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May 28, 2025

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Minnesota Board of Water and Soil Resources
520 Lafayette Road North
St. Paul, MN 55155

Re: Comments on April 25, 2025 Preliminary Draft Wetland Conservation Act Rules

Dear Board of Water and Soil Resources,

I submit these written comments on behalf of the Minnesota Corn Growers Association (MCGA) in response to the April 25, 2025 Preliminary Draft Rule Amendments to the rules governing wetland conservation, Chapter 8420.

I. MCGA Represents Corn Growers Throughout Minnesota.

MCGA is a grassroots organization with nearly 7,000 members that advocates on behalf of and works in conjunction with the Minnesota Corn Research & Promotion Council to conduct and fund research and provide educational programs for the benefit of Minnesota's 24,000 corn farmers. Among other things, MCGA supports its members by encouraging sustainable practices that work with their farming operations, promoting research into new uses for corn in the production of polymers, ethanol, and other bio-based chemicals, and supporting best practices in nutrient management on farms. MCGA also communicates with regulatory agencies and policy makers on the unique challenges and many benefits of crop production, and encourages that laws, rules, and policies are developed and applied fairly for Minnesota's family farmers.

Minnesota's corn farmers face a web of overlapping regulations on wetlands, drainage, and public waters. The Minnesota Wetland Conservation Act ("WCA") along with the "Swampbuster" laws applied by the Natural Resource Conservation Service ("NRCS") of the U.S. Department of Agriculture provide extensive wetland rules that corn farmers must comply with which can impact their farming operations significantly. Recent

amendments to WCA have the potential to simplify compliance for many agricultural producers. However, MCGA does have concerns with the proposed rules that might undermine the simplification and consistency the WCA amendments seek to create.

II. Minn. R. 8420.0420 subd. 2(A) Exceptions for Agricultural Activities Should Remain Consistent with Statute.

As noted in MCGA's earlier comments, artificial drainage including drainage tiles and public and private ditch systems, is an important part of the infrastructure that makes modern agriculture possible in Minnesota. Because of improvements to drainage and other advancements in farming, Minnesota continues to be among the top producers of corn and soybeans in the country. However, much of Minnesota's drainage infrastructure was constructed in the first half of the 20th century, and may be due for repairs, replacements, and upgrades to continue to provide important benefits for farmers. This infrastructure will remain vital for the continued success of Minnesota's farm economy.

In amendments to WCA, the Legislature sought to align the exceptions under WCA with the wetland requirements under the Swampbuster provisions of the Food Security Act, administered by the NRCS. Specifically, Minn. Stat. § 103G.2241 subd. 1 provides that a wetland replacement plan is not required for: "impacts to wetlands on agricultural land labeled prior-converted cropland and impacts to wetlands resulting from drainage maintenance activities authorized by" NRCS. This statute evinces a clear intent: if an activity has been approved by NRCS under the Swampbuster Rules, then it is not a violation of WCA. Given the vast majority of farmers already work to comply with Swampbuster rules to ensure eligibility for federal farm programs, this exception allows farmers to safely comply with a single regulatory scheme, rather than face differing treatment under state and federal regulators.

Minn. R. 8420.0420 subp. 2(A) provides a general exception for some agricultural activities that is consistent with the statutory language of WCA, allowing agricultural activities on prior-converted farmland and activities that are "authorized" by NRCS. However, several of the additional provisions within Minn. R. 8420.0420 subp. 2 appear to narrow the statutory exception or create duplicative regulatory review. Specifically, Minn. R. 8420.0420 subp. 2(A)(2) purports to create a number of "conditions" to the

agricultural exception. Several of these conditions are inconsistent with the language and purpose of the statute.

a. Minn. R. 8420.0420 subp. 2(A)(2)(b) – Condition that Area Must Have Been Planted with Annually Seeded Crop.

Minn. R. 8420.0420 subp. 2(A)(2)(b) requires that to qualify for the agricultural exception, the area "must have been planted with an annually seeded crop at least once before December 23, 1985 and not have supported woody vegetation as of December 23, 1985." While this requirement is generally consistent with the Swampbuster rules which makes a producer ineligible for farm program payments if a person "produces an agricultural commodity on a wetland that was converted after December 23, 1985," the proposed condition is already duplicative of the general exception language in subp. 2(A) and appears to create an additional level of review or certification not authorized by the statutory language. Under the statute, a producer who obtains a certified determination from NRCS that land is "prior converted" meets the exception under the statutory language of WCA and Minn. R. 8420.0420 subp. 2(A). Whether the land was used to produce a crop before December 23, 1985 is already part of the NRCS analysis in making the determination. Thus, this condition is merely duplicative of the analysis already completed by NRCS.

Further Minn. R. 8420.0420 subp. 2(A)(2)(b) would seem to give the LGU an additional ability to second-guess or redetermine the correctness of the wetland determination made by NRCS and therefore defeats the essential purpose of the statutory amendments. After NRCS has made the certified wetland determination, the LGU should not have an opportunity to reconsider or review NRCS's determination.

Finally, the language that the land must have been planted with an "annually seeded" crop is inconsistent with the Swampbuster rules in some situations. Land planted with a crop like alfalfa before 1985 may continue to be farmed consistent with the Swampbuster provisions, even though alfalfa is not always "annually seeded" on the same land. MCGA urges that Minn. R. 8420.0420 subp. 2(A)(2)(b) be deleted entirely from the final rules.

b. Minn. R. 8420.0420 subp. 2(A)(2)(c) – Condition that Wetlands be Labeled on a Final Certified Wetland Determination by NRCS

Minn. R. 8420.0420 subp. 2(A)(2)(c), provides that impacts to wetlands resulting from maintenance that involves relocating the drainage system are not exempt unless those wetlands are labeled as "farmed wetland, farmed wetland pasture, or wetland" on the final NRCS determination. This condition is duplicative of the exception itself and therefore should be deleted entirely from the final rules.

c. Minn. R. 8420.0420 subp. 2(A)(2)(e) – Condition the Impacts Not Exceed the Impacts Allowed by 7 C.F.R, part 12, in Effect as of August 1, 2024.

Minn. R. 8420.0420 subp. 2(A)(2)(e) provides that "impacts must not exceed those allowed using the label definitions and activities authorized under the version of the Code of Federal Regulations, title 7, part 12 that was in effect on August 1, 2024." The related commentary indicates that the agricultural exception applies only to the version of Swampbuster rules in place at the time of the statutory change to WCA and that BWSR may update the criteria and application of the exemption if changes to Swampbuster occur. This proposed rule conflicts with the statutory language from WCA that indicates that "prior-converted cropland, farmed wetland, farmed-wetland pasture, or wetland must be labeled on a valid final certified wetland determination issued by the Natural Resources Conservation Service in accordance with Code of Federal Regulations, title 7, part 12, as amended." Minn. Stat. § 103G.2241 subd. 1(1) (emphasis added). The statutory language "as amended" indicates that the legislature intended this agricultural exception to continue to apply even as the Swampbuster rules may be amended in the future. This proposed rule language would potentially give BWSR the ability to use even minor or technical amendments of the Swampbuster rules to draft a new regulatory framework in Minnesota.

In addition, the proposed rule language also seems to suggest there could be an additional review of wetland impacts beyond the review conducted by NRCS. As proposed, the rule provides that even if NRCS authorized an activity, the LGU or BWSR would be able to determine whether impacts "exceed those allowed" under the Swampbuster rules. This would give the LGU/BWSR the ability to second guess the decision made by NRCS and create a dual regulatory review—exactly what the amendments to WCA are meant to avoid. MCGA recommends that Minn. R. 8420.0420 subp. 2(A)(2)(e) be deleted entirely from the final rules.

III. Minn. R. 8420.0515 subd. 3 Has No Support In Statute and Should Be Removed Entirely from the Rules.

Minn. R. 8420.0515 subp. 3 provides that replacement plans that "involve the modification of a rare natural community…must be denied." However, this provision is without support in the statute. In the entirety Minnesota's water law, Chapters 103A – 114B, "rare natural community" is not defined and mentioned only once, in Minn. Stat. § 103G.2242 subd. 1(d), and only in an unhelpful and vague reference. The phrase is not defined in statute and not defined elsewhere in the WCA rules. There is no guidance for what constitutes a "rare natural community" and the effect of the presence of a supposed "rare natural community." This vague concept therefore cannot be implemented in a fair and rational manner. Minn. R. 8420.0515 subp. 3 should be stricken entirely.

IV. Minn. R. 8420.0900 Should be Revised to Confirm a Landowners' Rights on Appeal.

MCGA believes several revisions could clarify the operation of the enforcement and appeal provisions under WCA. First, Minn. R. 8420.0900 subp. 2(D) should be revised to state that, upon a determination by the LGU that an activity is exempt or qualifies for a no loss determination, the enforcement authority *must rescind* the cease and desist order, not merely that the LGU may *request* that it be rescinded.

Minn. R. 8420.0900 subp. 3(B) should be revised to state that a restoration order can be issued to bring the site in compliance with WCA, either by restoring it to its prealtered condition, *or* by modifying the practices so that the land is in compliance with WCA. In some circumstances, activities on a property may involve some work that complies with WCA, causes no-loss, or meets an exemption, and other work that does not comply with WCA. In these circumstances, restoring the entirety of the property to a prealtered condition goes beyond the requirements of WCA; instead, only activities that have violated the WCA need to be restored. The rule should be clarified to reflect this.

Minn. R. 8420.0900 subp. 3(H) should be revised to state that a restoration order is completed when the responsible party has satisfied the requirements of the plan, not only when the SWCD has issued a certificate of compliance. There may be situations where a landowner or responsible party and the LGU disagree on whether the landowner has completed the restoration plan, or where the LGU insists on additional work not

previously ordered as part of a restoration plan. A landowner or responsible party must comply with a valid restoration order and plan but need not go beyond that, and they must be entitled to a determination that they have in fact completed the restoration order and plan, regardless of whether an LGU will sign off on compliant work.

Minn. R. 8420.0900 subp. 7(A) should be revised to state that a violation "may" be prosecuted by the county attorney where the wetland is located. A county attorney always has prosecutorial discretion in whether to pursue criminal charges, particularly in cases when the county attorney may not believe he or she can prove a violation beyond a reasonable doubt, or when other facts exist which make criminal prosecution inappropriate.

Minn. R. 8420.0900 subp. 8(B)(2) should be revised to state that a deed restriction must be removed if "the order is rescinded, vacated, or reversed by the local government unit, or rescinded, vacated, or reversed on appeal." As currently drafted, the proposed rules do not provide that a deed restriction must be removed when a landowner is successful in challenging a restoration order on appeal.

V. Conclusion

Thank you for taking the time to consider these comments. MCGA believes these recommended changes ensure fair treatment for landowners and agricultural producers that is consistent with the language and intent of the WCA.

Best regards,

Dean M. Zimmerli

cc: Amanda Bilek (*via e-mail only*)