April 12, 2018

Mr. Tom Gile
Buffers and Soil Loss Operations Supervisor
Board of Water and Soil Resources
3555 9th Street NW, Suite 350
Rochester, MN 55901

Re: Proposed Amendment to Administrative Penalty Order Plan

Dear Mr. Gile,

The Minnesota Corn Growers Association (MCGA) submits these comments on behalf of its nearly 7,000 farmer-members in response to the request for public comments that was published by the Board of Water and Soil Resources (BWSR) on April 2, 2018. Specifically, BWSR seeks public comments regarding a proposed amendment to the administrative penalty order plan that BWSR previously issued with respect to the implementation of the buffer law to allow for the imposition of penalties based on the “linear feet of riparian frontage” for a parcel that is found to be in violation of the buffer law. Although Minnesota’s corn growers have supported efforts by BWSR to improve and implement the buffer law—including extensive support of research led by the University of Minnesota to develop alternative practices—the MCGA has significant concerns—both procedural and substantive—with the proposed amendment to the administrative penalty order plan and requests the BWSR reject the proposed amendment in its entirety.

Procedural Problems with the Proposed Amendment

As an initial matter, the MCGA is deeply troubled by process through which the proposed amendment was submitted and considered by BWSR. The amendment was brought before BWSR on March 28, 2018—only one day after it was first raised by the Buffers, Soils and Drainage Committee—with no prior notice to the public or discussion from interested stakeholders such as the MCGA regarding the underlying issue. The request for public comments was published in the State Register on April 2, 2018—five (5) days after the request for public comments was approved by the Board—even though the State Register generally requires the submission of items to be published at least six (6) days prior to publication. And the request for public comments only provides fourteen (14) days during which public comments will be accepted. The lack of advance notice and sheer speed of this process suggests an inappropriate effort by BWSR to rush these significant and highly controversial modifications through under a veil of secrecy and without an open public discussion.
The MCGA is also concerned that BWSR lacked the authority to approve the original administrative penalty order plan—and lacks the authority to adopt any modifications or amendments to such plan—outside of the formal rulemaking process. Under the Minnesota Administrative Procedures Act, a “rule” includes “every agency statement of general applicability and future effect . . . adopted to implement or make specific the law enforced or administered by that agency or to govern its organization or procedure.” Minn. Stat. § 14.02, subd. 4. Further, the buffer law provides that a county or watershed district may only exercise its authority to issue administrative penalties to enforce the buffer law if it has “adopt[ed] a plan consistent with the plan adopted by [BWSR] containing procedures for the issuance of administrative penalty orders.” Minn. Stat. § 103F.48, subd. 7(c). In the absence of such a plan, BWSR must enforce the buffer law. Id. Because the administrative penalty order plan thus establishes mandatory procedures and limitations on the enforcement of the buffer law, the plan is a statement of general applicability by BWSR to implement the buffer law and is therefore a rule under the Minnesota Administrative Procedures Act.

The Minnesota Administrative Procedures Act imposes specific requirements—including public notification, a statement of need and reasonableness for the proposed rule, and the opportunity for a public hearing—before a rule can be adopted. These requirements are intended to ensure an open, public process in which all stakeholders are provided with advance information about a proposal and a meaningful opportunity to participate in the process. These are the very criticisms that the MCGA (and several others) have raised regarding the proposed modifications to the administrative penalty order plan. Accordingly, the MCGA requests that BWSR engage in formal rulemaking proceedings with respect to any future proposed modifications to the administrative penalty order plan.

**Substantive Problems with the Proposed Amendment**

Aside from the procedural issues discussed above, the MCGA also has significant substantive concerns with proposed amendments to the administrative penalty order plan. The buffer law indicates that compliance with the buffer requirements is to be determined on a site-by-site basis. See Minn. Stat. § 103F.48, subd. 7. In the event that noncompliance is found and not cured, a monetary penalty of “up to $500” may be administratively imposed by BWSR (or a county or watershed district) for noncompliance with the buffer law “commencing on day one of the 11th month after the noncompliance notice was issued.” Minn. Stat. § 103B.101, subd. 12a.

Notably, while the applicable statutes refer to sites, none of the statutory provisions in the buffer law allow for compliance determinations or authorize the imposition of administrative penalties on a per-foot basis. In fact, the MCGA is not aware of any similar state law or local ordinances (such as the model shoreland ordinance adopted by the Minnesota Department of Natural Resources) that authorizes penalties on a per-foot basis. Further, the proposed modification is especially egregious because, as the proposal emphasizes, the penalty is based on the total length of the water body frontage and “is NOT based on linear feet of frontage that is out of compliance.” Even if a per-foot penalty made any logical sense—which it does not—there is no reasonable basis to impose the penalty on frontage that actually complies with the law.

Even more troubling, the proposed modification to the administrative penalty order plan dramatically exceeds BWSR’s authority under the buffer law. As noted above, the maximum amount of an
administrative penalty that may be imposed for a violation of the buffer law is $500. But the per-foot penalties contained in the proposed modification could—and, in many cases, would—dramatically exceed this statutory penalty threshold. For example, consider a landowner who owns a 40-acre parcel of land. If the landowner were found to be out of compliance with the buffer law for a drainage ditch that runs along the border of the property, the landowner would be subject to penalties of between $16,500 ($50 per foot times 330 feet) and $66,000 ($200 per foot times 330 feet) for a violation of the buffer law. Such penalty amounts are both completely unreasonable and far exceed the $500 statutory maximum penalty.

Finally, in addition to being plainly excessive on their face, the proposed penalty amounts are particularly burdensome and onerous in the context of the current agricultural economy. This year (2018) marks the fifth consecutive year that corn prices have remained almost continuously below $5.00 per bushel. For many producers, this price is below the cost of production. Producers are already facing the most difficult economic forces in recent years. Although the an appropriate administrative penalty scheme may be an appropriate means to enforce regulatory requirements such as the buffer law, the penalty amounts in the modifications proposed by BWSR are unnecessarily punitive and excessive and do not reciprocate the supportive efforts that Minnesota’s farmers have made to work cooperatively with the implementation of the buffer law.

Conclusion
In short, the proposed modifications to the administrative penalty order plan are completely unreasonable and illegal—both procedurally and substantively. The MCGA requests that the proposed modification be rejected in their entirety.

Sincerely,

Kirby Hettver
President
Minnesota Corn Growers Association