



## Buffer and Soil Loss Statutes, as amended in 2017 by Laws of Minnesota 2017, Chapter 93 (S.F. 844)

May 30, 2017

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### 103B.101 BOARD OF WATER AND SOIL RESOURCES

Subd. 12. **Authority to issue penalty orders.** (a) Except as provided under subdivision 12a, the board may issue an order requiring violations to be corrected and administratively assessing monetary penalties of up to \$10,000 per violation for violations of this chapter and chapters 103C, 103D, 103E, 103F, and 103G, any rules adopted under those chapters, and any standards, limitations, or conditions established by the board.

(b) Administrative penalties issued by the board under paragraph (a) or subdivision 12a, may be appealed according to section 116.072, if the recipient of the penalty requests a hearing by notifying the commissioner in writing within 30 days after receipt of the order. For the purposes of this section, the terms "commissioner" and "agency" as used in section 116.072 mean the board. If a hearing is not requested within the 30-day period, the order becomes a final order not subject to further review.

(c) Administrative penalty orders issued under paragraph (a) or subdivision 12a, may be enforced under section 116.072, subdivision 9. Penalty amounts must be remitted within 30 days of issuance of the order.

Subd. 12a. **Authority to issue penalty orders.** (a) A county or watershed district with jurisdiction or the Board of Water and Soil Resources may issue an order requiring violations of the water resources riparian protection requirements under sections 103F.415, 103F.421, and 103F.48 to be corrected and administratively assessing monetary penalties up to \$500 for noncompliance commencing on day one of the 11th month after the noncompliance notice was issued. The proceeds collected from an administrative penalty order issued under this section must be remitted to the county or watershed district with jurisdiction over the noncompliant site or otherwise remitted to the Board of Water and Soil Resources.

(b) Before exercising this authority, the Board of Water and Soil Resources must adopt a plan containing procedures for the issuance of administrative penalty orders by local governments and the board as authorized in this subdivision. This plan, and any subsequent amendments, will become effective 30 days after being published in the State Register. The initial plan must be published in the State Register no later than July 1, 2017.

(c) Administrative penalties may be reissued and appealed under paragraph (a) according to section 103F.48, subdivision 9.

### **103E.315 ASSESSMENT OF DRAINAGE BENEFITS AND DAMAGES.**

Subd. 8. **Extent of damages.** (a) Damages to be paid may include:

- (1) the fair market value of the property required for the channel of an open ditch and the permanent strip of perennial vegetation under section 103E.021;
- (2) the diminished value of a farm due to severing a field by an open ditch;
- (3) loss of crop production during drainage project construction;
- (4) the diminished productivity or land value from increased overflow; and
- (5) costs to restore a perennial vegetative cover or structural practice existing under a federal or state conservation program adjacent to the permanent drainage system right-of-way and damaged by the drainage project.

(b) When damages are determined to acquire or otherwise provide compensation for buffer strips or alternative riparian water quality practices previously installed as required by section 103F.48, subdivision 3, the viewers and drainage authority shall consider the land use prior to buffer strip or alternative practice installation in determining the fair market value of the property under paragraph (a), clause (1).

### **103F.421 ENFORCEMENT. (Soil Loss)**

Subd. 4. **Application for cost-sharing funds.** The landowner has 90 days after a complaint is substantiated to apply for state cost-sharing funds. Fifty percent of the cost share will be provided if the application is not made within 90 days after the settlement is filed, unless the soil and water conservation district or the board provides an extension. An extension must be granted if funds are not available.

Subd. 6. **Application of state and federal law.** Nothing in this section is intended to preclude the application of other applicable state or federal law.

### **103F.48 RIPARIAN PROTECTION AND WATER QUALITY PRACTICES.**

Subdivision 1. **Definitions.** (a) For the purposes of this section, the following terms have the meanings given them.

(b) "Board" means the Board of Water and Soil Resources.

(c) "Buffer" means an area consisting of perennial vegetation, excluding invasive plants and noxious weeds, adjacent to all bodies of water within the state and that protects the water resources of the state from runoff pollution; stabilizes soils, shores, and banks; and protects or provides riparian corridors.

(d) "Buffer protection map" means buffer maps established and maintained by the commissioner of natural resources.

(e) "Commissioner" means the commissioner of natural resources.

(f) "Executive director" means the executive director of the Board of Water and Soil Resources.

(g) "Local water management authority" means a watershed district, metropolitan water management organization, or county operating separately or jointly in its role as local water management authority under chapter 103B or 103D.

(h) "Normal water level" means the level evidenced by the long-term presence of surface water as indicated directly by hydrophytic plants or hydric soils or indirectly determined via hydrological models or analysis.

(i) "Public waters" ~~has the meaning given in section 103G.005, subdivision 15. The term means public waters as used in this section applies to waters that are on the public waters inventory as provided in section 103G.201.~~

(j) "With jurisdiction" means a board determination that the county or watershed district has

adopted a rule, ordinance, or official controls providing procedures for the issuance of administrative penalty orders, enforcement, and appeals for purposes of this section and section 103B.101, subdivision 12a.

Subd. 2. **Purpose.** It is the policy of the state to establish riparian buffers and water quality practices to:

- (1) protect state water resources from erosion and runoff pollution;
- (2) stabilize soils, shores, and banks; and
- (3) protect or provide riparian corridors.

Subd. 3. **Water resources riparian protection requirements on public waters and public drainage systems.** (a) Except as provided in paragraph (b), landowners owning property adjacent to a water body identified and mapped on a buffer protection map must maintain a buffer to protect the state's water resources as follows:

- (1) for all public waters, the more restrictive of:

- (i) a 50-foot average width, 30-foot minimum width, continuous buffer of perennially rooted vegetation; or

- (ii) the state shoreland standards and criteria adopted by the commissioner under section [103F.211](#); and

- (2) for public drainage systems established under chapter 103E, a 16.5-foot minimum width continuous buffer as provided in section 103E.021, subdivision 1. The buffer vegetation shall not impede future maintenance of the ditch.

(b) A landowner owning property adjacent to a water body identified in a buffer protection map and whose property is used for cultivation farming may meet the requirements under paragraph (a) by adopting an alternative riparian water quality practice, or combination of structural, vegetative, and management practices, based on the Natural Resources Conservation Service Field Office Technical Guide ~~or~~, common alternative practices adopted and published by the board, other practices approved by the board, or practices based on local conditions approved by the local soil and water conservation district that are consistent with the Field Office Technical Guide, that provide water quality protection comparable to the buffer protection for the water body that the property abuts. Included in these practices are retention ponds and alternative measures that prevent overland flow to the water resource.

(c) The width of a buffer on public waters must be measured from the top or crown of the bank. Where there is no defined bank, measurement must be from the edge of the normal water level. The width of the buffer on public drainage systems must be measured as provided in section 103E.021, subdivision 1.

(d) Upon request by a landowner or authorized agent or operator of a landowner, a technical professional employee or contractor of the soil and water conservation district or its delegate may issue a validation of compliance with the requirements of this subdivision. The soil and water conservation district validation may be appealed to the board as described in subdivision 9.

(e) Buffers or alternative water quality practices required under paragraph (a) or (b) must be in place on or before:

- (1) November 1, 2017, for public waters; and
- (2) November 1, 2018, for public drainage systems.

(f) Nothing in this section limits the eligibility of a landowner or authorized agent or operator of a landowner to participate in federal or state conservation programs, including enrolling or reenrolling in federal conservation programs.

(g) After the effective date of this section, a person planting buffers or water quality protection practices to meet the requirements in paragraph (a) must use only seed mixes verified by the Department of

Agriculture as consistent with chapter 18G or 21 to prevent contamination with Palmer amaranth or other noxious weed seeds.

**Subd. 4. Local water resources riparian protection.** In consultation with local water management authorities, on or before July 1, 2017, the soil and water conservation district shall develop, adopt, and submit to each local water management authority within its boundary a summary of watercourses for inclusion in the local water management authority's plan. A local water management authority that receives a summary of watercourses identified under this subdivision must incorporate an addendum to its comprehensive local water management plan or comprehensive watershed management plan to include the soil and water conservation district recommendations by July 1, 2018. The incorporation to include the summary of watercourses provided by the soil and water conservation district does not require a plan amendment as long as a copy of the included information is distributed to all agencies, organizations, and individuals required to receive a copy of the plan changes. A local water management authority that receives a summary of watercourses identified under this subdivision must address implementation of the soil and water conservation district recommendations when revising its comprehensive local water management plan as part of a regularly scheduled update to its comprehensive local water management plan or development of a comprehensive watershed management plan under section 103B.801.

**Subd. 5. Exemptions.** Land adjacent to waters subject to subdivision 3 is exempt from the water resource protection requirements under subdivision 3, to the extent these exemptions are not inconsistent with the requirements of the state shoreland rules adopted by the commissioner pursuant to section [103F.211](#), if it is:

- (3) enrolled in the federal Conservation Reserve Program;
- (4) used as a public or private water access or recreational use area including stairways, landings, picnic areas, access paths, beach and watercraft access areas, and permitted water-oriented structures as provided in the shoreland model standards and criteria adopted pursuant to section [103F.211](#) or as provided for in an approved local government shoreland ordinance;
- (5) covered by a road, trail, building, or other structures; or
- (6) regulated by a national pollutant discharge elimination system/state disposal system (NPDES/SDS) permit under Minnesota Rules, chapter 7090, and provides water resources riparian protection, in any of the following categories:
  - (i) municipal separate storm sewer system (MS4);
  - (ii) construction storm water (CSW); or
  - (iii) industrial storm water (ISW);
- (7) part of a water-inundation cropping system; or
- (8) in a temporary nonvegetated condition due to drainage tile installation and maintenance, alfalfa or other perennial crop or plant seeding, or construction or conservation projects authorized by a federal, state, or local government unit.

**Subd. 6. Local implementation and assistance.** (a) Soil and water conservation districts must assist landowners with implementation of the water resource riparian protection requirements established in this section. For the purposes of this subdivision, assistance includes planning, technical assistance, implementation of approved alternative practices, and tracking progress toward compliance with the requirements.

(b) The commissioner or the board must provide sufficient funding to soil and water conservation districts to implement this section.

**Subd. 7. Corrective actions.** (a) If the soil and water conservation district determines a landowner is not in compliance with this section, the district must notify the county or watershed district with jurisdiction over the noncompliant site and the board. The county or watershed district with jurisdiction or the board must provide the landowner with a list of corrective actions needed to come into compliance and a practical timeline to meet the requirements in this section. The county or watershed district with jurisdiction must provide a copy of the corrective action notice to the board.

(b) A county or watershed district exercising jurisdiction under this subdivision and the enforcement authority granted in section 103B.101, subdivision 12a, shall affirm their jurisdiction and identify the ordinance, rule, or other official controls to carry out the compliance provisions of this section and section 103B.101, subdivision 12a, by notice to the board prior to March 31, 2017. A county or watershed district must provide notice to the board at least 60 days prior to the effective date of a subsequent decision on their jurisdiction.

(c) If the landowner does not comply with the list of actions and timeline provided, the county or watershed district may enforce this section under the authority granted in section 103B.101, subdivision 12a, or by rule of the watershed district or ordinance or other official control of the county. Before exercising administrative penalty authority, a county or watershed district must adopt a plan consistent with the plan adopted by the board containing procedures for the issuance of administrative penalty orders and may issue orders beginning November 1, 2017. If a county or watershed district with jurisdiction over the noncompliant site has not adopted a plan, rule, ordinance, or official control under this paragraph, the board must enforce this section under the authority granted in section 103B.101, subdivision 12a.

(d) If the county, watershed district, or board determines that sufficient steps have been taken to fully resolve noncompliance, all or part of the penalty may be forgiven.

(e) An order issued under paragraph (b) may be appealed to the board as provided under subdivision 9.

(f) A corrective action is not required for conditions resulting from a flood or other act of nature.

(g) A landowner agent or operator of a landowner may not remove or willfully degrade a riparian buffer or water quality practice, wholly or partially, unless the agent or operator has obtained a signed statement from the property owner stating that the permission for the work has been granted by the unit of government authorized to approve the work in this section or that a buffer or water quality practice is not required as validated by the soil and water conservation district. Removal or willful degradation of a riparian buffer or water quality practice, wholly or partially, by an agent or operator is a separate and independent offense and may be subject to the corrective actions and penalties in this subdivision.

**Subd. 8. Funding subject to withholding.** The board may withhold funding from a local water management authority with jurisdiction or a soil and water conservation district that fails to implement this section, or from a local water management authority that fails to implement subdivision 4. Funding may be restored upon the board's approval of a corrective action plan.

**Subd. 9. Appeals of validations and penalty orders.** A landowner or agent or operator may appeal the terms and conditions of a soil and water conservation district validation or an administrative penalty order to the board within 30 days of receipt of written or electronic notice of the validation or order. The request for appeal must be in writing. The appealing party must provide a copy of the validation or order that is being appealed, the basis for the appeal, and any supporting evidence. The request for appeal may be submitted personally, by first class mail, or electronically to the executive director. If a written or electronic request for appeal is not submitted within 30 days, the validation or order is final. The executive director shall review the request and supporting evidence and issue a decision

within 60 days of receipt of an appeal. The executive director's decision is appealable directly to the Court of Appeals pursuant to sections [14.63](#) to [14.69](#).

**Subd. 10. Landowner financial assistance and public drainage system procedure.**

(a) A landowner or drainage authority may contact the soil and water conservation district for information on how to apply for local, state, or federal cost-share grants, contracts, or loans that are available to establish buffers or other water resource protection measures.

(b) The provisions of sections [103E.011](#), [subdivision 5 103E.021](#); and [103E.715](#) may be used in advance or retroactively to acquire or provide compensation for all or part of the buffer strip establishment or alternative riparian water quality practices as required under subdivision 3, paragraph (a).

Subd. 11. **State lands.** This section applies to the state and its departments and agencies.

**[477A.21] RIPARIAN PROTECTION AID.**

**Subdivision 1.**

**Definitions.**

For purposes of this section, the following terms have the meanings given:

(1) "buffer protection map" has the meaning given under section 103F.48, subdivision 1; and

(2) "public watercourses" means public waters and public drainage systems subject to riparian protection requirements under section 103F.48.

**Subd. 2.**

**Certifications to commissioner.**

(a) The Board of Water and Soil Resources must certify to the commissioner of revenue, on or before July 1 each year, which counties and watershed districts have affirmed their jurisdiction under section 103F.48 and the proportion of centerline miles of public watercourses, and miles of public drainage system ditches on the buffer protection map, within each county and each watershed district within the county with affirmed jurisdiction.

(b) On or before July 1 each year, the commissioner of natural resources shall certify to the commissioner of revenue the statewide and countywide number of centerline miles of public watercourses and miles of public drainage system ditches on the buffer protection map.

**Subd. 3.**

**Distribution.**

(a) A county that is certified under subdivision 2, or that portion of a county containing a watershed district certified under subdivision 2, is eligible to receive aid under this section to enforce and implement the riparian protection and water quality practices under section 103F.48. Each county's preliminary aid amount is equal to the proportion calculated under paragraph (b) multiplied by the appropriation received each year by the commissioner for purposes of payments under this section.

(b) The commissioner must compute each county's proportion. A county's proportion is equal to



the ratio of the sum in clause (1) to the sum in clause (2):

(1) the sum of the total number of acres in the county classified as class 2a under section 273.13, subdivision 23, the countywide number of centerline miles of public watercourses on the buffer protection map, and the countywide number of miles of public drainage system ditches on the buffer protection map; and

(2) the sum of the statewide total number of acres classified as class 2a under section 273.13, subdivision 23, the statewide total number of centerline miles of public watercourses on the buffer protection map, and the statewide total number of public drainage system miles on the buffer protection map.

(c) Aid to a county must not be greater than \$200,000 or less than \$50,000. If the sum of the preliminary aids payable to counties under paragraph (a) is greater or less than the appropriation received by the commissioner, the commissioner of revenue must calculate the percentage of adjustment necessary so that the total of the aid under paragraph (a) equals the total amount received by the commissioner, subject to the minimum and maximum amounts specified in this paragraph. The minimum and maximum amounts under this paragraph must be adjusted by the ratio of the actual amount appropriated to \$10,000,000.

(d) If only a portion of a county is certified as eligible to receive aid under subdivision 2, the aid otherwise payable to that county under this section must be multiplied by a fraction, the numerator of which is the buffer protection map miles of the certified watershed districts contained within the county and the denominator of which is the total buffer protection map miles of the county.

(e) Any aid that would otherwise be paid to a county or portion of a county that is not certified under subdivision 2 shall be paid to the Board of Water and Soil Resources for enforcing and implementing the riparian protection and water quality practices under section 103F.48.

#### **Subd. 4.**

#### **Payments.**

The commissioner of revenue must compute the amount of riparian protection aid payable to each eligible county and to the Board of Water and Soil Resources under this section. On or before August 1 each year, the commissioner must certify the amount to be paid to each county and the Board of Water and Soil Resources in the following year, except that the payments for 2017 must be certified by July 15, 2017. The commissioner must pay riparian protection aid to counties and to the Board of Water and Soil Resources in the same manner and at the same time as aid payments under section 477A.015.

### **Laws of Minnesota 2017, 1<sup>st</sup> Special Session, Article 2, Chapter 93 (S.F. 844)**

#### **Sec. 146.**

#### **INITIAL IMPLEMENTATION; WAIVERS.**

A soil and water conservation district must grant a conditional compliance waiver under Minnesota Statutes, section 103F.48, to landowners or authorized agents who have applied for and maintained eligibility for financial or technical assistance within one year of the dates listed in Minnesota Statutes,

section 103F.48, subdivision 3, paragraph (e), according to Minnesota Statutes, section 103F.48. A conditional compliance waiver also must be granted to landowners who are subject to a drainage proceeding commenced under Minnesota Statutes, sections 103E.011, subdivision 5; 103E.021, subdivision 6; and 103E.715. The conditional compliance waiver is valid until financial or technical assistance is available for buffer or alternative practices installation, but not later than November 1, 2018. A landowner or authorized agent that has filed a parcel-specific riparian protection compliance plan with the soil and water conservation district by November 1, 2017, shall be granted a conditional compliance waiver until July 1, 2018.

#### **Laws of Minnesota 2015, 1<sup>st</sup> Special Session, Chapter 4, Article 4**

##### **Sec. 150. REPEALER**

(c) Minnesota Statutes 2014, sections 103F.421, subdivision 5 (*Soil Loss Statute noncompliance subject to a civil penalty*); 103F.451 (*Soil Loss Statute not applicable without the adoption of a local ordinance*); and 114D.50, subdivision 4a (*regarding Clean Water Fund expenditures*), are repealed





# Administrative Penalty Order (APO) Plan for Buffer Law Implementation

June 28, 2017

This document was adopted by the Board of Water and Soil Resources (BWSR) pursuant to Minn. Stat. §103B.101, subd. 12(a) and (b) and Minn. Stat. §103F.48, subd. 7(c) to provide procedures for the issuance of APOs for counties and watershed districts and BWSR. It is a guide, not a rule. It is not a statement of general applicability and future effect. It is not designed to amend statute. Statutes are subject to change and if the language of this Plan differs from statute, the statute controls. In addition, users of the document are encouraged to obtain legal advice of an attorney regarding their specific application of Minn. Stat. §103F.48.

This document is organized as follows:

- A. Part A contains guidance for counties and watershed districts that elect to use Administrative Penalty Orders to enforce the riparian protection and water quality practices requirements of Minn. Stat. §103F.48;
- B. Part A is best used in conjunction with Procedure 9: BWSR's Review of Local Buffer Enforcement Rules, Ordinances and Official Controls when evaluating a county or watershed district buffer enforcement mechanism for consistency with this Administrative Penalty Order Plan and Minn. Stat. §103F.48, subd. 1(j); and
- C. Part B shall be used when BWSR is the enforcement authority for the riparian protection and water quality practices requirements of Minn. Stat. §103F.48.

## Background

In 2015 the Minnesota Legislature passed the "Riparian Protection and Water Quality Practices" law codified in Minn. Stat. §103F.48, which states: It is the policy of the state to establish riparian buffers and water quality practices to:

- 1) protect state water resources from erosion and runoff pollution;
- 2) stabilize soils, shores, and banks; and
- 3) Protect or provide riparian corridors.

Subdivision 3 of the law requires the fee title landowner<sup>1</sup> with property adjacent to a water body identified and mapped on the Buffer Protection Map to maintain a buffer to protect the State's water resources as specified in the law. Minnesota Statutes 103F.48 also authorizes counties, watershed districts and BWSR to require that landowner's violations of the riparian protection and water quality practices provided in Minn. Stat. §103F.48 be corrected and to assess administrative penalties to landowners who fail to comply. The APO authority is an enforcement tool to gain compliance with the riparian protection and water quality practices requirements in order to achieve the purposes of the law.

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<sup>1</sup> In certain circumstances, the landowner includes the landowner's agent or operator, see Minn. Stat. §103F.48, subd. 7(g) and subd. 9.

This law also directs BWSR in subdivision 7 to “adopt a plan containing procedures for the issuance of APOs by local governments and BWSR” which must be published in the State Register no later than July 1, 2017. The BWSR APO Plan, and any subsequent amendments, become effective 30 days after publishing. The procedures that BWSR will use when it is the enforcement authority are contained in Part B of this Plan.

This Plan provides guidance for counties, watershed districts or BWSR to effectively use APO authority to ensure that the landowner of property adjacent to a waterbody shown on the Buffer Protection Map comply with the riparian protection and water quality practices requirements of Minn. Stat. §103F.48. The primary goal is to protect water quality through compliance rather than to exact penalties. Thus, the responsible party or parties will have the opportunity to come into compliance before any penalties are assessed.

In addition, BWSR has developed additional documents to support implementation of the riparian protection and water quality practices requirements by BWSR, local governments and landowners. Local governments and landowners should comply with these documents, as appropriate, and encouraged to review the guidance when considering actions to comply with these requirements. These documents are available on BWSR’s website.

### **Enforcement responsibilities of Soil and Water Conservation Districts, Counties, Watershed Districts and BWSR**

*Soil and water conservation districts* (SWCD) are required under Minn. Stat. §103F.48, subdivision 6 to track landowners progress toward compliance under subdivision 7 and must notify the county or watershed district with jurisdiction and BWSR if it determines a landowner is not in compliance with the riparian protection and water quality practices requirements.

*Counties and watershed districts* are not required to enforce the riparian protection and water quality practices requirements of Minn. Stat. §103F.48, but may elect to exercise their jurisdiction as provided in subdivision 7 by notifying BWSR and identifying the ordinance, rule, or other official control it intends to use to carry out its compliance and enforcement authority. This may include the issuance of APOs and an associated penalty if the county or watershed district had adopted an APO plan consistent with the BWSR APO Plan. In areas where the county or watershed district have not elected to have jurisdiction, BWSR is required under §103F.48, subdivision 7(c) to carry out enforcement responsibilities.

*Counties and watershed districts with jurisdiction and BWSR* are authorized under Minn. Stat. §103B.101, subdivision 12a, to require that violations of the riparian protection and water quality practices requirements be corrected and to assess administrative penalties. In addition, Minn. Stat. §103F.48, subdivision 7, authorizes counties and watershed districts to enforce the riparian protection and water quality practices requirements by ordinance, rule, or by adopting an APO plan consistent with the Plan adopted by BWSR. A model county and watershed district APO Plan is provided in part A.

BWSR is required under Minn. Stat. §103F.48, subdivision 1(j), to determine whether a county or watershed district that has elected jurisdiction has adopted a rule, ordinance or other official control providing adequate procedures for APO issuance, enforcement and appeals for §§103F.48 and 103B.101, subd. 12a. In addition, BWSR has the responsibility to adopt an APO Plan by July 1, 2017 and to ensure that a county or watershed district APO plan is consistent with the Plan adopted by BWSR under Minn. Stat. §103F.48, subdivision 7(c). Minn. Stat. §103F.48, subdivision 9, establishes an appeals process that landowners or their agents or operators can use to appeal APOs issued by counties, watershed districts or BWSR.

## Part A. Model County and Watershed District APO Plan

### A. Enforcement Procedures

A county or watershed district that elects to exercise its jurisdiction to enforce the requirements of Minn. Stat. §103F.48 must adopt a rule, ordinance, or other official control that provides adequate procedures for the issuance of administrative penalty orders, enforcement and appeals, under Minn. Stat. §103F.48, subd. 7. It is recommended that a county or watershed district consider adopting the methods of determining compliance as provided in BWSR's APO Plan (Part B). A county or watershed District must define buffer width and measurement requirements and alternative practices and related provisions consistent with Minn. Stat. §103F.48, subd. 3. BWSR has the authority to adopt orders under Minn. Stat. §103B.101 and county enforcement authority is pursuant to Minn. Stat. Chapter 394, and watershed district enforcement authority is pursuant to Minn. Stat. Chapter 103D, which is in addition to any other official control or authority available to BWSR, counties and watershed districts.

### B. Administrative Penalty Order (APO) Provisions

A county or watershed district that chooses to use the APO authority granted in Minn. Stat. §103B.101, subd. 12a and Minn. Stat. §103F.48, subd. 7 must adopt a plan consistent with the plan adopted by BWSR (see Minn. Stat. §103F.48, subd. 7(c)). Part A provides guidance to a county or watershed district that elects to use APOs to enforce the riparian protection and water quality practices requirements of Minn. Stat. §103F.48 and can help to determine whether its APO plan is consistent with BWSR's Plan.

#### 1. Corrective Action Notice

Upon receipt of an SWCD notification of noncompliance, the county or watershed district sends the landowner a corrective action notice that:

- (a) Includes a list of corrective actions needed to come into compliance with the requirements of Minn. Stat. §103F.48;
- (b) Provides a timeline for the landowner to comply with the notice; and
- (c) Includes a statement that a landowner's failure to respond to this notice will result in the assessment of financial penalties.

The county or watershed district may send the landowner a combined corrective action notice and APO as provided in item 2 so long as the combined notice/APO includes all the required elements of both.

The county or watershed district may exercise its judgment by also naming a tenant or other person with control over that part of the property subject to riparian protection and water quality practices requirements, as a responsible party. The county or watershed district may deliver or transmit the corrective action notice by any means reasonably determined to reach the landowner, and it is recommended to document receipt. However, a failure to document receipt will not preclude the county or watershed district from demonstrating receipt or knowledge of the corrective action notice in an enforcement proceeding. The county or watershed district must send a copy of the notice to the SWCD.

At any time, the landowner may provide documentation of compliance to the county or watershed district. In addition, the landowner may supply information in support of a request to modify a corrective action or the timeline for compliance. On the basis of any such submittal or at its own discretion, the county or watershed district, in writing, may modify the corrective action notice or timeline for compliance, and will deliver or transmit the modified corrective action notice and timeline in accordance with this section. Any modification to the notice

or timeline for compliance should be in writing to ensure that the county or watershed district has a copy for its enforcement file. The county or watershed district should determine if the noncompliance has been fully corrected and issue its determination, in writing (as recommended above), to the landowner.

The SWCD may issue a validation of compliance if requested by the landowner and following consultation with the county or watershed district. On county or watershed district receipt of the validation, the corrective action notice will be deemed withdrawn for the purpose of this item, and the subject property will not be subject to enforcement under that section.

A corrective action notice is not considered a final decision and is not subject to appeal under Minn. Stat. §103F.48, subd. 9.

**OPTION:** Counties and watershed districts may establish a local process to appeal a corrective action notice. The time period for compliance and the initiation of a penalty should be put on hold while any appeal is pending for up to 60 days.

**2. APO.** The county or watershed district may issue an APO as provided for in Minn. Stat. §103B.101, subdivision 12a and 12(b) against a landowner that does not comply with a corrective action notice. The APO should be sent with the corrective action notice, alternatively, a combined corrective action notice and APO may be sent so long as the combined notice/APO includes all the elements of both. The penalty will continue to accrue until the violation is corrected as provided in the corrective action notice and APO. The penalty schedules shown below in (a) and (b) will be used by BWSR to evaluate county and watershed district APO plan consistency with the Plan adopted by BWSR according to Minn. State. §103F.48, subd. 7

(a) Initial Violation. The penalty range for landowner on the same parcel that has not previously been the subject of an APO issued by the county or watershed district should be based on the following schedule:

- i. \$0 for 11 months after issuance of the corrective action notice;
- ii. \$50 - \$200 per parcel per month for six (6) months (180 days) following the time period in i; and
- iii. \$200 - \$500 per parcel per month after six (6) months (180 days) following the time period in ii.

**OPTION:** counties and watershed districts are recommended to choose a specific penalty amount within the range shown in ii and iii to ensure consistency with the BWSR APO Plan.

Counties and watershed districts may modify the corrective actions and timeline for compliance, in accordance with section B.1, to extend the compliance timeline for a modification that imposes a substantial new action or that would significantly accelerates the completion date for an action.

(b) Repeat violation. The penalty range for a landowner on the same parcel that has previously been the subject of an APO issued by the county or watershed district shall be based on the following schedule:

- i. \$50 - \$200 per parcel per day for 180 days after issuance of the corrective action notice; and
- ii. \$200 - \$500 per parcel per day for after 180 days following the time period in i.

**OPTION:** Counties and watershed districts are recommended to choose a specific penalty amount within the range shown in I and ii to ensure consistency with the BWSR APO Plan.

Counties and watershed districts may modify the corrective actions and timeline for compliance, in

accordance with section B.1, to extend the compliance timeline for a modification that imposes a substantial new action or significantly accelerates the completion date for an action.

(c) Order. The APO should include:

- i. The facts constituting a violation of the riparian protection and water quality practices requirements;
- ii. The statute and/or ordinance or rule that has been violated;
- iii. Prior efforts to work with the landowner to resolve the violation;
- iv. The amount of the penalty to be imposed;
- v. The date the penalty will begin to be assessed;
- vi. The date that payment of the penalty is due;
- vii. The date by which all or part of the penalty may be forgiven if the landowner complies with the corrective action notice; and
- viii. The landowner or his/her agent or operators' right to appeal the APO.

All or part of the penalty may be forgiven based on the correction of the noncompliance by the landowner by the date specified in the APO. If part or all of the penalty is forgiven, the county or watershed district are recommended to document the reasons and the amount of the penalty that has been forgiven.

A copy of the issued APO must be sent to the SWCD and BWSR.

According to Minn. Stat. §103F.48, subd. 9 an APO that is not appealed to the executive director of BWSR within 30 days of receipt by the landowner or his/her agent or operator is final.

(d) Administrative Penalty Order Procedures

i. Statute of limitations. According to Minn. Stat. §541.07, subd. 2 (2), the county or watershed district has two years in which to commence an administrative penalty order action after the violation is discovered. The goal is to complete the action as soon as reasonably practical, recognizing that situations for which data must be gathered, field investigations must be completed and/or modeling must be performed will require adequate time to complete the work and communicate with the landowner involved.

ii. Compliance verification. Once a landowner has submitted written evidence of correction of the violation, compliance must be verified. The county or watershed district should:

- Review and evaluate all information related to the APO to determine if the violation has been corrected;
- Verify compliance by a site visit, re-inspection, examination of documentation, or other means as may be reasonable under the facts of the case; and
- Document compliance verification.

The county or watershed district may consult with the SWCD when conducting a compliance verification.

iii. Right to appeal. Minn. Stat. §103F.48, subdivision 9, establishes the rights and procedures for a landowner or his/her agent or operator to appeal an APO issued for a violation of the riparian

protection and water quality practices requirements. A landowner or his/her agent or operator may appeal, in writing, the terms and conditions of an APO issued by a county or watershed district within 30 days of receipt of the APO. The appealing party must provide a copy of the APO that is being appealed, the basis for the appeal and any supporting evidence. The appeal may be submitted personally, by U.S. mail, or electronically, to the Executive Director of BWSR. At the discretion of the Executive Director, APOs for the same or similar violations on a parcel may be combined and addressed as a single appeal. The Executive Director will review the appeal and supporting evidence and issue a decision within 60 days of receipt of the appeal. The Executive Director's decision is appealable to the Minnesota Court of Appeals pursuant to Minn. Stat. §14.63 to 14.69. The penalty shall not accrue while the appeal is pending.

iv. Penalty due. Unless the landowner or his/her agent or operator appeals the APO within 30 days of receipt of the APO, the penalty is due and payable to the county or watershed district as specified in the APO. If the landowner or his/her agent or operator submits written evidence within 30 days of the date specified in the APO, which may include a validation of compliance issued by the SWCD, that the violation was corrected, and the county or watershed district verify compliance, then the penalty will be payable based on the date the landowner or his/her agent or operator submitted the written evidence of compliance.

However, if the county or watershed district determines the violation was not fully corrected, the landowner or his/her agent or operator has 20 additional days to pay the penalty after receipt of a letter of determination from the county or watershed district that the violation has not been fully corrected, or the time period specified in the APO as issued, whichever is later. The penalty will continue to accrue until the violation is corrected as provided in the corrective action notice and APO.

v. Referral for collection of penalty. All penalties assessed under an APO must be paid by the landowner within the specified time and made payable to the county or watershed district. Any penalty not received in the specified time may be collected by any lawful means by the county or watershed district.

vi. Reporting and documentation. Effective compliance reporting and documentation will ensure that proper enforcement action is taken, and that a record is maintained of these actions. When the county or watershed district identifies a violation of the riparian protection and water quality practices requirements, staff should follow record keeping procedures to assess and document the following to the extent known or available:

- Cause of the violation;
- Magnitude and duration of the violation;
- Whether the violation presents an actual or imminent risk to public health and safety, or to the environment or the natural resources of the state;
- Past violations;
- Efforts by the SWCD, county, watershed district or BWSR to assist the landowner to become compliant, including written and oral communications with the landowner; and
- Past and present corrective action efforts by the landowner.

## **Part B: BWSR Administrative Penalty Order Plan**

### **I. Buffer Requirements**

#### **1. Buffer width**

Except as provided under section I.5, a landowner must maintain a buffer area on a water shown on the buffer protection map as follows:

- A. For waters shown on the buffer protection map requiring a fifty (50) foot average width and a thirty (30) foot minimum width buffer as measured according to subsection 2, except as provided in section I.5.
- B. For waters shown on the buffer protection map requiring a sixteen and a half (16.5) foot minimum width buffer as measured according to subsection 2 except as provided in subsection I.5.

#### **2. Buffer Measurement**

- A. The measurement of the required buffer on land adjacent to a water requiring a fifty (50) foot average width and a thirty (30) foot minimum width buffer must be from the top or crown of the bank. Where there is no defined bank, measurement must be from the edge of the normal water level.
- B. The measurement of the required buffer on land adjacent to a water requiring a sixteen and a half (16.5) foot minimum width buffer must be in the same manner as for measuring the perennial vegetation buffer strips under Minn. Stat. §103E.021.

#### **3. Use of Buffer Area**

A buffer may not be used for cultivation farming but may be grazed, mowed, hayed or otherwise harvested, provided permanent growth of perennial vegetation is maintained, except as provided in subsection 4.G and section I.5.

#### **4. Exemptions**

- A. The requirement of section I.1 does not apply to land that is:
  - i. Enrolled in the federal Conservation Reserve Program;
  - ii. Used as a public or private water access or recreational use area including stairways, landings, picnic areas, access paths, beach and watercraft access areas, and permitted water-oriented structures as provided in the shoreland model standards and criteria adopted pursuant to Minn. Stat. §103F.211 or as provide in an approved local government shoreland ordinance;
  - iii. Covered by a road, trail, building or other structures; or
  - iv. Regulated by a national pollutant discharge elimination system/state disposal system (NPDES/SDS) municipal separate storm sewer system, construction or industrial permit under Minnesota Rules, chapter 7090, and the adjacent waterbody is provided riparian protection;
  - v. Part of a water-inundation cropping system; or



- vi. In a temporary nonvegetated condition due to drainage tile installation and maintenance, alfalfa or other perennial crop or plant seeding, or a construction or conservation project authorized by a federal, state or local government unit.

B. The landowner claiming the applicability of an exemption to their parcel is responsible for identifying the exemption and maintaining evidence of eligibility to demonstrate qualification for the exemption.

## 5. Alternative practices

The landowner or his/her agent or operator of land that is used for cultivation farming may demonstrate compliance with section I.1 by establishing and maintaining an alternative riparian water quality practice(s), or combination of structural, vegetative, and management practice(s), based on the Natural Resources Conservation Service Field Office Technical Guide, common alternative practices adopted and published by BWSR, other practices approved by BWSR, or practices based on local conditions approved by the local SWCD that are consistent with the Field Office Technical Guide which provide water quality protection comparable to the water quality protection provided by a required buffer as defined in subsections I.1 to I.3.

## II. Compliance Determinations

Compliance on each parcel will be determined based on the establishment and maintenance of buffers and/or alternative practices.

Compliance status will be determined by BWSR:

- A. On a parcel basis as identified by a unique locally defined property identification number or description; and
- B. The compliance status of each bank, or edge of an applicable water body on an individual parcel will be determined independently.

### 1. Notification of Noncompliance

When BWSR observes potential noncompliance or receives a third party complaint from a private individual or entity, or from another public agency, it will consult with the SWCD to determine the appropriate course of action to confirm compliance status. This may include communication with the landowner or his/her agents or operators, communication with the shoreland management authority, inspection or other appropriate steps necessary to verify the compliance status of the parcel. On the basis of this coordination, the SWCD may issue a Notification of Noncompliance to BWSR. BWSR compliance or enforcement actions under Minnesota Statutes §103F.48 and section III will be based on an SWCD issued Notice of Noncompliance.

At any time, the landowner or his/her agents or operators may provide documentation of compliance to the SWCD. The SWCD should evaluate the documentation, or review the buffer and/or alternative practices to determine if the parcel is in compliance and issue its determination in writing to the landowner or his/her agents or operators and BWSR. The SWCD may issue a Validation of Compliance if applicable and requested by the landowner or his/her agents or operators. The SWCD must send a copy of a Notification of Noncompliance to BWSR.

## III. Enforcement and Penalty Procedures

### 1. Corrective Action Notice

Upon receipt of an SWCD notification of noncompliance, BWSR will send the landowner or his/her agents or operators a corrective action notice that will:

- (a) Include a list of corrective actions needed to come into compliance with the requirements of Minn. Stat. §103F.48;
- (b) Provide a timeline for complying with this notice; and
- (c) Include a statement that failure to respond to this notice will result in the assessment of financial penalties.

The landowner may be sent a combined corrective action notice and APO as provided in item 2 so long as the combined notice/APO includes all the elements of both.

BWSR may deliver or transmit the corrective action notice by any means reasonably determined to reach the landowner or agents or operators, which will document receipt. However, a failure to document receipt will not preclude BWSR from demonstrating receipt or knowledge of the corrective action notice in an enforcement proceeding under section III. BWSR will also send a copy of the notice to the SWCD.

At any time, the landowner or his/her agents or operators may provide documentation of compliance to BWSR. In addition, the landowner or his/her agent or operator may supply information in support of a request to modify a corrective action or the timeline for compliance. On the basis of any such submittal or at its own discretion, BWSR, in writing, may modify the corrective action notice or timeline for compliance, and will deliver or transmit the modified corrective action notice and timeline in accordance with this section. BWSR should determine if the noncompliance has been fully corrected and issue its determination as provided in section III. 3B, in writing, to the landowner or his/her agent or operator.

The SWCD may issue a validation of compliance if requested by the landowner or his/her agent or operator and following consultation with BWSR. On BWSR receipt of the validation the corrective action notice will be deemed withdrawn for the purpose of section 2.0, and the subject property will not be subject to enforcement under that section.

A corrective action notice is not considered a final decision and is not subject to appeal under Minn. Stat. §103F.48, subd. 9.

## **2. BWSR's Use of Administrative Penalty Orders.**

### A. Enforcement by BWSR

BWSR's authority to enforce the riparian protection and water quality practices requirements of Minn. Stat. §103F.48 by APO is pursuant to Minn. Stat. §103B.101, subdivision 12(a) and (b).

### B. BWSR's enforcement team

Prior to issuance of an APO, BWSR staff may establish an enforcement team to review the specific facts and develop an APO.

### C. Amount of penalty

BWSR staff may issue an APO, as provided for in Minn. Stat. §103B.101, subd. 12a against a landowner or his/her agent or operator that does not comply with a corrective action notice. The APO should be sent

with the corrective action notice, alternatively, a combined corrective action notice and APO may be sent so long as the combined notice/APO includes all the elements of both. The penalty will continue to accrue until the violation is corrected as provided in the corrective action notice and APO.

(1) Initial Violation. The penalty for a landowner or his/her agent or operator on the same parcel that has not previously been the subject of an APO issued by BWSR shall be based on the following schedule:

- (a) \$0 for 11 months after issuance of the corrective action notice;
- (b) \$100 per parcel per month for six (6) months (180 days) following the time period in (a); and
- (c) \$500 per parcel per month after six (6) months (180 days) following the time period in (b).

BWSR may modify the corrective actions and timeline for compliance, in accordance with section III.1, to extend the compliance timeline for a modification that imposes a substantial new action or significantly accelerates the completion date for an action.

(2) Repeat violation. The penalty for a landowner or his/her agent or operator on the same parcel that has previously been the subject of an APO issued by BWSR shall be based on the following schedule:

- (a) \$100 per parcel per day for 180 days after issuance of the corrective action notice; and
- (b) \$500 per parcel per day after 180 days following the time period in (a).

BWSR may modify the corrective actions and timeline for compliance, in accordance with section III.1, to extend the compliance timeline for a modification that imposes a substantial new action or significantly accelerates the completion date for an action.

D. Order. The APO should include:

- i. The facts constituting a violation of the riparian protection and water quality practices requirements;
- ii. The statute and/or Board Buffer program document that has been violated;
- iii. Prior efforts to work with the landowner or his/her agent or operator to resolve the violation;
- iv. The amount of the penalty to be imposed;
- v. The date the penalty will begin to be assessed;
- vi. The date that payment will be due;
- vii. The date by which all or part of the penalty may be forgiven if the landowner or his/her agent or operator has/have complied with the corrective action notice; and
- viii. The landowner or his/her agent or operator's right to appeal the order.

Pursuant to §103F.48, subd. 7(d) all or part of the penalty may be forgiven based on the correction of the noncompliance by the date specified in the APO by the landowner or his/her agents or operators. If part or all of the penalty is forgiven, the reasons and the amount of the penalty that has been forgiven will be documented in the enforcement file.

A copy of the APO should be sent to the SWCD.

According to Minn. Stat. §103F.48, subd. 9 an APO that is not appealed to the executive director of BWSR within 30 days of receipt by the landowner or his/her agent or operator is final.

### 3. Administrative Penalty Order Procedures

A. Statute of limitations. According to Minn. Stat. §541.07, subd. (2), BWSR has two years in which to commence an APO action after the violation is discovered. The goal is to complete the action as soon as reasonably practical, recognizing that situations for which data must be gathered, field investigations must be completed and/or modeling must be performed will require adequate time to complete the work and communicate with the person(s) involved.

B. Compliance verification. Once a landowner or his/her agents or operators has/have submitted written evidence of correction of the violation, compliance must be verified. BWSR should:

- Review and evaluate all information related to the APO to determine if the violation has been corrected;
- Verify compliance by site visit, re-inspection, examination of documentation, or other means as may be reasonable under the facts of the case; and
- Document compliance verification.

BWSR may consult with the SWCD when conducting a compliance verification.

C. Right to appeal. Minn. Stat. §103F.48, subdivision 9, establishes the rights and procedures for appeal of an APO issued for a violation of the riparian protection and water quality practices requirements. A landowner or his/her agent or operator may appeal, in writing, the terms and conditions of an APO issued by a county, watershed district or BWSR within 30 days of receipt of the APO. The appealing party must provide a copy of the APO that is being appealed, the basis for the appeal and any supporting evidence. The appeal may be submitted personally by U.S. mail, or electronically, to the Executive Director of BWSR. At the discretion of the executive director, APOs for the same or similar violations on a parcel may be combined and addressed as a single appeal. The Executive Director will review the appeal and supporting evidence and issue a decision within 60 days of receipt of the appeal. The Executive director's Decision is appealable to the Minnesota Court of Appeals pursuant to Minn. Stat. §14.63 to 14.69. The penalty shall not accrue while the appeal is pending.

D. Penalty due. Unless the landowner or his/her agents or operators appeals the APO within 30 days of receipt of the APO, the penalty is due and payable to BWSR as specified in the APO. If the landowner or his/her agents or operators submits written evidence within 30 days of the date specified in the APO, which may include a validation of compliance issued by the SWCD, that the violation was corrected, and BWSR verifies compliance, then the penalty will be payable based on the date the landowner submitted the written evidence of compliance. However, if BWSR determines the violation was not fully corrected, the landowner or his/her agents or operators has 20 additional days to pay the penalty after receipt of the letter of determination from BWSR that the violation has not been fully corrected, or the time period specified in the APO as issued, whichever is later. The penalty will continue to accrue until the violation is corrected as provided in the corrective action notice and APO.

E. Referral for collection of penalty. All penalties assessed under an APO must be paid by the landowner or his/her agent or operator within the specified time and made payable to BWSR. Penalties that have not been paid by the landowner or his/her agent or operator within 12 months of the date specified in the APO will be referred to the Minnesota Department of Revenue for collection. Any penalty or interest not received in the specified time may be collected by any lawful means.

F. Reporting and documentation. Effective compliance reporting and documentation is strongly recommended to ensure that proper enforcement action is taken, and that a record is maintained of these actions in the appropriate enforcement file. When BWSR identifies a violation of the riparian protection and water quality practices requirements, BWSR staff should follow record keeping procedures to assess and document the following to the extent known or available:

- Cause of the violation;
- Magnitude and duration of the violation;
- Whether the violation presents an actual or imminent risk to public health and safety, or the natural resources of the state;
- Past violations;
- Efforts by the SWCD, county, watershed district or BWSR to assist the landowner or agent or operator to become compliant, including written and oral communications with the landowner or agent or operator; and
- Past and present corrective action efforts by the landowner or agent or operator.

## Definitions

1. "**BWSR**" means the Board of Water and Soil Resources.
2. "**Buffer**" means an area consisting of perennial vegetation, excluding invasive plants and noxious weeds.
3. "**Buffer protection map**" means the buffer map established and maintained by the commissioner of the Minnesota Department of Natural Resources published in 2017, and as subsequently amended, that is available on the department of natural resources website.
4. "**Commissioner**" means the commissioner of the Minnesota Department of Natural Resources.
5. "**Cultivation farming**" means practices that disturb root or soil structure or that impair the viability of perennial vegetation.
6. "**Landowner**" means the fee title landowner or agent or operator.
7. "**Normal water level**" means the level evidenced by the long-term presence of surface water as indicated directly by hydrophytic plants or hydric soils or indirectly determined via hydrological models or analysis.
8. "**Public waters**" has the meaning given in Minn. Stat. §103G.005, subdivision 15. The term public waters as used in this ordinance applies to waters that are on the public waters inventory as provided in Minn. Stat. §103G.201.



# Model County Buffer Ordinance

## Buffer Law Implementation

September 26, 2017

Users of this document are encouraged to obtain the legal advice of an attorney regarding their specific application of Minn. Stat. §103F.48 and their own legal authorities.

### 1.0 STATUTORY AUTHORIZATION AND POLICY

- 1.1 **Statutory authorization.** This buffer ordinance is adopted pursuant to the authorization and policies contained in Minn. Stat. §103F.48, the Buffer Law, and the County planning and zoning enabling legislation in Minn. Stat. chapter 394.
- 1.2 **Purpose and intent.** It is the purpose and intent of the County to:
  - (a) Provide for riparian vegetated buffers and water quality practices to achieve the following purposes:
    - (1) Protect state water resources from erosion and runoff pollution;
    - (2) Stabilize soils, shores and banks; and
    - (3) Protect or provide riparian corridors.
  - (b) Coordinate the implementation and enforcement of the water resources riparian protection requirements of Minn. Stat. §103F.48 with the shoreland management rules and ordinances adopted under the authority of Minn. Stat. §103F.201 to 103F.227 and the management of public drainage systems established under Minn. Stat. chapter 103E where applicable; and
  - (c) Provide efficient and effective direction to landowners and protection of surface water quality and related land resources.

### 2.0 DEFINITIONS AND GENERAL PROVISIONS

- 2.1 **Definitions.** Unless specifically defined below, words or phrases used in this ordinance shall be interpreted to give them the same meaning they have in common usage and to give this ordinance its most reasonable application. For the purpose of this ordinance, the words "must" and "shall" are mandatory and not permissive. All distances, unless otherwise specified, are measured horizontally.
  - 2.1.1 **"APO"** means the administrative penalty order issued pursuant to Minn. Stat. §103F.48, subd. 7 and Minn. Stat. §103B.101, subd. 12a.
  - 2.1.2 **"Buffer"** has the meaning provided in Minn. Stat. §103F.48, subd. 1(c).
  - 2.1.3 **"Buffer protection map"** has the meaning provided in Minn. Stat. §103F.48, subd. 1(d) and which are available on the Department of Natural Resources website.
  - 2.1.4 **"BWSR"** means the Board of Water and Soil Resources.

2.1.5 **“Cultivation farming”** means farming practices that disturb root or soil structure or that impair the viability of perennial vegetation due to cutting or harvesting near the soil surface.

2.1.6 **“Drainage authority”** has the meaning provided in Minn. Stat. §103E.005, subd. 9.

2.1.7 **“Landowner”** means the holder of the fee title, the holder’s agents or assigns, any lessee, licensee, or operator of the real property and includes all land occupiers as defined by Minn. Stat. §103F.401, subd. 7 or any other party conducting farming activities on or exercising control over the real property.

2.1.8 **“Parcel”** means a unit of real property that has been given a tax identification number maintained by the County.

2.1.9 **“Public drainage system”** has the meaning given to “drainage system” in Minn. Stat. §103E.005, subd. 12.

2.1.10 **“Local water management authority”** has the meaning provided in Minn. Stat. §103F.48, Subd. 1(g).

2.1.11 **“Normal water level”** means the level evidenced by the long-term presence of surface water as indicated directly by hydrophytic plants or hydric soils or indirectly determined via hydrological models or analysis.

2.1.12 **“SWCD”** means Soil and Water Conservation District.

2.2 **Severability.** If any section, clause, provision, or portion of this ordinance is adjudged unconstitutional or invalid by a court of competent jurisdiction, the remainder of this ordinance shall not be affected thereby.

2.3 **Data sharing/management.**

2.3.1 The County may enter into arrangements with an SWCD, a watershed district if applicable, BWSR and other parties with respect to the creation and maintenance of, and access to, data concerning buffers and alternative practices under this ordinance.

2.3.2 The County will manage all such data in accordance with the Minnesota Data Practices Act and any other applicable laws.

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## 3.0 Jurisdiction and 4.0 Buffer Requirements

**NOTE:** Counties can elect enforcement jurisdiction over public waters and public ditches, which relate to the existing County responsibility for implementing the shoreland management rules and acting as the public drainage authority. Counties should discuss enforcement options and plans with the watershed district (if any) and SWCD prior to making a jurisdiction decision.

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### OPTION 1 – 50-Foot Average 30-Foot Minimum and 16.5-Foot Waters, excluding public drainage systems where the County is not the drainage authority

## 3.0 JURISDICTION

3.1 **Jurisdiction.** The provisions of this ordinance apply to all waters, shown on the buffer protection map, excluding public drainage systems for which the County is not the drainage authority under Minn. Stat. chapter 103E.



## 4.0 BUFFER REQUIREMENTS

4.1 **Buffer width.** Except as provided in subsection 4.4 and 4.5, a landowner owning property adjacent to a water body identified on the buffer protection map must establish and maintain a buffer area as follows:

(a) For waters shown on the buffer protection map requiring a fifty (50) foot width buffer, the buffer width will be fifty (50) foot average and thirty (30) foot minimum width as provided in Minn. Stat. §103F.48, subd. 3 and *(if County's shoreland ordinance requires a more restrictive buffer and the County chooses to retain that width, then include the more restrictive standards here)* as measured according to subsection 4.2; and

(b) For waters shown on the buffer protection map requiring a sixteen and a half (16.5) foot minimum width buffer, the buffer width will be sixteen and a half (16.5) feet as provided in Minn. Stat. §103F.48, subd. 3 and as measured according to subsection 4.2. This subsection applies only if the County is the drainage authority *(or a more restrictive width as determined locally)*.

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### OPTION 2 – 50-Foot Average 30-Foot Minimum and 16.5-Foot Waters, including public drainage systems where the County is not the drainage authority

## 3.0 JURISDICTION

3.1 **Jurisdiction.** The provisions of this ordinance apply to all waters, including public drainage systems for which the County is not the drainage authority under Minn. Stat. chapter 103E, shown on the buffer protection map.

## 4.0 BUFFER REQUIREMENTS

4.1 **Buffer width.** Except as provided in subsection 4.4 and 4.5, a landowner owning property adjacent to a water body identified on the buffer protection map must establish and maintain a buffer area as follows:

(a) For waters shown on the buffer protection map requiring a fifty (50) foot width buffer, the buffer width will be fifty (50) foot average and thirty (30) foot minimum width as provided in Minn. Stat. §103F.48, subd. 3 and *(if County's shoreland ordinance requires a more restrictive buffer and the County chooses to retain that width, then include the more restrictive standards here)* as measured according to subsection 4.2; and

(b) For waters shown on the buffer protection map requiring a sixteen and a half (16.5) foot minimum width buffer, the buffer width will be sixteen and a half (16.5) feet as provided in Minn. Stat. §103F.48, subd. 3 and as measured according to subsection 4.2 *(or a more restrictive width as determined locally)*.

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### 4.2 Measurement.

(a) The width of any required buffer on land adjacent to a water requiring a fifty (50) foot average width and a thirty (30) foot minimum width buffer shall be measured from the top or crown of the bank. Where there is no defined bank, measurement must be from the edge of the normal water level as provided in Minn. Stat. §103F.48, subd. 3(c).

(b) The width of any required buffer on land adjacent to a water requiring a sixteen and a half (16.5) foot minimum width buffer shall be measured in the same manner as for measuring the vegetated grass strip under Minn. Stat. §103E.021, subd. 1 as provided in Minn. Stat. §103F.48, subd. 3(c).

**4.3 Use of buffer area.** Except as provided in sections 4.4 and 4.5 a buffer as defined in this ordinance may not be put to any use, included but not limited to cultivation farming, which would remove or prevent the permanent growth of perennial vegetation.

**4.4 Exemptions.** The requirement of section 4.1 does not apply to land that is exempted from the water resources riparian protection requirements under Minn. Stat. §103F.48, subd. 5.

**4.5. Alternative practices.** As provided in Minn. Stat. §103F.48, subd. 3(b) an owner of land that is used for cultivation farming may demonstrate compliance with subsection 4.1 by establishing and maintaining an alternative riparian water quality practice(s), or combination of structural, vegetative, and management practice(s) which provide water quality protection comparable to the water quality protection provided by a required buffer as defined in sections 4.1 to 4.3. The adequacy of any alternative practice allowed under this section shall be based on:

(a) the Natural Resources Conservation Service (NRCS) Field Office Technical Guide (FOTG);

(b) common alternative practices adopted and published by BWSR;

(c) practices based on local conditions approved by the SWCD that are consistent with the Natural Resources Conservation Service (NRCS) Field Office Technical Guide (FOTG); or

(d) other practices adopted by BWSR.

**Option:** Counties may use either section 4.6 provided below to address pre-existing land uses, or nonconformities, to ensure compliance with the requirements of Minn. Stat. § 103F.48.

**4.6 Grandfathering.** Where the provisions of any statute, other ordinance or regulation imposes greater restrictions than this ordinance, the provisions of such statute, other ordinance or regulation shall be controlling. Parcels grandfathered in for other preexisting land uses shall not be grandfathered in with respect to these provisions and with respect to compliance with the Buffer Law, Minn. Stat. § 103F.48.

**4.6 Nonconformity.** Where the provisions of any statute, other ordinance or regulation imposes greater restrictions than this ordinance, the provisions of such shall be controlling. The continuation of nonconformities provided for by Minn. Stat. §394 and §462 shall not apply to compliance with this ordinance and Minn. Stat. §103F.48.

## 5.0 COMPLIANCE DETERMINATIONS

**5.1 Compliance determinations.** Compliance with the buffer requirements set forth in section 4 will be determined by the SWCD on a parcel by parcel basis. The compliance status of each bank, or edge of a waterbody on an individual parcel will be determined independently.

**5.2 Investigation and notification of noncompliance.** When the County identifies a potential noncompliance with the buffer requirements or receives a third party complaint from a private individual or entity, or from another public agency, it will consult with the SWCD to determine the appropriate course of action to document compliance status. This may include communication with the landowner, inspection or

other appropriate steps necessary to verify the compliance status of the parcel. On the basis of the evidence gathered in this process, the SWCD may issue a Notification of Noncompliance to the County. If the SWCD does not issue such a Notification, the County will not pursue a compliance or enforcement action under Minnesota Statutes §103F.48 and subsection 6.2.

At any time during process set forth in 5.2 and 5.3, the landowner may provide documentation of compliance to the SWCD.

**5.2.1 Compliance determination.** The SWCD will evaluate the available documentation, and/or evaluate and/or inspect the buffer and/or alternative practices to determine if the parcel is in compliance. Upon completion of the evaluation and/or inspection the SWCD shall issue a written compliance determination to the landowner, the County and BWSR. The SWCD may also issue a Validation of Compliance if applicable and requested by the landowner.

**5.3 Corrective Action Notice.** On receipt of an SWCD Notification of Noncompliance, the County will issue the landowner a Corrective Action Notice that will:

(a) include a list of corrective actions needed to come into compliance with the requirements of Minn. Stat. §103F.48;

(b) provide a timeline for complying with the corrective action notice;

(c) provide a compliance standard against which the County will judge the corrective action; and

(d) include a statement that failure to respond to this Notice may result in the assessment of criminal, civil or administrative penalties. *(Language will depend on the enforcement option selected by the County.)*

The County may send the landowner a combined Corrective Action Notice and APO as provided in section 6.2 so long as the combined Notice/APO includes all the required elements of both.

The County shall transmit the corrective action notice by either personal service to the landowner or by depositing the same in the U.S. Mail. If service is made by U.S. mail, the document is deemed received three business days after the notice was placed in the U.S. mail. Failure of actual receipt of a corrective action notice that has either been personally served or served by depositing the same in the U.S. Mail shall not be deemed a defense in an enforcement proceeding under section 6.0. The County shall also send a copy of the Notice to the SWCD and BWSR.

Counties may modify the corrective actions and timeline for compliance, in accordance with section 5.2, to extend the compliance timeline for a modification that imposes a substantial new action or significantly accelerates the completion date for an action.

**5.3.1** At any time after receipt of a corrective action notice, the landowner may provide documentation of compliance to the County. In addition, the landowner may supply information to the County or the SWCD in support of a request to modify a corrective action or the timeline for compliance. On the basis of any such submittal or at its own discretion, the County may make a written modification to the Corrective Action Notice or timeline for compliance. The County should also make a written determination documenting whether the noncompliance has been fully corrected. Any such modification of a compliance determination will be served on the landowner in the

manner provided for in section 5.3. The County shall provide the SWCD and BWSR a written copy of any modification made pursuant to this provision.

- 5.3.2 The SWCD may, after an evaluation of the evidence documenting compliance submitted by the landowner, issue a written Validation of Compliance if requested by the landowner. Upon receipt by the County of a written compliance determination issued by the SWCD, the Corrective Action Notice will be deemed withdrawn for the purpose of section 6.0, and the subject property will not be subject to enforcement under that section.

**OPTION:** A Notice of Noncompliance is not considered a final decision subject to appeal to BWSR. (Minn. Stat. §103F.48, subd. 9). Counties may establish a local process to appeal a Corrective Action Notice. The time period for compliance and the initiation of a penalty should be put on hold while any appeal is pending

## 6.0 ENFORCEMENT

**NOTE:** The model ordinance provides three options for enforcement of the Buffer Law, which are provided below. The County will need to evaluate the enforcement mechanism it intends to use when enforcing the requirements of the buffer law.

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### ENFORCEMENT OPTION 1 – Criminal Prosecution Only

6.1 Failure to comply with a Corrective Action Notice issued under section 5 constitutes a misdemeanor and shall be punishable as defined by law.

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### ENFORCEMENT OPTION 2 – Administrative Penalty Orders Only

6.1 The County may issue an APO as provided for in Minn. Stat. §§103F.48, subd. 7(b) and (c) and 103B.101, subdivision 12a to a landowner who has failed to take the corrective action as set forth in the corrective action notice. For the APO to be effective it must be served on the landowner together with a copy of the corrective action notice or alternatively the County may serve the landowner with a combined Corrective Action Notice and APO so long as the combined Notice/APO includes all the elements of both. Service is effective either by personal service or by depositing the documents set forth herein in the U.S. Mail. Any penalty assessed in the APO shall continue to accrue until the violation is corrected as provided in the Corrective Action Notice and APO.

**NOTE:** This option also includes all provisions after and including 6.2.

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### ENFORCEMENT OPTION 3 – Both Criminal Prosecution and Administrative Penalty Orders

6.1 Failure to comply with a corrective action notice issued under section 5.

The County may, at its own discretion, elect to pursue the failure to comply with a corrective action notice either criminally or through an administrative penalty order as set forth herein.

(a) Failure to comply with a corrective action notice issued under section 5 constitutes a misdemeanor and shall be punishable as defined by law.

(b) The County may issue an APO as provided for in Minn. Stat. §§103F.48, subd. 7(b) and (c) and 103B.101, subdivision 12a to a landowner who has failed to take the corrective action set forth in the corrective action notice. For the APO to be effective it must be served on the landowner together with a copy of the corrective

action notice or alternatively the County may serve the landowner with a combined Corrective Action Notice and APO so long as the combined Notice/APO includes all the elements of both. Service is effective either by personal service or by depositing the documents set forth herein in the U.S. Mail. Any penalty assessed in the APO shall continue to accrue until the violation is corrected as provided in the Corrective Action Notice and APO.

**NOTE:** This option also includes all provisions after and including 6.2.

**OPTION:** Counties will need to include sections 6.2 and 6.3 when using APO as the enforcement mechanism.

## 6.2 Administrative Penalty Order (APO).

(a) Initial violation. The penalty for a landowner on a single parcel that has not previously been the subject of an APO issued by the County shall be:

- i. \$0 for 11 months after issuance of the Corrective Action Notice;
- ii. \$50 - \$200 per parcel per month for the first six (6) months (180 days) following the time period in i; and
- iii. \$200 - \$500 per parcel per month after six (6) months (180 days) following the time period in ii.

**OPTION:** Counties are recommended to choose a specific penalty amount within the range shown in ii and iii to ensure consistency with the BWSR APO Plan.

(b) Repeat violation. The penalty for a landowner on a single parcel that has previously been the subject of an APO issued by the County shall be:

- i. \$50 - \$200 per parcel per day for 180 days after issuance of the Corrective Action Notice; and
- ii. \$200 - \$500 per parcel per day for after 180 days following the time period in i.

(c) Ongoing penalty assessment. Any penalty assessed under this section shall continue until the corrective action notice has been satisfied.

**OPTION:** Counties are recommended to choose a specific penalty amount within the range shown in i and ii to ensure consistency with the BWSR APO Plan.

6.2.1 APO. To be valid the APO shall include, at a minimum:

- i. The facts constituting the violation of the riparian protection and water quality practices requirements set forth in this section 4.0 of this ordinance or Minn. Stat. §103F.48 ;
- ii. The specific statute and/or ordinance section(s) that has/have been violated;
- iii. A written description of prior efforts to work with the landowner to resolve the violation;
- iv. The amount of the penalty to be imposed;
- v. The date the penalty will begin to accrue;
- vi. The date that payment of the penalty is due;
- vii. The date by which all or part of the penalty may be forgiven if the landowner has/have complied with the Corrective Action Notice; and

viii. A statement of the landowner's right to appeal the APO.

6.2.2 All or part of the penalty may be forgiven based on the correction of the noncompliance by the date specified in the APO by the landowner as provided in Minn. Stat. §103F.48, subd. 7(d).

*NOTE: If part or all of the penalty is forgiven, it is recommended that the County document the reasons and the amount of the penalty that has been forgiven.*

6.2.3 A copy of the APO must be sent to the SWCD and BWSR.

6.2.4 An APO issued under this section may be appealed to the BWSR within 30 days of receipt by the landowner in accordance with the requirements set for the in Minn. Stat. §103F.48, subd. 9. Any APO that is not appealed within the 30 day period shall be deemed final.

### 6.3 Administrative Penalty Order Procedures

6.3.1 Statute of limitations. Any criminal enforcement action undertaken pursuant to section 6.1 of this ordinance must be undertaken within two years after the alleged violation was discovered or reasonably should have been discovered by the County. According to Minn. Stat. §541.07, the County has two years in which to commence an APO action after the date the violation is discovered. The goal is to complete the action as soon as reasonably practical, recognizing that situations for which data must be gathered, field investigations must be completed and/or modeling must be performed will require adequate time to complete the work and communicate with the landowner involved.

6.3.2 Compliance verification. Once a landowner has submitted written evidence of correction of the violation set forth in the notice of compliance, compliance must be verified. The County will:

- i. Review and evaluate all information related to the APO to determine if the violation has been corrected;
- ii. Verify compliance by site visit, re-inspection, examination of documentation, or other means as may be reasonable under the facts of the case; and
- iii. Document compliance verification.

The County may consult with the SWCD when conducting a compliance verification.

6.3.3 Right to appeal. Within 30 days after receipt of the APO, a landowner may appeal the terms and conditions of an APO issued by a County to BWSR as provided in Minn. Stat. §103F.48, subd. 9. The appeal must be in writing and must include a copy of the APO that is being appealed, the basis for the appeal and any supporting evidence. The appeal may be submitted personally, by U.S. mail, or electronically, to the Executive Director of BWSR.

6.3.4 Penalty due. Unless the landowner appeals the APO as provided in section 6.3.3 the penalty specified in the APO becomes immediately due and payable to the County as set forth in the APO. If, however, the landowner submits written documentation that the violations has been corrected prior to the time the penalty becomes due and payable the County shall verify compliance and adjust the penalty to an amount the landowner would have owed had the penalty been paid on the date the landowner submitted written documentation of compliance. Written documentation of compliance may include a written validation of compliance issued by the SWCD.

However, if the County determines the violation was not fully corrected, the County shall notify the landowner by issuing a written letter of determination and depositing it in the U.S. Mail. Any determination sent by U.S. Mail shall be deemed received three business days after the letter of determination has been deposited in the U.S. Mail. The landowner shall have an additional 20 days after receipt of the letter of determination to pay the penalty or the time period specified in the APO as issued, whichever is later. The penalty will continue to accrue until the violation is corrected as provided in the Corrective Action Notice and APO.

6.3.5 Referral for collection of penalty. All penalties and interest assessed under an APO must be paid by the landowner within the time specified in this section. All payments shall be made payable to the County. Any penalty or interest not received in the specified time may be collected by the County using any lawful means.

6.3.6 Reporting and documentation. The County shall maintain the following records for any potential violation of the riparian protection and water quality practices requirements. Said records shall include but are not limited to the following:

- iv. The cause of the violation;
- v. The magnitude and duration of the violation;
- vi. Documentation showing whether the violation presents an actual or imminent risk to public health and safety;
- vii. Documentation showing whether the violation has the potential to harm to the natural resources of the state;
- viii. A record of past violations;
- ix. Efforts by the SWCD, County, Watershed District or BWSR to assist the responsible party or parties to become compliant, including written and oral communications with the responsible party or parties ; and
- x. Past and present corrective action efforts by the responsible party or parties.





# Model Watershed District Buffer Rule

## Buffer Law Implementation

DRAFT July 11, 2017

### 1.0 Policy

It is the policy of the Board of Managers to:

- (a) Provide for riparian vegetated buffers and water quality practices to achieve the following purposes:
  - (1) Protect state water resources from erosion and runoff pollution;
  - (2) Stabilize soils, shores and banks; and
  - (3) Protect or provide riparian corridors.
- (b) Coordinate closely with the District's landowners, soil and water conservation districts and counties, and utilize local knowledge and data, to achieve the stated purposes in a collaborative, effective and cost-efficient manner.
- (c) Integrate District authorities under Minnesota Statutes §§103D.341 and 103F.48 to provide for clear procedures to achieve the purposes of the rule.

### 2.0 Definitions

BWSR: Minnesota Board of Water and Soil Resources.

Buffer: An area consisting of perennial vegetation, excluding invasive plants and noxious weeds.

Buffer law: Minnesota Statutes §103F.48, as amended.

Commissioner: Commissioner of the Minnesota Department of Natural Resources.

Cultivation farming: Practices that disturb vegetation roots and soil structure, or involve vegetation cutting or harvesting that impairs the viability of perennial vegetation.

Drainage authority: The public body having jurisdiction over a drainage system under Minnesota Statutes chapter 103E.

NRCS: U.S. Department of Agriculture, Natural Resource Conservation Service.

Operator: A party other than a landowner that directly or indirectly controls the condition of riparian land subject to a buffer under the rule.

Person: Individual or entity.

Public water: As defined at Minnesota Statutes §103G.005, subdivision 15, and included within the public waters inventory as provided in Minnesota Statutes §103G.201.

Riparian protection: A water quality outcome for the adjacent waterbody equivalent to that which would be provided by the otherwise mandated buffer, from a facility or practice owned or operated by a municipal separate storm sewer system (MS4) permittee or subject to a maintenance commitment in favor of that permittee at least as stringent as that required by the MS4 general permit in effect.

Shoreland standards: Local shoreland standards as approved by the Commissioner or, absent such standards, the shoreland model standards and criteria adopted pursuant to Minnesota Statutes §103F.211.

Structure: An above-ground building or other improvement that has substantial features other than a surface.

SWCD: Soil and Water Conservation District.

### **3.0 Data sharing/management**

- 3.1 The District may enter into arrangements with an SWCD, a county, the BWSR and other parties with respect to the creation and maintenance of, and access to, data concerning buffers and alternative practices under this rule.
- 3.2 The District will manage all such data in accordance with the Minnesota Data Practices Act and any other applicable laws.

### **4.0 Vegetated Buffer Requirement**

- 4.1 Except as subsection 4.3 or 4.4 may apply, a landowner must maintain a buffer on land that is adjacent to a waterbody identified and mapped on the buffer protection map established and maintained by the Commissioner pursuant to the buffer law, or adjacent to a watercourse reach listed on Addendum A to this rule.
  - 4.1.1 For a public water, the buffer must extend landward to the further of:
    - (a) a 50-foot average width and 30-foot minimum width; or
    - (b) the landward edge of the shore impact zone pursuant to the state shoreland standards and criteria adopted by the Commissioner under Minnesota Statutes §103F.211.
  - 4.1.2 For a public drainage system, the buffer must be of a 16.5-foot minimum width.
  - 4.1.3 The buffer is measured from the top or crown of bank. Where there is no defined bank, measurement must be from the edge of the normal water level. The District will determine normal water level in accordance with BWSR guidance. For a public drainage system, the District will determine top or crown of bank in the same manner as for measuring the perennially vegetated strip under Minnesota Statutes §103E.021.

4.1.4 A buffer may not be used for cultivation farming, but may be grazed, mowed, hayed or otherwise harvested, provided permanent growth of perennial vegetation is maintained.

4.2 The requirement of subsection 4.1

***[elect from among the following, determined in accordance with BWSR Policy 8: Initial Election of Jurisdiction]***

Applies to all public drainage ditches within its boundary for which it is the drainage authority.

**AND/OR**

Applies to all public waters within its boundary.

**AND/OR**

Applies to all public drainage ditches within its boundary.

4.3 The requirement of subsection 4.1 does not apply to land that is:

4.3.1 Enrolled in the federal Conservation Reserve Program;

4.3.2 Used as a public or private water access or recreational use area including stairways, landings, picnic areas, access paths, beach and watercraft access areas, provided the area in such use is limited to what is permitted under shoreland standards or, if no specific standard is prescribed, what is reasonably necessary;

4.3.3 Used as the site of a water-oriented structure in conformance with shoreland standards or, if no specific standard is prescribed, what is reasonably necessary;

4.3.4 Covered by a road, trail, building or other structure;

4.3.5 Regulated by a national pollutant discharge elimination system/state disposal system (NPDES/SDS) municipal separate storm sewer system, construction or industrial permit under Minnesota Rules, chapter 7090, and the adjacent waterbody is provided riparian protection for the subject property;

4.3.6 Part of a water-inundation cropping system; or

4.3.7 In a temporary nonvegetated condition due to drainage tile installation and maintenance, alfalfa or other perennial crop or plant seeding, or a construction or conservation project authorized by a federal, state or local government unit.

4.4 Land subject to subsection 4.1 that is used for cultivation farming may meet the requirement of that subsection by means of an alternative riparian water quality practice; or combination of structural, vegetative and management practices, based on the NRCS Field Office Technical Guide, common alternative practices adopted and published by the board, other practices approved by the board, or practices based on local conditions approved by the local soil and water conservation district that are consistent with the Field Office Technical Guide, as provided in section 4.1.

- 4.4.1 An alternative practice may be approved by means of a validation of compliance issued by the SWCD. The approval must find that the proposed practice provides water quality protection comparable to the buffer protection of subsection 4.1.
- 4.4.2 A landowner may not rely on an alternative practice for compliance with subsection 4.1 unless the landowner holds an SWCD-issued validation of compliance for the alternative practice and the landowner has implemented the practice and is maintaining it as the validation stipulates.
- 4.5 A landowner or authorized agent or operator of a landowner may, or for the purpose of paragraph 4.4.2 must, submit an application for a validation of compliance to the SWCD pursuant to administrative procedures prescribed by the SWCD. The application may request: (a) a finding that a buffer satisfies subsection 4.1; (b) a determination as to the applicability of an exemption listed in subsection 4.3; or (c) approval of an alternative practice pursuant to subsection 4.4. An SWCD validation of compliance will be conclusive for the purpose of subsection 7.2. In making a finding of compliance with this rule for the purpose of subsection 7.1, the District will give substantial weight to an SWCD validation of compliance. Any District compliance determination contrary to the SWCD validation will rest on specific findings justifying the contrary determination.
- 4.6 A landowner owning land subject to subsection 4.1 must obtain a permit from the District in order to be in compliance with this section 4.0. A landowner shall be considered to hold a general permit meeting this requirement if the subject land conforms to the requirements set forth in section 4.0.

## **5.0 Drainage System Acquisition and Compensation for Buffer**

(Note: This section should be included only if the District acts as the Drainage Authority.)

- 5.1 In accordance with Minnesota Statutes §103F.48, subdivision 10(b), a landowner owning land within the benefited area of and adjacent to a public drainage ditch may request that the District, as the drainage authority, acquire and provide compensation for the buffer strip required under this rule.
  - 5.1.1 The request may be made to use Minnesota Statutes §103E.021, subdivision 6, or by petition pursuant to Minnesota Statutes §103E.715, subdivision 1.
  - 5.1.2 The decision on the request is within the judgment and discretion of the District, unless the request concerns a buffer strip mandated by Minnesota Statutes §103E.021.
  - 5.1.3 If the request is granted or the petition proceeds, the requirements of the buffer strip and the compensation to be paid for its incorporation into the drainage system will be determined in accordance with the statutes referenced in paragraph 5.1.1 and associated procedures. When the order establishing or incorporating the buffer strip is final, the buffer strip will become a part of the drainage system and thereafter managed by the District in accordance with the drainage code.
  - 5.1.4 On a public drainage ditch that also is a public water subject to a 50-foot average buffer, the drainage system will acquire only the first 16.5 feet of the buffer.

- 5.2 The District, on its own initiative pursuant to Minnesota Statutes §103F.48, may acquire and provide compensation for buffer strips required under this rule on individual or multiple properties along a public drainage system.
- 5.3 The District's decision to grant or deny a request under subsection 5.1 is not subject to appeal. A determination as to compensation or another term of the order may be appealed as provided for under the drainage code.
- 5.4 This section 5.0 supplements, and does not displace, the terms of Minnesota Statutes chapter 103E requiring or providing for drainage system establishment and acquisition of vegetated buffer strips along public ditches.

## **6.0 Action for Noncompliance**

- 6.1 When the District observes potential noncompliance or receives a third party complaint from a private individual or entity, or from another public agency, it will consult with the SWCD to determine the appropriate course of action to confirm compliance status. This may include communication with the landowner or his/her agents or operators, communication with the shoreland management authority, inspection or other appropriate steps necessary to verify the compliance status of the parcel. On the basis of this coordination, the SWCD may issue a notification of noncompliance to the District. If the SWCD does not transmit such a notification, the District will not pursue a compliance or enforcement action under Minnesota Statutes §103F.48 and paragraph 7.2, but may pursue such an action under the authority of Minnesota Statutes §103D.341 and paragraph 7.1.
- 6.2 On receipt of an SWCD notification of noncompliance, or if acting solely under authority of Minnesota Statutes §103D.341, the District will issue a corrective action list and practical schedule for compliance to the landowner. The District may inspect the property and will consult with the SWCD, review available information and exercise its technical judgment to determine appropriate and sufficient corrective action and a practical schedule for such action. The District will maintain a record establishing the basis for the corrective action that it requires.
  - 6.2.1 The District will issue the corrective action list and schedule to the landowner of record and to any operator that, in its judgment, is a responsible party. The landowner and any other named responsible party each may be the independent subject of enforcement liabilities under subsections 7.1 and 7.2. The District may deliver or transmit the list and schedule by any means reasonably determined to reach the responsible party or parties, and will document receipt. However, a failure to document receipt will not preclude the District from demonstrating receipt or knowledge in an enforcement proceeding under section 7.0.
  - 6.2.2 The corrective action list and schedule will identify the tract of record to which it pertains and the portion of that tract that is alleged to be noncompliant. It will describe corrective actions to be taken, a schedule of intermediate or final dates for correction, a compliance standard against which it will judge the corrective action, and a statement that failure to respond to this list and schedule will result in an enforcement action. The District will provide a copy of the list and schedule to the BWSR.
  - 6.2.3 At any time, a landowner may supply information to identify an additional responsible party, and any named responsible party may supply information as evidence that it is not responsible. In addition, at any time a responsible party may supply information in support of a request to

modify a corrective action or the schedule for its performance. On the basis of any such submittal or at its own discretion, the District may modify the corrective action list or schedule, and deliver or transmit the modified list and schedule in accordance with paragraph 6.3.1, or may advise the responsible party or parties in writing that it is not pursuing further compliance action.

- 6.2.4 The corrective action list and schedule for compliance may be modified in accordance with subsection 6.2, to extend the compliance timeline for a modification that imposes a substantial new action or significantly accelerates the completion date for an action.
- 6.2.5 At any time after the District has issued the list and schedule, a landowner, or authorized agent or operator of a landowner, may request that the SWCD issue a validation of compliance with respect to property for which the list and schedule has been issued. On District receipt of the validation: (a) the list and schedule will be deemed withdrawn for the purpose of subsection 7.2, and the subject property will not be subject to enforcement under that subsection; and (b) the subject property will not be subject to enforcement under subsection 7.1 unless the District makes a contrary compliance determination under subsection 4.5.
- 6.2.6 A corrective action list and schedule is not considered a final decision subject to appeal. A responsible party objecting to a finding of noncompliance may apply for a validation of compliance under subsection 4.5. An objection to a finding of noncompliance, or to any specified corrective action or its schedule, is reserved to the responsible party and may be addressed in an enforcement proceeding under section 7.0.

## 7.0 Enforcement

- 7.1 Under authority of Minnesota Statutes §§103D.545 and 103D.551, the District may seek remedies for noncompliance with section 4.0 against any responsible party including but not limited to: (a) administrative compliance order; (b) administrative order requiring reimbursement of District compliance costs under Minnesota Statutes §103D.345 and/or an escrow for same; (c) district court remedy including injunction, restoration or abatement order, authorization for District entry and/or order for cost recovery; and (d) referral to county attorney for criminal misdemeanor prosecution.
- 7.2 The District may issue an administrative order imposing a monetary penalty against a landowner for noncompliance with the corrective action list and schedule, as provided under paragraphs 7.2.1 and 7.2.2. The penalty will continue to accrue until the noncompliance is corrected as provided in the corrective action list and schedule. In addition, a noncompliance that is not corrected within the timelines provided in the corrective action notice may be considered a repeat violation and an additional notice may be issued as provided in subsection 7.2.2.

7.2.1 The penalty for a landowner on a single parcel that previously has not received an administrative penalty order issued by the District shall be:

- (a) \$0 for 11 months after issuance of the corrective action list and schedule;
- (b) \$50 - \$200 per parcel per month for the first six (6) months (180 days) following the time period in (a); and
- (c) \$200 - \$500 per parcel per month after six (6) months (180 days) following the time period in (b).

**OPTION:** Watershed Districts are recommended to choose a specific penalty amount within the range shown in (b) and (c) to ensure consistency with the BWSR APO Plan.

7.2.2 The penalty for a landowner on a single parcel that previously has received an administrative penalty order issued by the District shall be:

- (a) \$50 - \$200 per parcel per day for 180 days after issuance of the corrective action list and schedule; and
- (b) \$200 - \$500 per parcel per day for after 180 days following the time period in (a).

**OPTION:** Watershed Districts are recommended to choose a specific penalty amount within the range shown in (a) and (b) to ensure consistency with the BWSR APO Plan.

7.3 The administrative order will state:

- i. The facts constituting a violation of the buffer requirements;
- ii. The statute and/or rule that has been violated;
- iii. Prior efforts to work with the landowner to resolve the violation;
- iv. For an administrative penalty order, the amount of the penalty to be imposed, the date the penalty will begin to accrue, and the date when payment of the penalty is due; and
- v. The right of the responsible party to appeal the order.

A copy of the APO must be sent to the SWCD and BWSR.

7.4 An administrative order under subsection 7.1 or 7.2 will be issued after a compliance hearing before the District Board of Managers. The landowner and any other responsible parties will receive written notice at least two weeks in advance of the hearing with a statement of the facts alleged to constitute noncompliance and a copy or link to the written record on which District staff intends to rely, which may be supplemented at the hearing. A responsible party may be represented by counsel, may present and question witnesses, and may present evidence and testimony to the Board of Managers. The District will make a verbatim record of the hearing.

7.5 After a hearing noticed and held for consideration of an administrative penalty or other administrative order, the Board of Managers may issue findings and an order imposing any authorized remedy or remedies.

7.5.1 The amount of an administrative penalty will be based on considerations including the extent, gravity and willfulness of the noncompliance; its economic benefit to the responsible party; the extent of the responsible party's diligence in addressing it; any noncompliance history; the public costs incurred to address the noncompliance; and other factors as justice may require.

7.5.2 The Board of Managers findings and order will be delivered or transmitted to the landowner and other responsible parties. An administrative penalty order may be appealed to the BWSR in accordance with Minnesota Statutes §103F.48, subdivision 9, and will become final as provided therein. The District may enforce the order in accordance with Minnesota Statutes §116.072, subdivision 9. Other remedies imposed by administrative order may be appealed in accordance with Minnesota Statutes §103D.537.

7.5.3 The Board of Managers may forgive an administrative penalty, or any part thereof, on the basis of diligent correction of noncompliance following issuance of the findings and order and such other



factors as the Board finds relevant.

- 7.6 Absent a timely appeal pursuant to paragraph 7.5.2, an administrative penalty is due and payable to the District as specified in the administrative penalty order.
- 7.7 A landowner agent or operator may not remove or willfully degrade, wholly or partially, a riparian buffer or alternative practice, unless the agent or operator has obtained a signed statement from the landowner stating that written permission for the work has been granted by the District or that the buffer or alternative practice is not required as indicated in a validation of compliance issued by the SWCD. A prohibited action under this paragraph is a separate violation of this rule that is subject to remedies under both subsections 7.1 and 7.2.
- 7.8 Nothing within this rule diminishes or otherwise alters the District's authority under Minnesota Statutes, chapter 103E with respect to any public drainage system for which it is the drainage authority, or any buffer strip that is an element of that system.

## **8.0 Effect of Rule**

- 8.1 If any section, provision or portion of this rule is adjudged unconstitutional or invalid by a court of competent jurisdiction, the remainder of the rule is not affected thereby.
- 8.2 Any provision of this rule, and any amendment to it, that concerns District authority under Minnesota Statutes §103F.48 is not effective until an adequacy determination has been issued by the BWSR. Authority exercised under Minnesota Statutes chapter 103D does not require a BWSR adequacy determination.



# Procedure 8: Election of Jurisdiction

## Buffer Law Implementation

June 28, 2017

This document was adopted by the Board of Water and Soil Resources (BWSR) pursuant to Minn. Stat. §103F.48, subds. 1(j) and 7 to describe how counties and watershed districts should consider and/or elect jurisdiction to enforce the requirements of this section. It is a guide; not a rule. It is not a statement of general applicability and future effect. It is not designed to amend statute. Statutes are subject to change and if the language of this procedure differs from statute, the statute controls. In addition, users of the document are encouraged to obtain legal advice of an attorney regarding their specific application of Minn. Stat. §103F.48 and their own legal authorities.

It is encouraged that when boundaries overlap local governments units (LGUs) will discuss which waters Buffer Law enforcement jurisdiction is being elected within each entity's boundary.

## Procedure

To provide orderly administration of statutory responsibilities, the following provisions are necessary for counties and watershed districts electing jurisdiction for enforcement of the Buffer Law:

1. *When a county elects jurisdiction*, it **must** (see Minn. Stat. §103F.201 to 103F.227 and chapter 103E) include all public waters within its boundary that require a minimum 50' average, 30' minimum width buffer, as identified on the Buffer Protection Map, and all public drainage ditches within its boundary that require a 16.5' width buffer, as identified on the Buffer Protection Map, for which it is wholly or jointly the drainage authority. A county:
  - a. **May** also elect jurisdiction on all public drainage ditches identified on the Buffer Protection Map within its boundary for which it is not the drainage authority, if the drainage authority does not elect jurisdiction.
  - b. **Must** provide a notice at minimum 60 days prior to the effective date of its decision to BWSR and to all watershed districts and soil and water conservation districts within its boundary.
2. *When a watershed district elects jurisdiction*, it **must** (see Chapter 103E) include all public drainage ditches within its boundary that require a 16.5' width buffer, as identified on the Buffer Protection Map, for which it is the drainage authority. A watershed district:
  - a. **May** elect jurisdiction on all public waters identified on the Buffer Protection Map within its boundary, if the county does not.
  - b. **May** elect jurisdiction on all public drainage ditches identified on the Buffer Protection Map within its boundary for which it is not the drainage authority if the drainage authority does not.
  - c. **Must** provide a notice at minimum 60 days prior to the effective date of its decision to BWSR and to all counties and soil and water conservation districts within its boundary.

3. Counties and watershed districts must submit to BWSR a copy of the rule, ordinance or official control, consistent with Procedure 9; BWSR staff will make a determination of adequacy within 60 days of receipt.
4. A county or watershed district may change a previous election of jurisdiction by providing notice to BWSR, all counties, all soil and water conservation districts and all watershed districts within its boundary at least 60 days prior to the effective date of the decision.
5. Should a change in jurisdiction occur after November 1, 2017 the following procedures are recommended to ensure a smooth transition of enforcement authority:
  - a. A county or watershed district that elects to discontinue jurisdiction should provide all records related to compliance and enforcement of Minn. Stat. §103F.48 to BWSR prior to the effective date of the change in election.
  - b. BWSR should provide all records related to compliance and enforcement of Minn. Stat. §103F.48 to a county or watershed district that elects jurisdiction prior to the effective date of the change in election.

## Background

The water resources riparian protection requirements of the Buffer Law are related to the buffer provisions of the Public Drainage Law (Chapter 103E) and state shoreland management standards. Counties and watershed districts serve as drainage authorities and counties locally administer the shoreland management program. The election of jurisdiction provisions of the Buffer Law does not place a preference on which waters should be under the jurisdiction of which local government. However, the aforementioned relationship with other laws and authorities that are directly connected to a specific jurisdiction warrants acknowledging these other pre-existing responsibilities of counties and watershed districts that will enhance the efficiency and effectiveness of enforcement of the Buffer Law through local authorities.

### Program Need

- 1) BWSR needs to provide a consistent basis for determining which LGU has primacy for electing jurisdiction for public waters and public drainage ditches identified on the Buffer Protection Map.
- 2) Landowners, local governments, and BWSR need clear, consistent and comprehensive enforcement of the Buffer Law.
- 3) SWCDs and the public need to understand which government unit will carry out enforcement authority in the instances when corrective actions are needed.

## Statutory Basis

- Minn. Stat. Chapter 103E. the Public Drainage Law
- Minn. Stat. §103F.201 to 103F.227. Shoreland Management
- Minn. Stat. §103F.48 subd. 3(b). Water resource protection requirements on public waters and public drainage systems
- Minn. Stat. §103F.48, subd. 6. Local implementation and assistance

- Minn. Stat. §103F.48, subd. 7. Corrective actions
- Minn. Stat. §103F.48, subd. 8. Funding subject to withholding
- Minn. Stat. §103B.101, subd. 12(a). Authority to issue administrative penalty orders
- Minn. Stat. §471.59. Joint exercise of powers



# Procedure 9: BWSR's Review of County and Watershed District Buffer Rules, Ordinances and Official Controls

Buffer Law Implementation

June 28, 2017

This document was adopted by the Board of Water and Soil Resources (BWSR) pursuant to Minn. Stat. §103F.48, subd. 1(j), subd. 7(b) and subd. 7(c) to describe how BWSR will review the buffer enforcement rules, ordinances, and other official controls of counties and watershed districts that elect to exercise their jurisdiction for the enforcement of the riparian protection and water quality practices requirements of Minn. Stat. §103F.48. It is a guide; not a rule. It is not a statement of general applicability and future effect. It is not designed to amend statute. Statutes are subject to change and if the language of this procedure differs from statute, the statute controls. In addition, users of the document are encouraged to obtain legal advice of an attorney regarding their specific application of Minn. Stat. §103F.48 and their own legal authorities.

## I. Procedure

County and watershed district buffer rules, ordinances and official controls will be reviewed by BWSR as provided below:

1. In accordance with Minn. Stat. §103F.48, subd. 1(j) and subd. 7(c) BWSR staff will review the enforcement and appeals procedures of county and watershed district rules, ordinances or other official controls to determine if they contain adequate provisions to ensure compliance and effective enforcement of Minn. Stat. §103F.48. If the county or watershed district rules, ordinances or other official controls propose using administrative penalty order (APO) authority pursuant to Minn. Stat. §103B.101 Subd. 12a as the enforcement mechanism, BWSR review will also evaluate whether the county or watershed district APO plan is consistent with the plan adopted by BWSR. The adequacy and/or consistency review for rules, ordinances or other official controls received by BWSR by September 1, 2017 will be completed by November 1, 2017. The adequacy and/or consistency review for rules, ordinances and other official controls received after September 1, 2017 will be completed within 60 days of receipt. BWSR will send the adequacy and/or consistency determination to the county or watershed district electronically.
2. BWSR staff will review county and watershed district rules, ordinances and other official controls to ensure that the state mandated requirements of Minn. Stat. §103F.48 are met as follows:
  - a. Counties and watershed districts that elect to exercise their jurisdiction, must submit the following information to BWSR, at least 60 days prior to the effective date of the rule, ordinance or other official control which includes:
    - i. The resolution or other formal decision of the county or watershed district governing body documenting adoption of the rule, ordinance or other official control;
    - ii. The rule, ordinance or other official control adopted by the county or watershed district governing body; and
    - iii. If applicable, a document that describes how the rule, ordinance or other official control departs from the model ordinance or rule developed by BWSR.

- b. Failure to provide the required information will result in a determination by BWSR that the rule, ordinance or other official control does not contain adequate provisions to ensure compliance and effective enforcement of Minn. Stat. §103F.48.
  - c. A county or watershed district may vary the procedures outlined in the APO Plan pertaining to the penalty amount and interval of recurrence to the extent it is consistent with Part A of BWSR's APO Plan. The submission of an APO Plan with changes from the BWSR APO Plan should include adequate justification and be based on considerations that include the extent, gravity and willfulness of the noncompliance.
  - d. Any change from a prior adopted rule, ordinance or other official control must be submitted to BWSR at least 60 days prior to the effective date of the change.
3. The option of a county or watershed district to modify or delegate a previous election of jurisdiction and the adoption of a rule, ordinance or other official control will follow the same review as provided above.

## II. Background

A county or watershed district may (or may not) elect to exercise its jurisdiction to enforce the water resources riparian protection requirements. Pursuant to Minn. Stat. §103F.48, subd. 1(j) and subd. 7(c) a county or watershed district must submit their rule, ordinance or other official control to BWSR to comply with the legislative requirements under Minn. Stat. §103F.48 regarding BWSR's determination on the adequacy and consistency of the rule, ordinance or other official control.

BWSR will follow a consistent process when reviewing an ordinance, rule, or other local control for adequacy with Minn. Stat. §103F.48 and consistency with the APO Plan adopted by BWSR. A county or watershed district must allow at least 60 days for BWSR review and to determine adequacy prior to the effective date of the rule, ordinance or other official control. Determinations will be based, in part, on primacy as defined in BWSR's Procedure 8: Election of Jurisdiction and the ability to effectively carry out the compliance provisions.

BWSR is required under Minn. Stat. §103F.48, subd. 1(j) to determine that the county or watershed district rule, ordinance or other official control has adequate procedures for APO issuance, enforcement and appeals. In addition, BWSR has responsibility to ensure that a county or watershed district APO Plan is consistent with the APO Plan adopted by BWSR pursuant to Minn. Stat. §103F.48, subd. 7(c).

Counties are encouraged to keep their buffer ordinance and shoreland ordinance as separate, stand-alone chapters. However, if a local shoreland ordinance is being amended for buffer law implementation, any changes should use the Minnesota Department of Natural Resources' (DNR) model language and must be approved by the DNR. The county or watershed district should coordinate DNR review concurrently with BWSR review.

BWSR believes that the compliance provisions of the water resources riparian protection requirements of Minn. Stat. §103F.48 will work most effectively through local implementation at the county or watershed district level.

A county or watershed district that elects jurisdiction under the water resources riparian protection requirements of Minn. Stat. §103F.48 has the option to elect or discontinue jurisdiction by providing written notice to the BWSR at least 60 days prior to the effective date of the change in election. Additional details on changes to the election of jurisdiction are found in Procedure 8: Election of Jurisdiction.

## Local Government Implementation and Enforcement Options:

Each county and watershed district should consult with their legal counsel in preparing and adopting rules, ordinances or other official controls for local enforcement of the water resources riparian protection requirements of Minn. Stat. §103F.48.

Counties and watershed districts that decide to elect jurisdiction have several enforcement options:

- a. Adopt BWSR's Model County Buffer Ordinance or Rule with no or only nonsubstantive changes;
- b. Adopt BWSR's Model County Buffer Ordinance or Rule with revisions that allow for local priorities that are at least as restrictive as those in Minn. Stat. §103F.48;
- c. Incorporate the water resources riparian protection requirements of Minn. Stat. §103F.48 into an existing local ordinance, rule or other official control;
- d. Use the APO authority granted in Minn. Stat. §103B.101, subd. 12a and adopt a standalone local APO plan as an official control or with one of the above options; or
- e. Implement other options that are available to counties and watershed districts in statute.

## Program Need:

Counties and watershed districts need assurance on procedural review of rule, ordinance, or other official controls that will be used to carry out the compliance provisions of the water resources riparian protection requirements in Minn. Stat. §103F.48. This includes:

- Providing clear, consistent review standards.
- Identifying a timeline and level of review.
- Determining if the rule, ordinance, or other official control includes adequate procedures for APO, enforcement, and appeals.
- Identifying potential consequences for a county or watershed district's failure to implement and enforce their rule, ordinance, or other official control once adopted per Minn. Stat. §103F.48, subd. 8.

## III. Statutory Basis

- Minn. Stat. §103F.48, subd.6 Local implementation and assistance
- Minn. Stat. §103F.48, subd. 7 Corrective Actions
- Minn. Stat. §103F.48, subd. 8 Funding subject to withholding
- Minn. Stat. §103F.48, subd.9 Appeals and validations and penalty orders
- Minn. Stat. §103B.101, subd 12a Authority to issue penalty orders
- Minn. Stat. §103B.102, subd 4. Corrective actions

## IV. Compliance Determinations

Local units of government are encouraged to consult with BWSR staff throughout the process to assist in the development of local enforcement provisions consistent with the water resources riparian protection requirements of Minn. Stat. §103F.48.

All decisions will be based on a standard of review that ensures equitable compliance provisions are in place. If the initial determination is that a county or watershed district lacks adequate controls to ensure



compliance, BWSR staff will assist that local unit of government in addressing the necessary measures to change the initial determination and bring about compliance.

## **V. Enforcement and Penalty Procedures for Noncompliance**

BWSR has the statutory responsibility to determine whether local government units that elect jurisdiction have rules, ordinances or other official controls that contain adequate provisions to ensure compliance and effective enforcement of the Riparian Protection and Water Quality Practices of Minn. Stat. §103F.48. If a county or watershed district exercising jurisdiction fails to impose their enforcement authority regarding implementation of those requirements, BWSR will notify the local government unit in writing of its concerns and the required corrective action that needs to take place. If after 60 days, the local government unit fails to correct the problem, BWSR may proceed to withhold funding as provided in Minn. Stat. §103F.48, subd. 8 and Procedure 7: Failure to Implement and could take other appropriate legal action to ensure compliance.