#### **8420.0547 OTHER REQUIREMENTS.**

Subpart 1. **Carbon balance.** When it is necessary to replace a drained or filled peatland, the replacement wetland must be revegetated with planted or naturally pioneering native vegetation established within three growing seasons.

Subp. 2. **Ecological consistency.** Restoration and replacement of wetlands must be accomplished according to the ecology of the landscape area affected. A replacement plan that would result in wetlands or wetland characteristics that do not naturally occur in the landscape area in which the replacement will occur will not be approved.

**Statutory Authority:** *MS s 14.06; 103B.101; 103B.3355; 103G.2242*

**History:** *18 SR 274; 22 SR 1877; 25 SR 152; 27 SR 135*

#### **8420.0548 SPECIAL CONSIDERATIONS.**

Subpart 1. **Scope.** The factors in this part, when identified as being applicable to an impact site or a replacement site, must be considered by the local government unit in the review of replacement plans.

Subp. 2. **Endangered and threatened species.** A replacement plan for activities that involve taking species listed as endangered or threatened in parts 6134.0200 to 6134.0400 must be denied unless the commissioner issues a permit pursuant to part 6212.1800 or Minnesota Statutes, section 84.0895, subdivision 7. Applicants may determine if there are known locations of listed species at a particular site by contacting the Department of Natural Resources' natural heritage and nongame research program.

Subp. 3. **Rare natural communities.** A replacement plan for activities that involve the modification of a rare natural community as determined by the Department of Natural Resources' natural heritage program must be denied if the local government unit determines that the proposed activities will permanently adversely affect the natural community.

Subp. 4. **Special fish and wildlife resources.** A replacement plan for activities that would have a significant adverse impact that cannot be mitigated on a special or locally significant fish and wildlife resource must be denied. These activities include, but are not limited to:

- A. fish passage and spawning areas;
- B. colonial waterbird nesting colonies;
- C. migratory waterfowl concentration areas;
- D. deer wintering areas; and/or
- E. wildlife travel corridors.

Activities involving streams must not block fish passage unless approved by the Department of Natural Resources.

Subp. 5. **Archaeological, historic, or cultural resource sites.** A replacement plan for activities that involve the modification of known archaeological, historical, or cultural resource sites on or eligible for the National Register of Historic Places, as designated by the state historic preservation officer, must be denied, if the local government unit, in consultation with the State Historical Preservation Office, determines that the proposed activities will have a significant adverse impact on the archaeological or historical value of the site.

Subp. 6. **Groundwater sensitivity.** A replacement plan for activities must be denied if the local government unit determines the activities would have a significant adverse impact on groundwater quality. The publication “Criteria and Guidelines for Assessing Geologic Sensitivity of Ground Water Resources in Minnesota” (MDNR, 1991) may be used as a guide in determining potential impacts.

Subp. 7. **Sensitive surface waters.** A replacement plan must be denied if the local government unit determines the activities will have a significant adverse impact on the water quality of outstanding resource value waters listed in part 7050.0180 or on trout waters designated by the commissioner.

Subp. 8. **Education or research use.** Wetlands known to be used for educational or research purposes must be maintained or adequately replaced.

Subp. 9. **Waste disposal sites.** The local government unit must evaluate the type and amount of waste material found at the site. Activities involving known or potential hazardous wastes or contaminants must be conducted according to applicable federal and state standards.

Subp. 10. **Consistency with other plans.** The local government unit must consider the extent to which proposed activities are consistent with other plans, such as watershed management plans, land use plans, zoning, and master plans.

**Statutory Authority:** *MS s 14.06; 103B.101; 103B.3355; 103G.2242*

**History:** *18 SR 274; 22 SR 1877; 25 SR 152; 27 SR 135*

**8420.0549 EVALUATION OF WETLAND FUNCTIONS AND VALUES.**

Subpart 1. **Evaluation options.** Replacement wetlands must replace the functions and values that are lost from a wetland that is drained or filled. When environmentally preferable, a replacement wetland should replace the same combination of functions and values provided by the impacted wetland. Replacement of wetland functions and values may occur at more than one location. The local government unit may allow the evaluation of wetlands by measuring and comparing public values specified in Minnesota Statutes, section 103B.3355, with a scientifically accepted methodology in subparts 7 and 8.

Subp. 2. **Wetland types.** For wetland replacement ratio determinations, wetland type shall be based on the 12 wetland plant community types as listed in this subpart.

Wetland Plants and Plant Communities of Minnesota and Wisconsin (Eggers and Reed 1997), as modified by the Board of Water and Soil Resources–United States Army Corps of Engineers Wetland Mitigation Memorandum of Understanding (May 2007)	Classification of Wetlands and Deepwater Habitats of the United States (Cowardin et al. 1979)	Fish and Wildlife Service Circular 39 (Shaw and Fredine 1971)
Shallow, open water	Palustrine or lacustrine, littoral; aquatic bed; submergent, floating, and floating-leaved	Type 5: Inland open fresh water

# MINNESOTA RULES 2007

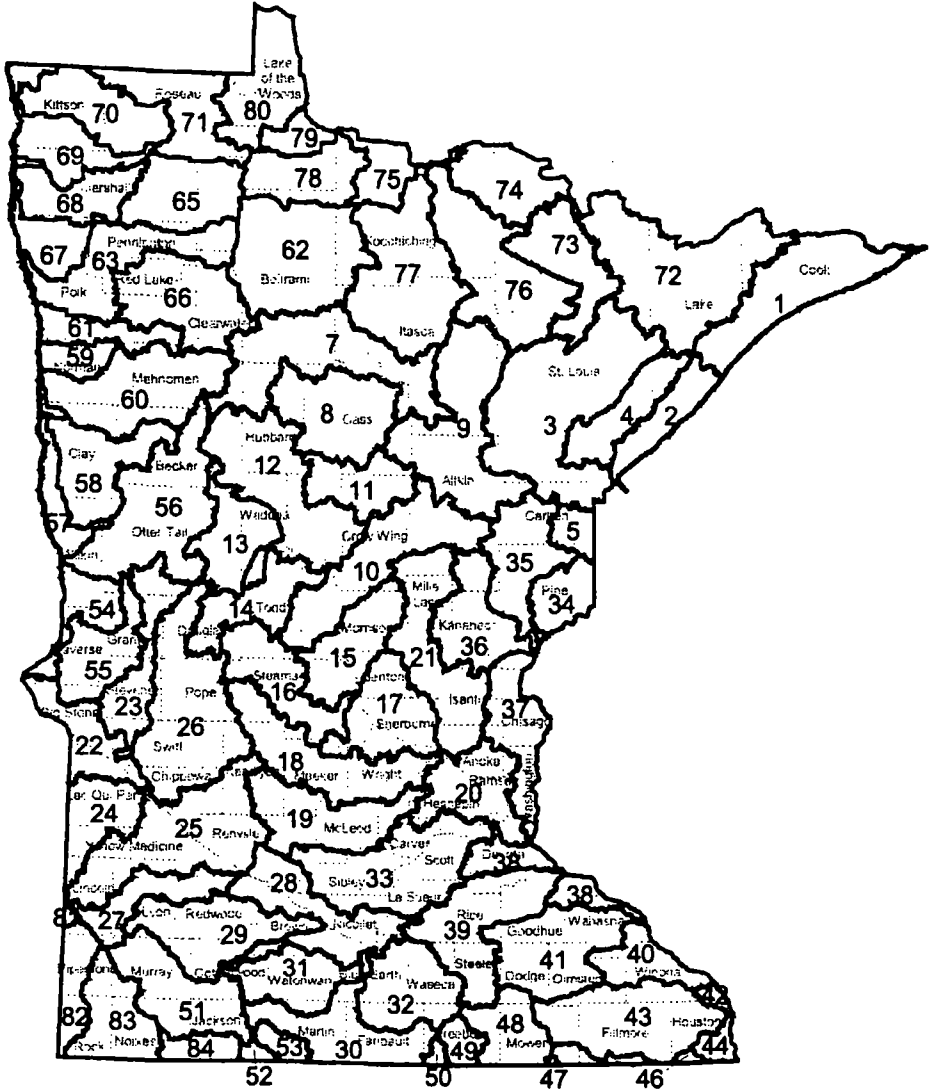
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Deep marsh	Palustrine or lacustrine, littoral; aquatic bed; submergent, floating, and floating-leaved; emergent; persistent and nonpersistent	Type 4: Inland deep fresh marsh
Shallow marsh	Palustrine; emergent; persistent and nonpersistent	Type 3: Inland shallow fresh marsh
Sedge meadow	Palustrine; emergent; narrow-leaved persistent	Type 2: Inland fresh meadow
Fresh (wet) meadow	Palustrine; emergent; broad- and narrow-leaved persistent	Type 1: Seasonally flooded basin or flat Type 2: Inland fresh meadow
Wet to wet-mesic prairie	Palustrine; emergent; broad- and narrow-leaved persistent	Type 1: Seasonally flooded basin or flat Type 2: Inland fresh meadow
Calcareous fen	Palustrine; emergent; narrow-leaved persistent; scrub/shrub; broad-leaved deciduous	Type 2: Inland fresh meadow Type 6: Shrub swamp
Open bog or coniferous bog	Palustrine; moss/lichen; scrub/shrub; broad-leaved evergreen; forested; needle-leaved evergreen and deciduous	Type 8: Bog
Shrub-carr or alder thicket	Palustrine; scrub/shrub; broad-leaved deciduous	Type 6: Shrub swamp
Hardwood swamp or coniferous swamp	Palustrine; forested; broad-leaved deciduous; needle-leaved evergreen and deciduous	Type 7: Wooded swamp
Floodplain forest	Palustrine; forested; broad-leaved deciduous	Type 1: Seasonally flooded basin or flat
Seasonally flooded basin	Palustrine; flat; emergent; persistent and nonpersistent	Type 1: Seasonally flooded basin or flat

STATE OF MINNESOTA WATERSHED BOUNDARIES – 1979  
(81 MAJOR WATERSHED UNITS)

Minnesota Counties and Watersheds



LIST OF 81 MAJOR WATERSHED UNITS OF MINNESOTA

- 1 Lake Superior (north)
- 2 Lake Superior (south)
- 3 St. Louis River
- 4 Cloquet River
- 5 Nemadji River
- 7 Mississippi River (Headwaters, Lake Winnibigoshish)
- 8 Leech Lake River
- 9 Mississippi River (Grand Rapids)
- 10 Mississippi River (Brainerd)
- 11 Pine River

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WETLAND CONSERVATION 8420.0549

- 12 Crow Wing River
- 13 Redeye River (Leaf River)
- 14 Long Prairie River
- 15 Mississippi River (Sartell)
- 16 Sauk River
- 17 Mississippi River (St. Cloud)
- 18 North Fork Crow River
- 19 South Fork Crow River
- 20 Mississippi River (Metro)
- 21 Rum River
- 22 Minnesota River (Headwaters)
- 23 Pomme de Terre River
- 24 Lac qui Parle River
- 25 Minnesota River (Granite Falls)
- 26 Chippewa River
- 27 Redwood River
- 28 Minnesota River (Mankato)
- 29 Cottonwood River
- 30 Blue Earth River
- 31 Watonwan River
- 32 Le Sueur River
- 33 Minnesota River (Shakopee)
- 34 St. Croix River (Upper)
- 35 Kettle River
- 36 Snake River
- 37 St. Croix River (Stillwater)
- 38 Mississippi River (Red Wing) and Lake Pepin
- 39 Cannon River
- 40 Mississippi River (Winona)
- 41 Zumbro River
- 42 Mississippi River (La Crescent)
- 43 Root River
- 44 Mississippi River (Revo)
- 46 Upper Iowa River
- 47 Wapsipinican River (Headwaters)
- 48 Cedar River
- 49 Shell Rock River
- 50 Winnebago River (Lime Creek)
- 51 West Fork des Moines River (Headwaters)
- 52 West Fork des Moines River (Lower)
- 53 East Fork des Moines River
- 54 Bois de Sioux River
- 55 Mustinka River
- 56 Otter Tail River
- 57 Red River of the North (Headwaters)
- 58 Buffalo River
- 59 Marsh River
- 60 Wild Rice River
- 61 Sandhill River
- 62 Upper and Lower Red Lake
- 63 Red Lake River
- 65 Thief River
- 66 Clearwater River
- 67 Grand Marais Creek (Red River of the North)
- 68 Snake River
- 69 Tamarack River (Red River of the North)
- 70 Two River
- 71 Roseau River
- 72 Rainy River (Headwaters)
- 73 Vermillion River

74	Rainy River (Rainy Lake)
75	Rainy River (Manitou)
76	Little Fork River
77	Big Fork River
78	Rapid River
79	Rainy River (Baudette)
80	Lake of the Woods
81	Big Sioux River (Medary Creek)
82	Big Sioux River (Pipestone)
83	Rock River
84	Little Sioux River

Subp. 3. **In-kind wetland replacement.** Wetland replacement for drainage, excavation, or fill shall be considered in-kind if the replacement wetland is of the same type as the impacted wetland.

Subp. 4. **Out-of-kind wetland replacement.** Out-of-kind replacement is any replacement that is not in-kind in subpart 3.

If a wetland to be drained or filled exhibits more than one wetland type as determined by the technical evaluation panel, and more than one wetland type is proposed to be drained or filled, the local government unit shall use the following procedure to determine needed replacement. The acreage of each wetland type to be impacted shall be determined. The sum of the replacement for each wetland type shall be the resultant acreage requirement.

Subp. 4a. **In advance replacement.** Replacement is in advance if the replacement is:

A. approved wetland bank credits; or

B. a replacement site that has established wetland hydrology and vegetation, but the vegetation may not be mature.

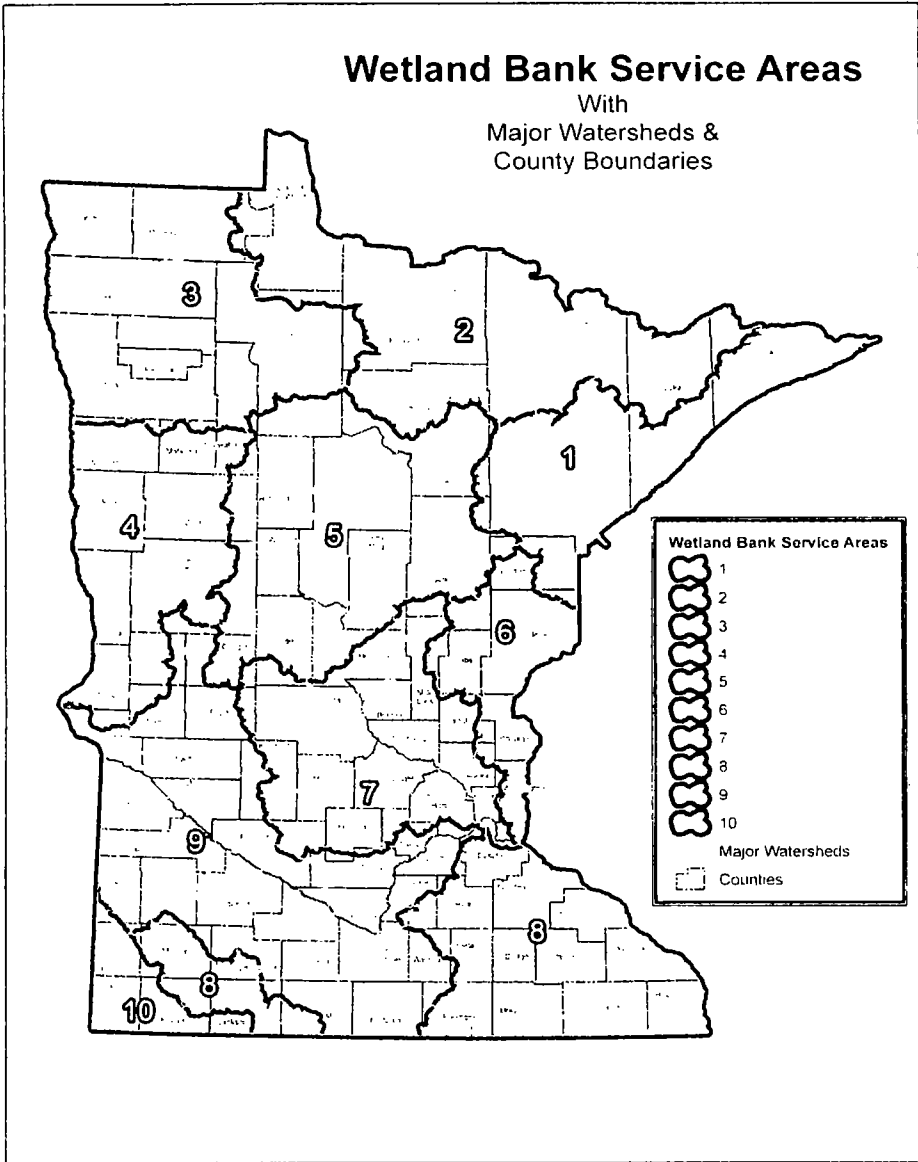
At a minimum, the replacement site must have wetland hydrology and hydrophytic vegetation established one full growing season (April–October) prior to the impact. Further, the site must meet all performance standards applicable to that development stage of the replacement site.

Subp. 4b. **In-place replacement.** Replacement is in-place if the mitigation occurs within the same watershed as the permitted activity or, if wetland credits are withdrawn from an approved wetland bank site, in the same bank service area as that where the permitted impact occurred, according to the map in this subpart. The following exceptions apply to this definition:

A. replacement for impacts in bank service area 10 can be accomplished in bank service area 9 or the Des Moines River Basin in bank service area 8 with no increase in the replacement ratio;

B. replacement for impacts in bank service area 1 can be accomplished in bank service area 2 with no increase in the replacement ratio; and

C. the board may approve special replacement ratios based on data derived from comprehensive inventories of replacement opportunities. The board shall give notice of the replacement ratios to local government units and shall publish the ratios in the State Register. The board shall provide opportunities for public input and comment prior to publishing the special replacement ratios. The conditions and standards shall take effect 30 days after publication and remain in effect unless superseded by subsequent statute, rule, or notice in the State Register.



Subp. 4c. **Minimum wetland replacement ratios.** The minimum wetland replacement ratios are based on the location of the impact and replacement, the wetland type, and the timing of replacement, as determined by the table below.

Impact Location	Replacement Location (in-place)	Type of Replacement Wetland (in type)	Replacement Process (in time)	Minimum Replacement Ratio	
> 80% area (or agricultural land)	In-place wetland	Same type as impact	In advance	1:1	
			Not in advance	1.25:1	
	Not in-place	Same type as impact wetland	Different type	In advance	1.25:1
				Not in advance	1.5:1
		Different type	Same type as impact wetland	In advance	1.25:1
				Not in advance	1.5:1
< 80% area (and non-agricultural land)	In-place wetland	Same type as impact	In advance	2:1	
			Not in advance	2.25:1	
	Not in-place	Different type	Same type as impact wetland	In advance	2.25:1
				Not in advance	2.5:1
		Different type	Same type as impact wetland	In advance	2.25:1
				Not in advance	2.5:1

Subp. 5. **Determining impacts of partial drainage.** In cases where wetlands will be partially or incompletely drained, the amount of wetland to be replaced must be determined as follows:

The area impacted by partially draining a wetland is determined in two parts. The wetland area where the hydrology is totally removed must be replaced in its entirety. The area that is partially drained must be replaced in an amount that is at least 50 percent of the acreage of the remaining wetland area or determined by an assessment of the wetland functions listed in part 8420.0103, using a methodology chosen by the technical evaluation panel from one of the methodologies established or approved by the board.

Subp. 6. **Alternative evaluation methodologies.** The local government unit may evaluate the replacement plan using a scientifically accepted methodology that evaluates all wetland functions specified in Minnesota Statutes, section 103B.3355, for both the impacted and replacement wetlands. Such alternative methodologies must be approved and listed by the board, in consultation with the commissioners of natural resources and agriculture, and local government units.

When using alternative evaluation methodologies to evaluate replacement plans, the ratio of impact wetland to replacement wetland must not be less than the minimum acreage requirements as listed in part 8420.0546, except as provided for in part 8420.0650.

Subp. 7. **Special cases or appeals.** For projects of unusual complexity, or replacement plans that have been denied and are being appealed, and for which the local government unit believes an alternative evaluation process may produce a substantially different replacement requirement, the local government unit may evaluate the replacement plan using the current



version of the Minnesota wetland evaluation methodology or another scientifically accepted methodology approved by the board, in consultation with the commissioner, that evaluates all wetland functions and values for both the impacted and replacement wetlands.

When using a board-approved methodology to evaluate replacement plans, the ratio of impact wetland to replacement wetland must not be less than the minimum acreage requirements as listed in part 8420.0546. Further, the topographic setting ratio in subpart 4 and the local public value ratio, if any, in subpart 4 must also be considered when using a board-approved methodology.

**Subp. 8. Adequacy decision.** A replacement plan that fails to meet the requirements in this part must be considered inadequate in replacing lost functions and values and must be denied by the local government unit. A replacement plan that has been considered by the local government unit and not approved may be revised and resubmitted for consideration by the local government unit. As required by part 8420.0250, the decision of a local government unit to approve, approve with conditions, or deny a replacement plan becomes final if not appealed to the board within 30 days after the date on which the decision is mailed to those required to receive notice of the decision. Within 30 days of completing construction of a replacement wetland, the notice specified in part 8420.0530, item D, subitem (6), must be recorded and proof of recording provided to the local government unit.

**Statutory Authority:** *MS s 14.06; 14.386; 103B.101; 103B.3355; 103G.2242*

**History:** *18 SR 274; 22 SR 1877; 25 SR 152; 27 SR 135; 32 SR 281*

#### **8420.0550 WETLAND REPLACEMENT STANDARDS.**

**Subpart 1. General requirements.** The standards and guidelines in this part shall be used in wetland creation and restoration efforts to ensure adequate replacement of wetland functions and values.

In evaluating a wetland replacement plan, the local government unit must determine whether the wetland type stated as the replacement plan goal will result from the replacement plan specifications. If a wetland type other than the replacement plan goal is likely to result, the local government unit must evaluate the plan based on this determination. The local government unit must also determine that the proposed replacement plan will adequately replace functions and public values lost. If adequate replacement of function and public value is not likely to result, the local government must determine what further measures are necessary to obtain adequate replacement or deny the replacement plan.

**Subp. 2. Specific requirements.** The standards in items A to H shall be followed in all wetland replacements unless the technical evaluation panel determines that a standard is clearly not appropriate.

**A.** Water control structures must be constructed using specifications provided in the Minnesota Wetland Restoration Guide or their equivalent. Control structures may be subject to the Department of Natural Resources dam safety regulations.

**B.** Best management practices must be established and maintained adjacent to the entire perimeter of all replacement wetlands.

**C.** For replacement wetlands where native, noninvasive vegetation that is characteristic of the wetland type identified as the replacement goal in part 8420.0530, item D, is not likely to become dominant naturally in a five-year period, the replacement wetland shall be seeded or planted with appropriate native, noninvasive species, as determined by the technical evaluation panel. If the replacement wetland is seeded or planted, the seed or planting stock should be from native, noninvasive species of regional wetland origin. During the monitoring period, the applicant must take reasonable steps to control invasion by any non-native or invasive species, for example, reed canary grass, Canada thistle, common buckthorn, spotted knapweed, leafy spurge, purple loosestrife, and Eurasian water milfoil, that would defeat the revegetation goal of the replacement plan.

**D.** Erosion control measures as determined by the soil and water conservation district must be employed during construction and until permanent ground cover is established to prevent siltation of the replacement wetland or nearby water bodies.

**E.** For all restored wetlands where the original organic substrate has been stripped away and for all created wetlands, provisions must be made for providing an organic sub-

strate unless the technical evaluation panel recommends otherwise. When feasible, the organic soil used for backfill should be taken from the drained or filled wetland dominated by native, noninvasive species. Organic soil for backfill from wetlands dominated by nonnative, invasive species should be avoided.

F. The bottom contours of created types 3, 4, and 5 wetlands should be undulating, rather than flat, to provide a variety of water depths, comparable to natural wetlands in the vicinity of the replacement, and be consistent with part 8420.0547, subpart 2.

G. Sideslopes of created portions of wetlands and graded buffer strips must not be steeper than 5:1, five feet horizontally for every one foot vertically as averaged around the wetland. Sideslopes of 10:1 to 15:1 are preferred. More than half of the slopes of graded areas inside the exterior boundaries of restored, created, or enhanced wetlands must be no steeper than 10:1 unless the technical evaluation panel concurs that steeper slopes are acceptable.

H. Created wetlands should have an irregular edge to create points and bays, consistent with part 8420.0547, subpart 2.

Subp. 3. [Repealed, 27 SR 135]

**Statutory Authority:** *MS s 14.06; 103B.101; 103B.3355; 103G.2242*

**History:** *18 SR 274; 22 SR 1877; 27 SR 135*

#### 8420.0600 MONITORING.

The purpose of wetland replacement monitoring is to ensure that the replacement wetland achieves the goal of replacing lost functions and values.

**Statutory Authority:** *MS s 14.06; 103B.101; 103B.3355; 103G.2242*

**History:** *18 SR 274; 27 SR 135*

#### 8420.0610 DURATION OF MONITORING.

Monitoring shall be by means of an annual report as specified in part 8420.0620 and shall continue for five years following completion of the wetland replacement project, or until the technical evaluation panel deems the replacement wetland to be fully functional. Through written notification to the applicant, the local government unit may extend the required monitoring period for not more than an additional five-year period if the goal of the replacement plan has not been achieved, but, in the written opinion of the technical evaluation panel, may be achieved with more time.

**Statutory Authority:** *MS s 14.06; 103B.101; 103B.3355; 103G.2242*

**History:** *18 SR 274; 22 SR 1877; 27 SR 135*

#### 8420.0620 MONITORING ANNUAL REPORT.

Subpart 1. **Purpose.** The purpose of the annual report is to describe actual wetland restoration or creation activities completed during the past year, activities planned for the upcoming year, and the information in subpart 2. The applicant shall submit the annual report to the local government unit where the replacement wetland is located on a date determined by the local government unit until the applicant has fulfilled all of the requirements of the local government unit. The local government unit, at its discretion, may prepare the annual report for the applicant.

Subp. 2. **Report content.** The annual report shall include the following information and other site-specific information identified by the local government unit:

A. a description of the project location, size, current wetland type (Cowardin classification), and desired wetland type (goal);

B. a comparison of the as-built specifications versus the design specifications (first annual plan only) and a rationale for significant changes;

C. hydrology measurements: seasonal water level elevations or areal coverage measurements during the period April through October;

D. a map of plant communities within the boundaries of the replacement site, including hydrologic indicators observed; and

E. color photographs of the project area taken anytime during the growing season.

**Statutory Authority:** *MS s 14.06; 103B.101; 103B.3355; 103G.2242*

**History:** *18 SR 274; 22 SR 1877; 27 SR 135*

#### **8420.0630 MONITORING DETERMINATIONS BY THE LOCAL GOVERNMENT UNIT.**

The local government unit responsible for monitoring as determined under part 8420.0230:

A. must inspect the project when construction is complete and certify compliance with construction specifications, and may inspect the project at any time during the construction and monitoring period, and any time after that to assess the long-term viability of the replaced wetland. When the local government unit certifies that the construction specifications have been met, the local government unit shall so advise the applicant and return any construction bond or other construction security that the applicant had provided;

B. may order corrective action at any time during the required monitoring period if it determines that the goal of the approved replacement plan will not be met, and may require the applicant to prepare an amended wetland value replacement plan for review and approval by the local government unit, which describes in detail the corrective measures to be taken to achieve the goal of replacing lost wetland functions and values;

C. shall make a finding based on a site visit at the end of the monitoring period as to whether the goal of the replacement plan has been met. If the goal of the replacement plan has not been met, the local government unit shall order corrective action and extend the monitoring period; and

D. shall require one or more of the following actions if during the monitoring period the local government unit finds that the goal of the replacement plan will not be met:

(1) order the applicant to prepare and implement a new replacement plan;

(2) issue a cease and desist order on the draining and filling activity if it has not been completed;

(3) order restoration of the impacted wetland;

(4) obtain forfeiture of a bond or other security and use the proceeds to replace the lost wetland functions and values;

(5) ask the district court to order the applicant to fulfill the replacement plan;

or

(6) other actions that the local government unit determines necessary to achieve the goal of the replacement plan.

**Statutory Authority:** *MS s 14.06; 103B.101; 103B.3355; 103G.2242*

**History:** *18 SR 274; 27 SR 135*

#### **8420.0650 LOCAL COMPREHENSIVE WETLAND PROTECTION AND MANAGEMENT PLANS.**

##### **Subpart 1. General requirements and participation.**

A. As an alternative to the rules adopted under Minnesota Statutes, section 103G.2242, subdivision 1, and the public value criteria established or approved under Minnesota Statutes, section 103B.3355, a comprehensive wetland protection and management plan may be developed by a local government unit, or one or more local government units operating under a joint powers agreement, provided that:

(1) a notice is made at the beginning of the planning process to the board, the commissioner of natural resources, the Pollution Control Agency, local government units, and local citizens to actively participate in the development of the plan; and

(2) the plan is implemented by ordinance as part of the local government unit's official controls under Minnesota Statutes, chapter 394, for a county; Minnesota Statutes, chapter 462, for a city; Minnesota Statutes, chapter 366, for a town; and by rules adopted under Minnesota Statutes, chapter 103D, for a watershed district; and Minnesota Statutes, chapter 103B, for a watershed management organization.

B. An organization that is invited to participate in the development of the local plan, but declines to do so and fails to participate or to provide written comments during the local review process, waives the right during board review to submit comments, except comments concerning consistency of the plan with laws and rules administered by that agency. In determining the merit of an agency comment, the board shall consider the involvement of the agency in the development of the local plan. The technical evaluation panel must be consulted in all components of plan and ordinance development including, but not limited to, conducting wetland functional assessments, establishing wetland management classifications, and identifying local reference standard wetlands.

C. After board approval and local government adoption, replacement plan, exemption, and no-loss determinations are made according to the plan and ordinance. This part provides minimum standards. Local government units must require equivalent or greater standards and procedures for wetland conservation, but not less.

Subp. 2. **Plan contents.** The comprehensive wetland protection and management component of the local water plan may:

A. provide for classification of wetlands in the plan area based on:

(1) an inventory of wetlands in the plan area;

(2) an assessment of the wetland functions listed in part 8420.0103, using a methodology chosen by the technical evaluation panel from one of the methodologies established or approved by the board; and

(3) the resulting public values;

B. vary application of the sequencing standards in part 8420.0520, for projects based on the classification and criteria set forth in the plan;

C. vary the replacement standards of part 8420.0540, based on the classification and criteria set forth in the plan, for specific wetland impacts provided there is no net loss of public values within the area subject to the plan, and so long as:

(1) in a 50 to 80 percent area, a minimum acreage requirement of one acre of replaced wetland for each acre of drained or filled wetland requiring replacement is met within the area subject to the plan; and

(2) in a less than 50 percent area, a minimum acreage requirement of two acres of replaced wetland for each acre of drained or filled wetland requiring replacement is met within the area subject to the plan, except that replacement for the amount above a 1:1 ratio can be accomplished as described in part 8420.0540, subpart 2;

D. in a greater than 80 percent area, allow replacement credit, based on the classification and criteria set forth in the plan, for any project that increases the public value of wetlands, including activities on adjacent upland acres;

E. in a greater than 80 percent area, based on the classification and criteria set forth in the plan, expand the application of the exemptions in part 8420.0122, subpart 1, item B, to also include nonagricultural land, provided there is no net loss of wetland values;

F. prescribe standards for size and location of replacement wetlands by establishing type requirements, size/ratio requirements, functional quality requirements, location requirements, and wetland mitigation fee in lieu of direct replacement criteria. Requirements for replacement must have a direct relationship with wetland classification as defined in the plan and must result in no net loss of wetland quantity, quality, and biological diversity over the life of the plan which cannot exceed ten years;

G. allow exemptions based on ordinance standards, eligibility criteria, and processes that are not less restrictive than the requirements in parts 8420.0115, 8420.0122, and 8420.0210 based on wetland classifications as defined in the plan; and

H. define and establish high priority wetland areas pursuant to parts 8420.0350 and 8420.0400.

Subp. 2a. **Project notice and appeal under local ordinance.**

A. The local government unit shall submit to the commissioner of natural resources, the watershed district if there is one, local government units, members of the technical evaluation panel, and local citizens who request it, a copy of the application and provide at least 15 days' notice for comments and a schedule for a hearing if one is to be held. A copy of all decisions shall be forwarded to those mentioned above within ten days of the action.

B. Appeals of ordinance decisions. Persons may appeal replacement plan, no-loss and exemption determinations made pursuant to an approved wetland ordinance according to the procedures defined in part 8420.0250.

**Subp. 3. Board review and approval; mediation; judicial review.**

A. The plan is deemed approved 60 days after the local government unit submits the final plan to the board, unless the board disagrees with the plan as provided in item D.

B. The board may not disapprove a plan if the board determines the plan meets the requirements of this part.

C. In its review of a plan, the board shall advise the local government unit of those elements of the plan that are more restrictive than state law and rules.

D. If the board disagrees with the plan or any elements of the plan, the board shall, in writing, notify the local government unit of the plan deficiencies and suggested changes. The board shall include in the response to the local government unit the scientific justification, if applicable, for the board's concerns with the plan. Upon receipt of the board's concerns with the plan, the local government unit has 60 days to revise the plan and resubmit the plan to the board for reconsideration, or the local government unit may request a hearing before the board. The board shall hold a hearing within the boundaries of the jurisdiction of the local government within 60 days of the request for hearing. After the hearing, the board shall, within 60 days, prepare a report of its decision and inform the local government unit.

E. If, after the hearing, the board and local government unit disagree on the plan, the board shall, within 60 days, initiate mediation through a neutral party. If the board and local government unit agree in writing not to use mediation or the mediation does not result in a resolution of the differences between the parties, then the board may commence a declaratory judgment action in the district court of the county where the local government unit is located. If the board does not commence a declaratory judgment action within the applicable 60-day period, the plan is deemed approved.

F. The declaratory judgment action must be commenced within 60 days after the date of the written agreement not to use mediation or 60 days after conclusion of the mediation. If the board commences a declaratory judgment action, the district court shall review the board's record of decision and the record of decision of the local government unit. The district court shall affirm the plan if it meets the requirements of this part.

G. The comprehensive wetland protection and management plan may be developed as part of, or in conjunction with, a local water plan. Except as otherwise provided for in this part, all other requirements relating to development of the plan must be consistent with the local water plan processes under Minnesota Statutes, section 103B.231, 103B.311, or 103D.401.

**Subp. 4. Effective date and amendments.**

A. The plan becomes effective as provided in subpart 3 and after adoption of the plan into the official controls of the local government unit.

B. All amendments to the adopted plan and ordinance must be approved by the board.

C. After the effective date of the plan, a local government unit shall make replacement, exemption, no-loss, and other determinations consistent with the plan.

Subp. 5. [Repealed, 27 SR 135]

Subp. 6. [Repealed, 27 SR 135]

**Subp. 7. Local program capacity requirements.** Any local government unit opting to pursue incorporating this chapter into local ordinance must provide documentation to the board demonstrating local capacity to implement the program consistent with requirements prescribed in part 8420.0200, subpart 2, item A.

**Subp. 8. Reporting and oversight.** An annual activity report must be provided to the board which documents compliance with plan standards as required in subpart 2. The annual report shall include such items as the number and type of permits and exemptions issued, including documentation of the area of wetlands impacted and replaced, complaints re-

ceived, plan and ordinance violations including number of cease and desist orders, projects constructed, variances granted, and local appeal proceedings.

**Statutory Authority:** *MS s 14.386; 103B.101; 103B.3355; 103G.2242*

**History:** *22 SR 1877; 25 SR 152; 27 SR 135; 32 SR 281*

### STANDARDS AND CRITERIA FOR STATE WETLAND BANKING

#### 8420.0700 PURPOSE.

The purpose of parts 8420.0700 to 8420.0760 is to provide standards for the establishment and administration of a state wetland banking system as authorized by Minnesota Statutes, section 103G.2242.

**Statutory Authority:** *MS s 14.06; 103B.101; 103B.3355*

**History:** *18 SR 274*

**8420.0710** [Repealed, 22 SR 1877]

#### 8420.0720 PRINCIPLES OF WETLAND BANKING.

Subpart 1. **Goal.** Implementation of a wetland banking system must comply with the purposes and goals of the act by achieving a no-net loss in the quantity, quality, and biological diversity of Minnesota's existing wetlands.

Subp. 2. **Sequencing prerequisite.** The state wetland banking system may only be used for replacement of drained or filled wetlands when the local government unit determines that the applicant has complied with all of the sequencing requirements of part 8420.0520 and that the owner of the account agrees to the withdrawal of wetland banking credits from the account.

Subp. 3. **Geographic limitations.** Wetland banking is allowed for any impact subject to the requirements of part 8420.0543.

Subp. 4. **Eligible wetlands.** Only wetland and buffer areas eligible for replacement credit under parts 8420.0540 to 8420.0549 are eligible for deposit in the state wetland bank.

Subp. 5. **Ineligible wetlands.** Wetlands that are drained or filled under an exemption in part 8420.0122 and subsequently restored are not eligible for deposit in the wetland bank. Modification or conversion of nondegraded naturally occurring wetlands from one type to another are not eligible for enrollment in a statewide wetlands bank.

Subp. 6. **Account balance.** Accounts must maintain a positive balance. A wetland bank account shall specify acreage by wetland type deposited by the account holder minus subsequent withdrawals.

Subp. 7. **Wetland banking credit withdrawals and transfers.** Wetland banking credits may be withdrawn to provide replacement pursuant to an approved replacement plan or equivalent. Wetland banking credits may also be transferred to another account holder for future use or resale if a conservation and access easement has been recorded as required in subpart 8. Wetland banking credits may be withdrawn from an account or transferred to another account by submittal of such requests on forms provided by the board along with any authorized fees. No sale, withdrawal, or transfer of credits is final until the board approves and debits the account of origin.

Subp. 8. **Conservation and access easement.** No credits may be deposited in the state wetland bank until a perpetual conservation easement, in a format provided by the board, is granted to and accepted by the state. The easement shall provide for preservation of the banked wetland's functions by the fee owner and wetland banking plan applicant. The wetland banking plan applicant must also provide a title insurance policy that is acceptable to the state naming the state of Minnesota as the insured. If the conservation easement does not abut a public road, the fee owner and wetland banking plan applicant must also grant and record an access easement in favor of the board, the local government unit, and any other state, local, or federal regulatory authority that has authorized use of credits from the site for mitigation. This subpart does not apply to state land.

Subp. 8a. **Reporting of sale of credits.** The owner of an account in the state wetland bank must report the sale of credits to the board on withdrawal or transfer forms prescribed by the board and include a copy of the bill of sale. Proposed withdrawals are not complete until at least one regulatory authority has approved the use of the subject credits for a specific purpose. Failure to report credit sales may result in restrictions on withdrawals until the account is reconciled.

Subp. 9. [Repealed, 27 SR 135]

Subp. 10. **Marking of boundaries of bank areas.** The boundary of bank areas must be clearly marked as prescribed in the conservation and access easement.

Subp. 11. **Administrative fees.** The board and local government units may collect administrative fees for managing wetland banking accounts.

Subp. 12. **Wetland banking appeals.** Appeals of the local government unit banking determinations are taken according to part 8420.0250.

Subp. 13. **Fees established.** Fees must be assessed for managing wetland bank accounts and transactions as follows:

A. account maintenance annual fee: one percent of the value of credits not to exceed \$500;

B. account establishment, deposit, or transfer: 6.5 percent of the value of credits not to exceed \$1,000 per establishment, deposit, or transfer; and

C. withdrawal fee: 6.5 percent of the value of credits withdrawn.

Subp. 14. **Fees paid to board.** All fees established in subpart 13 must be paid to the Board of Water and Soil Resources and credited to the general fund to be used for the purpose of administration of the wetland bank.

**Statutory Authority:** *MS s 14.06; 103B.101; 103B.3355; 103G.2242*

**History:** *18 SR 274; 22 SR 1877; 25 SR 152; 27 SR 135; L 2004 c 228 art 1 s 71*

#### **8420.0730 ADMINISTRATION AND MANAGEMENT AUTHORITY.**

Subpart 1. **Establishment.** The board shall establish a state wetland bank. The board or the board's assignee is responsible for management of the bank including recording all bank transactions, maintaining bank records, and ensuring that the operation of the bank complies with parts 8420.0700 to 8420.0760. The board shall notify all local government units upon establishment of the bank. Any separate banking system including those established by local governments must comply with parts 8420.0700 to 8420.0760 and must be approved by the board and the commissioner.

Subp. 2. **Deposit prerequisites.** To be deposited into the state wetland bank, a wetland must be certified as eligible for deposit by the local government unit in which it is located, according to part 8420.0740, subpart 1. If a local government unit elects to certify wetlands for deposit in the wetland bank, the local government unit is also responsible for ensuring that the monitoring provisions in part 8420.0750 are fulfilled. A local government unit may decline to certify all wetlands within its jurisdiction or, based on a comprehensive local water or wetland protection and management plan, a local government unit may elect to certify wetlands for deposit into the wetland bank only in selected areas, for example, high priority regions and areas. If the local government unit elects to reject or limit banking, it must do so by rule or ordinance, as applicable. The board may reject or modify an application for deposit if, during its review, any part of the bank application or plan is missing, incorrect, or inconsistent with this chapter.

Subp. 3. [Repealed, 27 SR 135]

**Statutory Authority:** *MS s 14.06; 103B.101; 103B.3355; 103G.2242*

**History:** *18 SR 274; 22 SR 1877; 25 SR 152; 27 SR 135*

#### **8420.0740 PROCEDURES.**

Subpart 1. **Deposits and credits.**

A. Wetland replacement credits approved before July 1, 1993, are eligible for deposit into the state wetland banking system if the wetland replacement credit was authorized

by a public agency specifically for a wetland bank that has been approved by the commissioner. Also, wetland replacement credits that have been deposited in a local government unit bank before July 1, 1993, and after January 1, 1992, are eligible for deposit into the state wetland banking system if the deposit meets all the criteria in parts 8420.0700 to 8420.0760 based on a site inspection and review by the board and the commissioner.

B. After July 1, 1993, wetlands restored or created without prior local government unit approval as specified in this part are not eligible for deposit into the wetland bank.

C. There is no maximum or minimum wetland acreage eligible for deposit in the wetland bank. Based on the recommendation of the technical evaluation panel, the local government unit must identify the acreage that will receive credit. The acreage must be based on a land survey or comparable method of field measurement of the credit areas recommended for deposit. The person making the measurement must certify in writing as to the method and accuracy of the measurement.

D. The initial deposit of wetland banking credits must be done by the fee title owner or easement holder of the wetland bank area.

E. Except as provided for in item A, in order to deposit wetland acres into the wetland bank, the wetland banking plan applicant must notify the local government unit in writing, before restoration or creation, that the proposed wetland is specifically designated for deposit into the wetland bank. This notification may be part of the documentation requested in item F. In cases where excess wetland acreage is expected to result from a specific replacement plan according to parts 8420.0530 to 8420.0550, the owner must indicate on the replacement plan that the excess acreage is to be considered available for wetland banking or lose the opportunity to use the excess credits for future projects. If the excess credit is less than 1.0 acre, an account may be established without the need to grant a perpetual conservation easement to the state of Minnesota.

F. In cases where a wetland is proposed to be restored or created solely for wetland banking purposes, that is, the wetland is not part of a project-specific wetland replacement plan, the wetland banking plan applicant must submit to the local government unit a bank plan containing the information required in part 8420.0530, items A and D. The bank plan must include design plans that show structural, earthmoving, and vegetative management components. The plan must clearly show existing jurisdictional wetlands and areas proposed to receive credit, and be signed, dated, and consistent with part 8420.0550.

A copy of the bank plan shall be mailed to members of the technical evaluation panel, the administrator of the state wetland bank, members of the public who have requested a copy, the commissioner of natural resources, the district office of the United States Army Corps of Engineers, and the watershed district or watershed management organization if there is one. Based on input from the technical evaluation panel and other comments received, the local government unit must determine the likelihood that the restoration or creation will be successful and approve, modify, or reject the banking plan. The local government unit decision must be made in compliance with Minnesota Statutes, section 15.99, which generally requires a decision to be made within 60 days of receipt of a complete application. The local government unit decision must be mailed to the wetland banking plan applicant within ten working days of the decision. A summary of the government unit decision must be mailed within ten working days of the decision to those required to receive notice of the application.

G. In cases where a wetland is to be restored or created by an agency, department, or subdivision of the local government unit for deposit into the wetland bank, the local government unit must prepare the information required in part 8420.0530, items A and D, and notice this information according to item F.

H. The proposed wetland must be restored or created within two years of approval or the bank plan must be resubmitted for consideration. Upon approval, the wetland banking plan applicant shall restore or create the wetland and notify the local government unit when construction has been completed. The technical evaluation panel shall inspect the site when construction is completed to ensure that construction specifications and the vegetation management plan have been followed. Failure to follow approved construction specifications and the vegetation management plan is sufficient grounds for the local government unit to deny consideration of the wetland for banking.



I. Up to 15 percent of the proposed credits are eligible for deposit in the bank immediately after completion of construction and vegetative planting if all of the following subitems apply:

(1) For projects that contain elements that include dams, dikes, or other impoundment features, the construction plans were designed, overseen, and certified by a registered professional engineer.

(2) The technical evaluation panel certifies that the initial planting has been completed in accordance with the vegetation management plan.

(3) The provisions of part 8420.0720, subpart 8, have been complied with.

The remaining proposed credits may be eligible for deposit no sooner than six months after construction has been completed and approved for restored wetlands, and no sooner than one year after construction has been completed and approved for created wetlands. The wetland banking plan applicant shall contact the local government unit to request a determination of wetland bank acceptability and approved quantities of wetland banking credits for initial and subsequent deposits. The technical evaluation panel shall ensure that sufficient time has been allowed for the wetland to become established, especially vegetation and hydrology, before making this determination. If the technical evaluation panel has reason to believe that the wetland characteristics may change substantially, the panel must postpone its recommendation to the local government unit until the wetland has stabilized. As part of its initial review and comment on the bank plan, the panel may recommend specific performance standards that are linked to a credit allocation schedule. The wetland banking plan applicant must be advised of any performance standards and credit allocation schedule recommended by the panel.

Based on a site visit, the technical evaluation panel will determine the size and type of wetland as well as topographic setting characteristics and, if applicable, the new wetland credits and public value credits resulting from the to be deposited wetland. The technical evaluation panel will provide the information to the local government unit.

J. The local government unit shall consider the recommendations of the technical evaluation panel and comments from those required to receive a copy of the banking plan prior to developing findings. The local government unit shall review and approve wetland banking credits and submit the complete wetland bank application for deposit, wetland bank project application, and plans to the board. If the wetland banking plan applicant chooses not to proceed with the deposit, the wetland banking plan applicant may return the wetland to its preconstruction condition without replacement within five years. At any time within the five-year period, the wetland banking plan applicant may request the board to deposit any or all eligible and approved credits into the bank or may amend the bank plan and resubmit the plan to the local government unit for board certification. After five years, any activity in the wetland is subject to this chapter.

K. To be deposited into the bank, the following information concerning the wetland must be submitted to the board by the wetland banking plan applicant or by local government unit in which the wetland is located:

(1) name, address, and telephone number of the wetland banking plan applicant;

(2) a complete copy of the wetland banking plan application, supporting documents, and a survey of the land area that will be subject to restrictions;

(3) a copy of the deed for the property containing the wetland and any easement if the wetland banking plan applicant is not the fee owner;

(4) size of the wetland acreage to be deposited, to the 0.1 acre, by wetland type and topographic setting characteristics and, if applicable, the new wetland credits and public value credits; and

(5) local government unit certification that the wetland is approved for deposit into the bank.

L. The board shall acknowledge the deposit to the wetland banking plan applicant and local government unit and officially enter the information in item K into the wetland bank. Information on deposited wetlands shall be available from the board on request according to subpart 2, item D.

M. Wetlands deposited into the wetland bank, on which withdrawals have occurred, are subject to replacement for any subsequent drainage or filling.

N. Wetlands deposited into the wetland bank are subject to the monitoring provisions in part 8420.0750.

**Subp. 2. Withdrawals.**

A. Before consideration of use of the wetland bank, replacement plan applicants must satisfy the requirements of part 8420.0520 or equivalent.

B. Credits from the state wetland bank may be used to mitigate wetland losses authorized by local government units or other local, state, and federal regulatory authorities provided the impacted wetland is within the state of Minnesota and the credit withdrawal procedures of this chapter are followed.

C. When using the wetland bank to replace drained or filled wetlands, the replacement must comply with parts 8420.0540 to 8420.0549.

D. The board, on request, will provide the following information to persons making inquiries concerning available wetland bank deposits with a local government unit jurisdiction, county, or watershed:

(1) account holder: name, address, and telephone number;

(2) available wetlands: wetland acres by type and topographic setting characteristics, and, if applicable, the new wetland credits and public value credits;

(3) location: section, township, range, county, and watershed.

E. The applicant may contact, negotiate, and purchase the required wetland banking credits from the account holder. When the account holder and applicant come to agreement, the applicant will provide requested information on a wetland banking credit withdrawal form developed by the board, and include the wetland banking credit withdrawal form as part of the wetland replacement plan transmitted to the local government unit. The wetland banking credit withdrawal form will include information indicating the wetland type by acres for withdrawal, location of banked wetland, and the topographic setting characteristics and, if applicable, the new wetland credits and public value credits of the banked wetland.

F. The local government unit must circulate the applicant's wetland replacement plan and the wetland banking credit withdrawal form to identify specific wetland banking credits as the applicable replacement wetland, using the public comment and review process in part 8420.0230 and to the local government unit whose jurisdiction covers the location of the wetland banking credits. The local government unit must contact the board to verify that replacement credits indicated on the wetland banking credit withdrawal form are available before final approval of wetland bank withdrawals.

G. On approval of the applicant's wetland replacement plan using wetland banking credits as wetland replacement, the local government unit shall notify the board to debit the appropriate account by type and amount. The board will complete the accounting transactions and send a notice of wetland banking credit withdrawal to the account holder and the applicant. No sale, withdrawal, transfer, or use of wetland credits is valid until the board debits a wetland bank account. Wetland credits may be only used once.

H. The applicant shall not be allowed to begin proposed drain or fill activities until the local government unit formally approves the wetland replacement plan using the acknowledged wetland banking credits as replacement and the applicant has received notice of withdrawal of the wetland banking credits from the board or local government unit.

I. An individual, corporation, local government unit, state or federal agency, or other organization may buy and hold wetland banking credits from account holders in the bank for later use or resale. Transfer of wetland banking credits must be accomplished through use of a board wetland banking credit transfer form, and must be maintained in an account in the state wetland banking system. An account will be established for the individual or organization on presentation to the board of a wetland banking credit transfer form, and evidence that the perpetual conservation easement required by part 8420.0720, subpart 8, has

been recorded. The board will notify both account holders on transfer of the wetland banking credits.

**Statutory Authority:** *MS s 14.06; 103B.101; 103B.3355; 103G.2242*

**History:** *18 SR 274; 22 SR 1877; 25 SR 152; 27 SR 135; L 2003 c 128 art 1 s 175*

#### **8420.0750 AUDITING AND MONITORING.**

##### **Subpart 1. Annual report and audit.**

A. The board will develop wetland bank deposit, withdrawal, and credit transfer and withdrawal forms and distribute them to local government units indicating a desire to certify restored wetland banking credits for deposit in the wetland bank.

B. The wetland bank data file maintained by the board will contain at least the following information:

(1) wetland acres by type, topographic setting characteristics, restoration or creation date, and bank acceptance date, fee owner, location by (public land survey coordinates, local government unit, county, and watershed of the banked wetland); and

(2) previous withdrawals against each banked wetland by impact wetland (wetland acres by type, topographic setting characteristics, and, if applicable, the new wetland credits and public value credits, date of wetland impact), ownership (fee owner, address, telephone number) and location (public land survey coordinates, local government unit, county, and watershed of the impacted wetland).

C. The board may periodically inspect wetland bank records and correspondence maintained by a local government unit to determine compliance with this part.

D. A wetland bank status report shall be prepared as part of the report required by Minnesota Statutes, section 103G.2373, and distributed by the board to applicable local government units, soil and water conservation districts, watershed districts, watershed management organizations, the departments of natural resources and agriculture, and on request.

##### **Subp. 2. Monitoring.**

A. After the wetland is entered into the bank, the local government unit responsible for monitoring under part 8420.0230 and the wetland banking plan applicant shall continue monitoring according to parts 8420.0600 to 8420.0630. A copy of each monitoring report must be submitted to the local government unit and the board.

B. The board shall inspect wetlands deposited into the wetland bank at least once each five years to ensure that the wetlands conform to conditions specified in the approved bank plan, and to make a determination of needed corrective action.

**Statutory Authority:** *MS s 14.06; 103B.101; 103B.3355; 103G.2242*

**History:** *18 SR 274; 22 SR 1877; 25 SR 152; 27 SR 135*

#### **8420.0760 ENFORCEMENT AND CORRECTIVE ACTIONS.**

A. The fee owner and the wetland banking applicant, if different from the fee owner, are jointly and severally responsible for the success of the wetland banking project and maintaining the wetland banking project in accordance with the approved wetland banking plan both during and after monitoring. The wetland banking plan applicant, if different from the fee owner, is not responsible after monitoring if the wetland banking plan applicant no longer owns an easement interest in the real estate or credits associated with the banked wetland.

B. If, on inspection, the board determines that wetlands deposited in the wetland bank are not in compliance with this chapter, the board must prescribe corrective measures to the local government unit and fee owner or wetland banking plan applicant to bring the wetland into compliance.

C. If satisfactory remediation does not result, the board may refuse future wetland bank certifications by the local government unit and future deposits from the fee owner or wetland banking plan applicant.

D. If, whether during or after the completion of the monitoring, a local government unit or the technical evaluation panel determines that a banked wetland does not substantially

meet the specifications in the approved bank plan, the local government unit or technical evaluation panel must notify the board. The board shall restrict further withdrawals and transfers of all credits associated with the wetland, whether held by the wetland banking plan applicant or a subsequent account holder, until the local government unit or technical evaluation panel notifies the board, or the board otherwise determines, that the wetland banking project has been brought into compliance.

E. The local government unit or the board may undertake reconstruction work and require reimbursement of reasonable costs from the fee owner or wetland banking plan applicant.

F. Fee owners, wetland banking plan applicants, or account holders may appeal restrictions on credit withdrawals and transfers or demands for reimbursement of reconstruction costs to the dispute resolution committee of the board which shall make a recommendation to the full board.

G. Noncompliance with or impacts to, wetland banking projects are subject to enforcement under part 8420.0290.

**Statutory Authority:** *MS s 14.06; 103B.101; 103B.3355; 103G.2242*

**History:** *18 SR 274; 27 SR 135*

### STANDARDS AND CRITERIA FOR IDENTIFICATION, PROTECTION, AND MANAGEMENT OF CALCAREOUS FENS

#### 8420.1010 PURPOSE.

The purpose of parts 8420.1010 to 8420.1070 is to provide minimum standards and criteria for the identification, protection, and management of calcareous fens as authorized by Minnesota Statutes, section 103G.223. Calcareous fens may not be drained or filled or otherwise altered or degraded except as provided for in a management plan approved by the commissioner.

Part 8420.0122 does not apply to calcareous fens.

**Statutory Authority:** *MS s 14.06; 103B.101; 103B.3355; 103G.2242*

**History:** *18 SR 274; 22 SR 1877; 27 SR 135*

#### 8420.1020 IDENTIFYING CALCAREOUS FENS.

A calcareous fen is a peat-accumulating wetland dominated by distinct groundwater inflows having specific chemical characteristics. The water is characterized as circumneutral to alkaline, with high concentrations of calcium and low dissolved oxygen content. The chemistry provides an environment for specific and often rare hydrophytic plants.

**Statutory Authority:** *MS s 14.06; 103B.101; 103B.3355*

**History:** *18 SR 274*

#### 8420.1030 PROCEDURES TO LIST CALCAREOUS FENS.

A. The commissioner shall investigate wetlands to determine if the wetland is properly identified as a calcareous fen.

B. The commissioner shall maintain a current list of known calcareous fens in the state and their location.

C. The commissioner shall provide an updated list of calcareous fens to the board for further distribution.

**Statutory Authority:** *MS s 14.06; 103B.101; 103B.3355*

**History:** *18 SR 274*

#### 8420.1040 MANAGEMENT PLANS.

Calcareous fens may not be drained or filled or otherwise altered or degraded except as provided for in a management plan approved by the commissioner. The commissioner will provide technical assistance to landowners or project sponsors in the development of management plans.

**Statutory Authority:** *MS s 14.06; 103B.101; 103B.3355; 103G.2242*

**History:** *18 SR 274; 22 SR 1877*

**8420.1050 RESTORATION.**

The commissioner may approve management plans to restore or upgrade a previously damaged calcareous fen.

**Statutory Authority:** *MS s 14.06; 103B.101; 103B.3355*

**History:** *18 SR 274*

**8420.1060 APPEALS.**

A. A landowner or project proposer may challenge the commissioner's determination that a wetland is a calcareous fen or the commissioner's calcareous fen management plan by demanding a hearing. The hearing will be carried out in the same manner as water permit hearings under Minnesota Statutes, chapter 103G.

B. The hearing must be demanded within 30 days after mailed notice of the commissioner's decision to the project proposer, otherwise the decision becomes final and may not be challenged by the project proposer.

C. Appeal of the commissioner's decision after the hearing must be done in the manner provided for appeals from contested case decisions in Minnesota Statutes, chapter 14.

**Statutory Authority:** *MS s 14.06; 103B.101; 103B.3355*

**History:** *18 SR 274*

**8420.1070 ENFORCEMENT PROCEDURES.**

Enforcement procedures for calcareous fens shall be conducted consistent with Minnesota Statutes, sections 103G.141 and 103G.2372, except that necessary restoration or replacement activities, if required, will be determined by the commissioner, in consultation with the local soil and water conservation district.

**Statutory Authority:** *MS s 103B.3355; 103G.2242*

**History:** *27 SR 135*