

NATURION

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December 20, 2024

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

Minnesota Board of Water and Soil Resources,

Thank you for the opportunity to comment on the preliminary draft of the Minnesota Wetland Conservation Act Rulemaking and we appreciate the work already completed to create this draft. As a mitigation banking company, we intend to continue to work with BWSR to provide mitigation solutions for project developers within Minnesota. We are supportive of BWSR's efforts for early public input and look forward to continuing to participate in the rulemaking process.

We understand that one of BWSR's goals with these edits is to align Minnesota's wetland program with the US Army Corps of Engineers (USACE) permitting program under Section 404 of the Clean Water Act. We agree that consistency with USACE is important to provide clarity and to streamline the application process for both mitigation banks and impactors.

Timing of Replacement

In 8420.0522 Subpart 8(B)(1) the proposed revision notes that replacement is considered in advance if approved wetland bank or in-lieu fee replacement credits are withdrawn before the impact. This language should be revised to be clearly consistent with the federal preference hierarchy in the 2008 Mitigation Rule at 33 CFR 230.93(b)(2) through (b)(6). As outlined in the 2008 Rule, because a mitigation bank must be approved before credits can begin to be used to offset wetland impacts, mitigation banks minimize temporal loss and are truly in advance of an impact. This is especially true in Minnesota, as mitigation banks do not receive an initial credit release until after the bank is fully constructed. In contrast, in-lieu fee replacement credits, where a payment is made to the board or board-approved sponsor, can be sold in advance of identifying or implementing a restoration project.

Any edits to Timing of Replacement at 8420.0522 Subpart 8, should reflect that approved and released mitigation bank credits are preferred to in-lieu fee credits as they are truly advance replacement. In-lieu fee credits, while purchased prior to an impact, do not minimize temporal loss as the restoration project has not yet been identified or begun at the time the impact occurs. These suggested changes are also consistent with the Minnesota statutory updates at 103G.2242 Subdivision 3(a)(2) and 3(b), which provide authorization for replacement to occur after the impact when using an in-lieu fee program, but do not inherently put in-lieu fee replacement that takes place after the wetland impacts on equal footing with mitigation bank credits.

In-Lieu Fee Program

A definition of an in-lieu fee program is introduced in 8420.0111 Subpart 35(a), to incorporate statutory changes. We recognize the need to reflect changes in the statute, and the potential role for an in-lieu fee program, and encourage BWSR to develop policy or guidance on how an established in-lieu fee program will operate consistent with the Federal Mitigation Rule requirements at 33 CFR 332.8, as required in the Statute at 103G.2242 Subdivision 1(a).

Bank Service Area Revisions

We support the revision of the Bank Service Areas (BSAs) to focus on the BSA watershed-based boundaries and eliminate the consideration of pre-settlement wetlands. We understand that under current practice USACE St. Paul District generally prefers mitigation remain within in the same 8-digit Hydrologic Unit Code, which is a subset of the larger BSA. We suggest that the revised BSAs be aligned with the preferences of the USACE to provide clarity and efficiency for permittees in identifying mitigation banks that can service their need, as well as to provide clarity for the mitigation banking community.

Bank Service Area Grandfathering

8420.0522 Subpart 4G and Subpart 7F we understand to be intended to allow banks that are approved as of the date of the final Wetland Conservation Act rulemaking to have a primary service area that encompasses both the primary service area at the time the bank was approved, and the primary service area the bank would be assigned under the new final rule BSAs. We support this grandfathering, and suggest BWSR explore ways to clarify that the intent is for these grandfathered banks to be able to utilize as a primary service area both the historical, approved service area *and* the new, revised BSA.

We also suggest this grandfathering provision be expanded to apply to mitigation banks that have begun the permitting process with an application that has been deemed complete and assigned an application number, as of the date of the final Wetland Conservation Act rulemaking. Bank development can be a lengthy process, and investment decisions made when

initiating permitting for a bank are based on the bank service areas in place at the time permitting began. Changes to the BSAs from this rulemaking could materially change the economics of a bank already in the permitting process, making this grandfathering appropriate.

Replacement Ratios

BWSR has also made updates to the replacement ratio chart shown in 8420.0522 Subpart 4(A)(3). We understand these changes are intended to provide clarity, and suggest that in the table labeled Minimum Replacement Ratios: Banking, the Location of impact categories should align with the pre-settlement wetland category assigned to the new BSAs: <80% or >80%. Specifically, we suggest that the entry for <50% area should be re-labeled as <80%, as the 2.5:1 or 2:1 minimum replacement ratios would apply to all <80% pre-settlement areas.

Monitoring Plans and Conservation Easements

We agree with the edits to the rulemaking language that remove the specificity regarding monitoring plans and conservation easements. We agree with BWSR's assessment that having less specificity in regulation is more practical and will allow for better, site-specific decision-making, while preserving high standards and consistency with USACE requirements.

In describing the changes to the conservation easement language, BWSR notes that the amendment will increase the Board's flexibility to provide adequate long-term protection. We encourage the Board to develop model easement language for circumstances where the banking plan applicant desires retaining responsibility for the project's performance, rather than the land owner. In working with landowners, Naturion – as the banking plan applicant – retains responsibility for project performance during the monitoring period, and if needed will enter into a relationship with a long-term steward and provide an endowment to fund any long-term stewardship activities. This relationship with landowners allows Naturion to develop and maintain high-quality sites in circumstances where landowners are supportive of restoration work on their property, but are uncomfortable with being responsible for restoration and performance, which relies on expertise and/or financial resources they do not have.

Do not hesitate to reach out if you have any questions regarding these comments. I can be reached at jenny@mitigationholdings.com or at 734.272.6939.

Thank you for the opportunity to comment,

Jenny Thomas