

Environmental Services

County Board Agenda Staff Report for W 09/05/2017

New Business:

- **Bad Axe Lake – AIS Rapid Response Request**

Enclosed Documents:

- **Minnesota Department of Natural Resources Bad Axe Lake Eurasian watermilfoil Inspection Report**
- **August 21, 2017 letter from the Bad Axe Lake Association**

On August 22, 2017, Eurasian watermilfoil was confirmed as being found in Bad Axe Lake. A copy of the Minnesota Department of Natural Resources (DNR) report on the subject is attached. The report includes some maps that show the infestation's extent which is reasonably small and thus conducive to a treatment attempt.

The Bad Axe Lake Association would like to treat the infestation through chemical application in September and again next spring. It has worked with the DNR and a treatment contractor to develop a treatment plan and accompanying cost estimate. The Association is asking the County to partner with it in the treatment project by sharing the estimated \$6,500 treatment cost 50/50. Thus the amount requested from us via our set-aside \$30K rapid response fund is \$3,250. The time-sensitive nature of the initial September treatment window requires that the matter of whether to partner in funding treatment be decided at the first of the two September Board meetings. For 2017, we budgeted \$30,000 for rapid response. The same amount is proposed for the 2018 budget. The DNR is not providing funding for Eurasian watermilfoil eradications. The exact reason for this is not known, but it is likely because there are so many lakes infested with Eurasian watermilfoil that the State does not have enough funding to go around.

Bill DonCarlos, AIS Coordinator, believes that there is a good chance to contain the infestation and slow its spread. A treatment effort will also allow us to have a case-study right in our county to reference in the future if/when there are more infestations and funding requests.

The AIS Advisory Team's input on the Bad Axe situation and funding request was solicited. Three members responded as of 8/29 when this report was written. Two members support the request. The other member does not feel we are ready to accept funding requests and would like to see a protocol developed first on how the rapid response money will be spent on treatment requests, but is willing to support funding the request having shared this concern.

The department recommends and respectfully requests that the Board approve providing the requested \$3,250 to assist the Bad Axe Lake Association in treating this infestation.

- **Buffer Law Ordinance**

Enclosed Documents:

- **Map showing counties' election of jurisdiction over buffer enforcement**
- **Board of Water and Soil Resources (BWSR) Buffer Program Enforcement Update**
- **BWSR Guidance to Counties on Buffer-Related Ordinances**
- **Department of Natural Resources Guidance for Amending a Shoreland Ordinance for Buffer Law Consistency**
- **BWSR Model County Buffer Ordinance**

Since the Board elected to enforce the Buffer Law, we are now required to create and adopt an ordinance for doing so. November 1, 2017 is the deadline by which the Minnesota Board of Water and Soil Resources (BWSR) wants our ordinance to be in place. An update from BWSR describing the remaining steps we have to take in adopting an

ordinance is enclosed. Also enclosed is a map showing which counties chose to enforce the Buffer Law and two other guidance documents from the BWSR and DNR regarding the Buffer Law ordinance process.

The BWSR created a model ordinance template (enclosed) that we can use to create our ordinance. The Buffer Law statute (MS 103F.48) states that a county exercising jurisdiction per the statute shall affirm its jurisdiction and identify the ordinance, rule, or other official controls to carry out the compliance provisions in the statute. The statute does not provide further instructive detail on what an ordinance is to contain for language. So, we might be able to write our own ordinance copy with the County Attorney's or other legal counsel's assistance if you would be so inclined.

In the model ordinance, there are two items where you may choose from available options. In Section 3, you may choose to have jurisdiction that includes or excludes public drainage systems where the County is not the drainage authority. As far as I know, there are no public drainage systems over which we are not the drainage authority so the first option is probably the one to use. In Section 6, there are three enforcement options from which to choose: 1. criminal prosecution only, 2. administrative penalty order (APO) only, and 3. both criminal prosecution and APO. The department recommends option 1.

Section 906. Agricultural Uses in the Shoreland Management Ordinance (SMO) is also affected by the Buffer Law and thus may need to be amended slightly depending on which direction you would like to go. The SMO currently requires that the shore impact zone (SIZ) be left in permanent vegetation. The SIZ ranges from a minimum of 50' on recreational development classified lakes to 75' on natural environment classified lakes. The State is giving counties the option of either making the buffer required in a buffer ordinance for public waters other than drainage ditches (which require a 16.5' width buffer) match the SMO buffer widths or vice-versa, amending the SMO buffer widths to match the Buffer Law's allowed 50' average buffer width and 30' minimum buffer width. There are very few lakes that fall under the Buffer Law, but are too small to be classified by the SMO as regulated lakes. They are mainly located in the gulch area of the Paul Bunyan Forest on either side of Highway 64 south of Kabekona Lake. Because the SMO jurisdiction covers the majority of the waterbodies affected by the Buffer Law, the department recommends using the option of placing the SMO buffer widths in the buffer ordinance.

I need to know the direction you would like to go on the various items described above so I can develop an ordinance draft and know how you would like to proceed. For example, would you like the Planning Commission (PC) to work on the draft? If so, would you like to review the draft before the PC works on it?

Other:



DEPARTMENT OF
NATURAL RESOURCES
Invasive Species Program
MnDNR – Division of Ecological and Water Resources

WATERMILFOIL INSPECTION, BAD AXE LAKE, HUBBARD COUNTY,

Location: **Bad Axe (DOW# 29020800)**

Date of inspection: **10th & 11th August 2017**

County: **Hubbard**

Type of inspection: **Eurasian Watermilfoil**

Time on Water: **7 Hours**

Results: **Confirmed**

Observer[s]: **MN DNR Staff: Lucas Raitz, Mark Ranweiler**

Hubbard County AIS Coordinator: Bill DonCarlos

Date of report: **August 12 & 15, 2017**

Author[s] of report: **Lucas Raitz, Mark Ranweiler**

On Thursday August 10, 2017, the DNR office in Park Rapids received a report of Eurasian watermilfoil (*Myriophyllum spicatum*- hereafter EWM) from Bad Axe Lake in Hubbard County. Bad Axe Lake Association was conducting a plant survey when they found some suspicious plants. The lake association collected some samples and brought it to the Bill DonCarlos, Hubbard County AIS Coordinator, who then brought them to the DNR office in Park Rapids, where Darrin Hoverson confirmed it was EWM (see photo 1).

On August 10, 2017, DNR staff along with the assistance of Hubbard County AIS Coordinator conducted a near-shore inspection of EWM. Conditions were generally favorable for the inspection, with light winds and mostly clear skies, and good water clarity. Samples were collected with a double-sided rake to confirm the presence of EWM and was also visually observed in shallow water.

On August 11, 2017, Lucas Raitz and Bill DonCarlos conducted a near-shore search for EWM on what was not completed the day prior. Conditions were generally favorable for the inspection. Additional time was spent to determine the extent and size of the EWM stand, near the reported location. Lucas Raitz and Bill DonCarlos observed some additional stand of EWM slightly north in a little deeper water (7-8 feet) then where most plants were observed.

During the inspection, we found rooted EWM growing near the point off of Just a Dream Trail (see Map 1). Plant growth of EWM was typically shallow (≥ 10 feet), and thus, near shore. Growth of EWM was fairly abundant with a few dense stands scattered in the reported location. It was not observed matted on the surface. An estimated acreage of EWM was calculated using ArcGIS, and was determined to be 1.4 acres (see Map 2). Native plants were also observed during the survey including, but not limited to, Northern watermilfoil (*Myriophyllum sibiricum*), wild celery (*Vallisneria americana*), Claspingleaf



WATERMILFOIL INSPECTION, BAD AXE LAKE, HUBBARD COUNTY,

DEPARTMENT OF
NATURAL RESOURCES Invasive Species Program
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pondweed (*Potamogeton richardsonii*), Flat-stem pondweed (*Potamogeton zosteriformis*), Bushy pondweed (*Najas flexilis*), Muskgrass (*Chara* spp.), Coontail (*Sparganium angustifolium*), Water lilies (*Nymphaea* spp.) and floating leaf pondweed (*Potamogeton natans*).

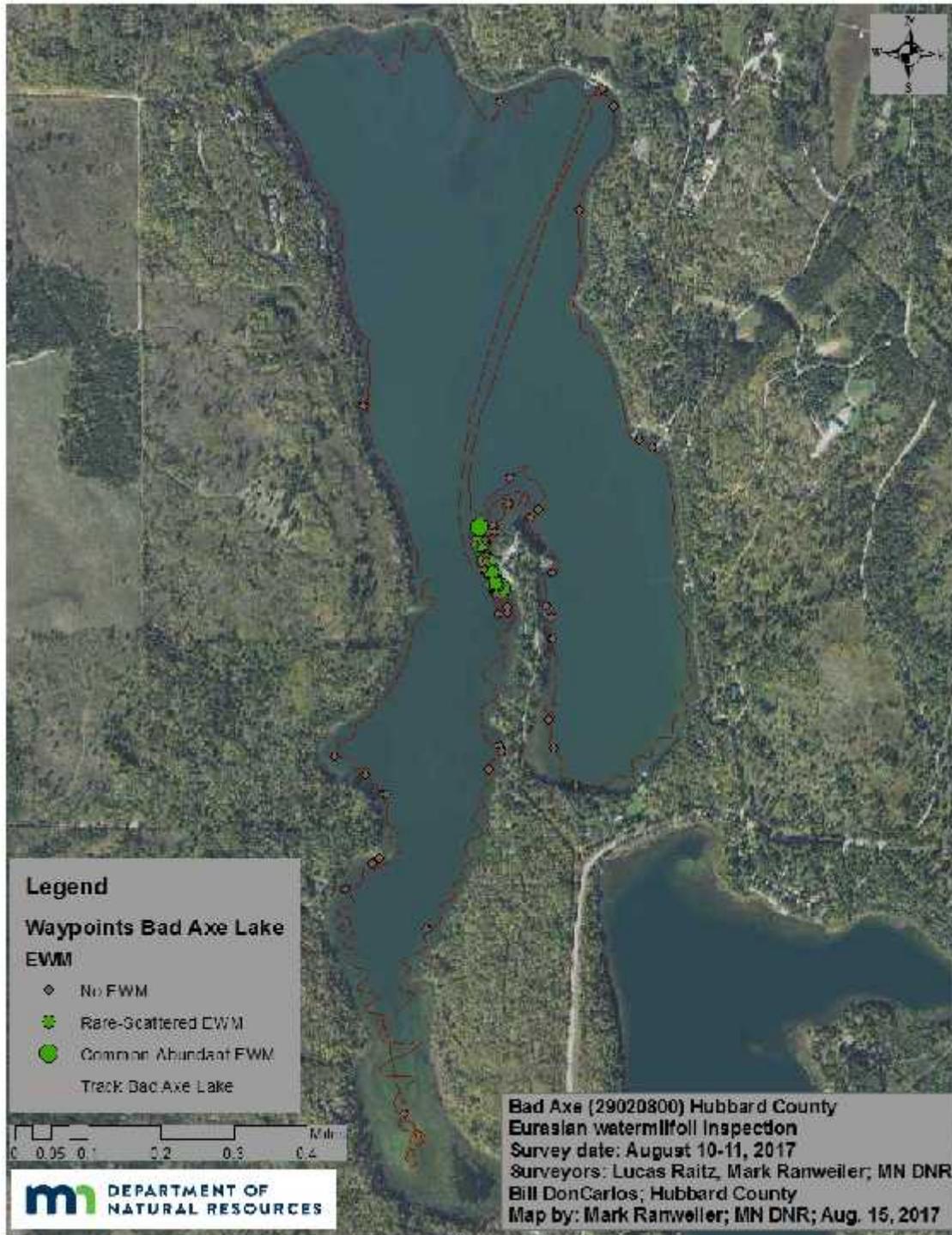
Photo 1 (top) and 2 (bottom): Eurasian watermilfoil sample that was brought to the Park Rapids Office from Bad Axe Lake (29020800), Hubbard County. Bottom photo is a section showing the leaves arranged in a whorl that was removed from one of the samples.



Photo 3: Eurasian watermilfoil collected from in Bad Axe Lake (29020800), Hubbard County during the inspection on August 10, 2017.



Map 1: Locations of Eurasian watermilfoil in Bad Axe Lake (29020800), Hubbard County.

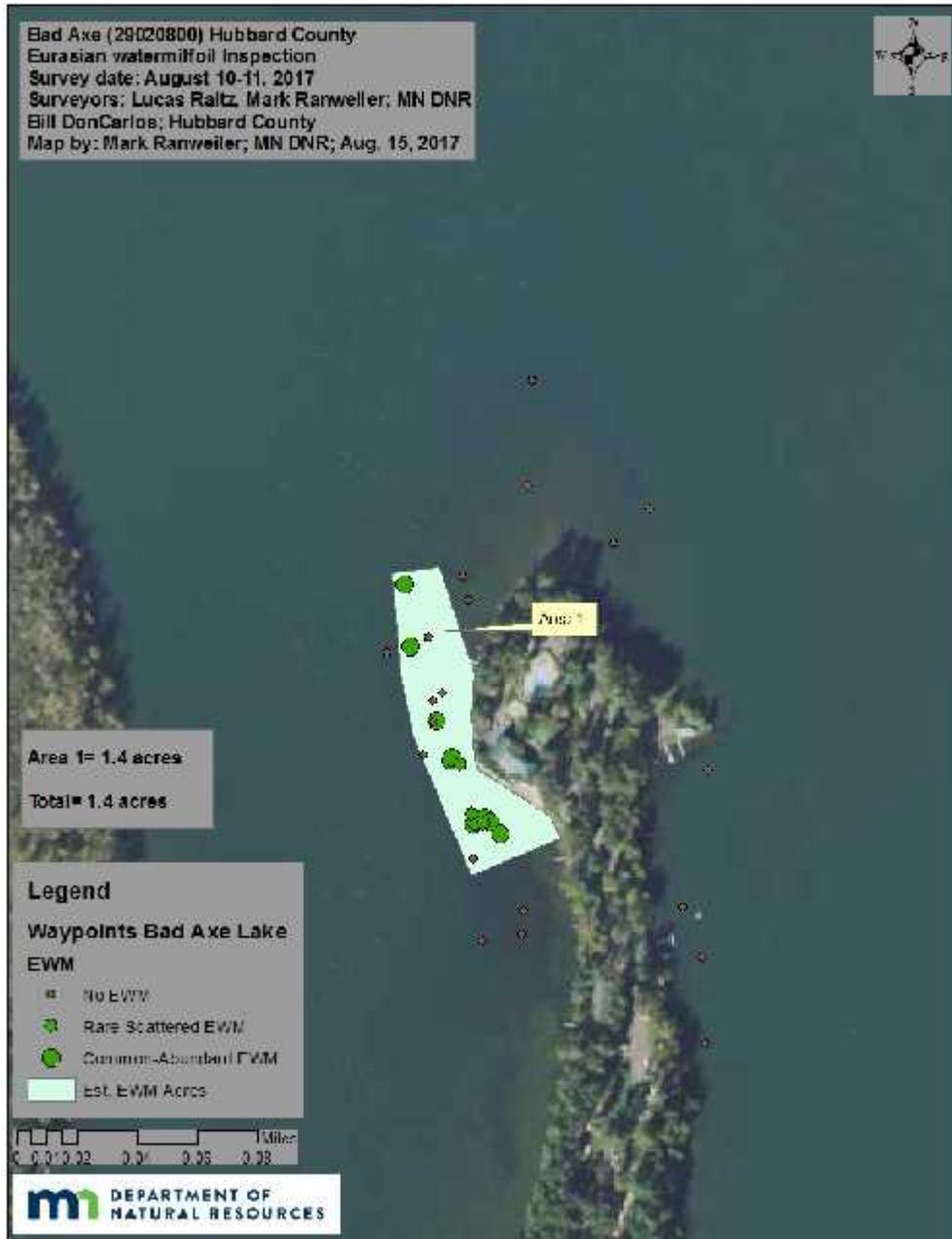


Map 2: Estimated acres of Eurasian watermilfoil in Bad Axe Lake (29020800), Hubbard County.



WATERMILFOIL INSPECTION, BAD AXE LAKE, HUBBARD COUNTY,

invasive Species Program
MnDNR – Division of Ecological and Water Resources



August 21, 2017

Bill DonCarlos
AIS Program Coordinator
Hubbard County Government Office
301 Court Ave
Park Rapids, MN 56470

Dear Mr. DonCarlos,

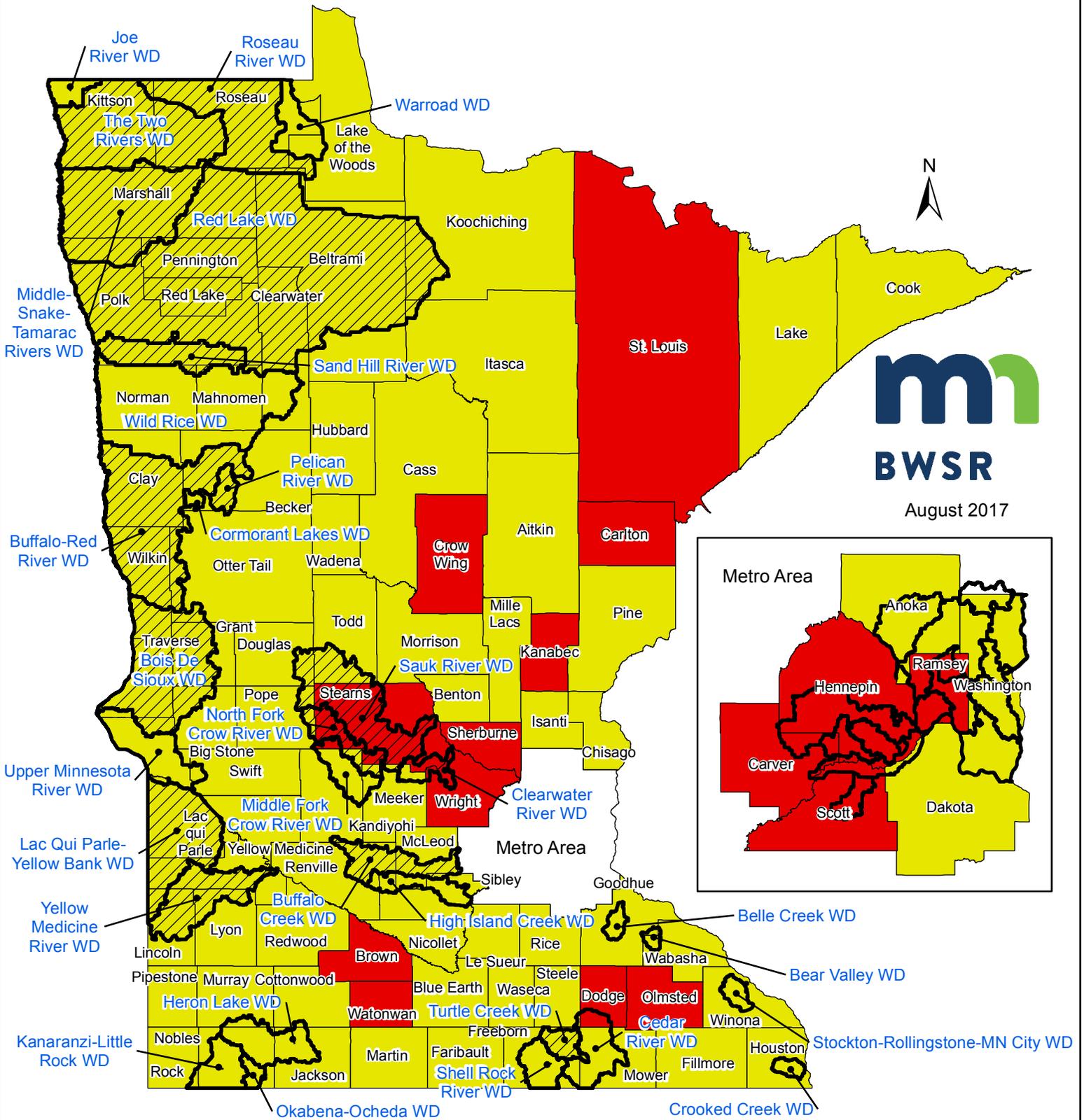
Bad Axe Lake Association is requesting from Hubbard County a grant to help with the initial treatment of the aquatic invasive species Eurasian Watermilfoil which has been identified as being present in Bad Axe Lake. The DNR has recommended chemical treatment of the AIS and referred us to PLM Lake and Land Management from Brainerd as the company to treat the identified infested area (about 1.4 acres). PLM has recommended the following treatment: a chemical application in September, 2017, \$2500, a 2018 spring survey to evaluate the treated area and look for any new areas of infestation, \$1500, and a 2018 summer chemical application to the original sight, \$2500. Total cost=\$6500.

We are asking for your help with the funding on a cost share basis: \$3250 for Bad Axe Lake Association and \$3250 for Hubbard County.

Thank you for your consideration.

Thomas Molin, AIS Coordinator for Bad Axe Lake Association
320-267-5252
tmolin@en-tel.net

Election of Jurisdiction over Buffer Enforcement



mn
BWSR
 August 2017

Watershed Districts

- Elected Jurisdiction and Enacted Enforcement Procedures
- Elected Jurisdiction
- Did Not Elect Jurisdiction

Counties

- Elected Jurisdiction and Enacted Enforcement Procedures
- Elected Jurisdiction
- Did Not Elect Jurisdiction

Buffer Program Enforcement Update August 9, 2017

This Buffer Program Update is to provide information to counties, watershed districts and soil and water conservation districts regarding the status of local government enforcement of the Buffer Law, next steps for local governments, and Board of Water and Soil Resources (BWSR) responsibilities and procedures for carrying out those responsibilities. As always, frequent communication and coordination will help ensure these next steps in the Buffer Program are completed as smoothly as possible. With that in mind, local government officials and staff are encouraged to stay in touch with your local partners and BWSR staff.

Election of Jurisdiction Status

As of June 28, 2017, a total of 72 out of 87 counties and 14 out of 46 watershed districts have elected jurisdiction to enforce the Buffer Law. A map showing this information is available on the BWSR website: http://bwsr.state.mn.us/maps/Website/Land%20&%20Water/Buffers/Election_of_Jurisdiction_7-24-2017.pdf

Next Steps for Counties and Watershed Districts

It is essential that counties and watershed districts that have elected jurisdiction and will be enforcing the buffer requirement on lands adjacent to public waters as shown on the Buffer Protection Map (<http://www.dnr.state.mn.us/buffers/index.html>) have a rule, ordinance or official control in effect on or before November 1, 2017. Development of your ordinance and rule should include the following steps:

1. Develop your draft ordinance/rule, using the model language (<http://bwsr.state.mn.us/buffers/>) as a starting point.
2. Send that draft ordinance/rule to this email address buffers.bwsr@state.mn.us and request a preliminary review by BWSR staff. Comments will be provided as soon as possible, but please provide any public hearing dates or other meetings where having BWSR comments would be desirable.
3. Incorporate the comments to the draft ordinance/rule, if any, provided by BWSR staff.
4. Re-submit your draft ordinance/rule for BWSR review if, during the public hearing process, a substantive change is made to the document.
5. Following adoption by your board, submit your ordinance/rule for a final BWSR staff review. BWSR will provide its adequacy and/or consistency determination within 60 days as provided in Procedure 9: BWSR's Review of County and Watershed Districts Buffer Rules, Ordinances and Official Controls.

The process is laid out in this manner to ensure there is early and frequent communication with BWSR staff. The goal of frequent communication is to have a smooth local adoption process and compliance with the Buffer Law.

Key BWSR contacts include:

- Board Conservationists (see work area map - http://bwsr.state.mn.us/maps/Website/Administrative%20Boundaries/BWSR%20Administrative/BC_areas.pdf)

- Tom Gile, Buffers and Soil Erosion Coordinator (507-206-2894/tom.gile@state.mn.us)
- Travis Germundson, Appeals and Regulatory Compliance Coordinator (651-297-4958/travis.germundson@state.mn.us)

Ordinance and Rule Submission

Preliminary and final ordinances should be sent to BWSR at the following email address: buffers.bwsr@state.mn.us. You should copy your BWSR Board Conservation on this email.

Resources

BWSR has a number of documents on our website that you will find useful as you draft your rule, ordinance or official control (<http://bwsr.state.mn.us/buffers/>). These documents include:

- Procedure 9: BWSR’s Review of County and Watershed Districts Buffer Rules, Ordinances and Official Controls: Provides important details on BWSR’s required review of your official controls, including that it must be submitted to BWSR at least 60 days prior to its effective date.
- Model Buffer Ordinance: This was developed with the DNR, and consulted with counties, and provides a useful starting point in the drafting of your buffer ordinance.
- Model Buffer Rule: This was developed in coordination with the Minnesota Association of Watershed Districts, and like the Model Buffer Ordinance provides a useful starting point in the drafting of your buffer rule.
- Administrative Penalty Order (APO) Plan for Buffer Law Implementation: This is the BWSR enforcement document for the 15 counties where the state is obligated to provide enforcement. It also includes a model APO Plan which may be used by counties and watershed districts which is identical to provisions in each of the models described above.
- Guidance for Buffer Related Ordinances and DNR Guidance for amending shoreland ordinances which are both helpful documents to review when thinking about how you would like your ordinance to be set up locally and ensuring consistency within different requirements of your ordinances.

BWSR Procedure 9: BWSR’s Review of County and Watershed Districts Buffer Rules, Ordinances and Official Controls:

Counties and watershed districts are advised to review this Procedure as it provides important details on BWSR authority and process to review your rule, ordinance, and official control, including future amendments. This Procedure provides that BWSR will complete its final review within 60 days and the following information regarding submission of the rule, ordinance, or official control for BWSR review:

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.*

Procedure 9 provides additional details that should be reviewed as the official control development and approval process gets underway.

Variations in Language

The question of using alternative language to that provided in the model ordinance often comes up. Every county and watershed district have their own way of doing business and there is not necessarily one “right way” to do things. Alternative language in a rule, ordinance or other official control will be acceptable so long as the intent of the language in the model ordinance or rule is met.

For example, “grandfathering” or nonconforming uses, the model ordinance provides the following:

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.

As an alternative, other counties have proposed use of this language:

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 Minnesota Statutes §394 and §462 shall not apply to compliance with this ordinance and Minnesota Statutes §103F.48.

Either would be acceptable as each has the same intent.

Relationship with Shoreland Management

BWSR has coordinated the development of the model ordinance and the state agency review process of your official controls with the Department of Natural Resources (DNR). In addition to submitting your ordinance to buffers.bwsr@state.mn.us, you should also contact your DNR area hydrologist when amending your shoreland management ordinance or substantially deviating from the model county buffer ordinance. If you have any questions you should contact Tom Gile at BWSR (507-206-2894/tom.gile@state.mn.us).

As stated previously, frequent communication among counties, watershed districts, soil and water conservation districts, and BWSR will help ensure that this process of implementing the Buffer Law provides water quality benefits and is done in a manner that works for landowners and local government alike.

Guidance to Counties on Buffer-Related Ordinances

The Minnesota Board of Water and Soil Resources (BWSR) and Minnesota Department of Natural Resources (DNR) have developed a comprehensive package of model ordinance language and operational guidance that counties may use to implement the Buffer Law (Minnesota Statutes, §103F.48). The intent of this package is to provide counties with a menu of implementation options and model language that is simple, consistent, and compliant with state law on buffers, shorelands, and public drainage systems.

This document provides specific guidance to counties on ordinance options and available model language. This guidance is not intended to provide legal advice. Counties are strongly encouraged to seek legal advice regarding the implementation of model ordinance language into their own ordinance.

Counties Electing Jurisdiction

For counties electing jurisdiction to enforce the Buffer Law, a model buffer ordinance is available on the [BWSR website](#). **This model buffer ordinance is designed to be a stand-alone chapter of a county's zoning ordinance, separate from the shoreland ordinance chapter.**

Although they are related, the Buffer Law and Shoreland Act are governed by two separate statutes with different purposes and state agency regulatory authorities. As such, counties are encouraged to keep ordinance provisions related to each program separate and distinct to minimize administrative confusion and retain program integrity long-term.

Regarding the width of buffers for public waters, counties have options under Minn. Stat. § 103F.48, subd. 3:

- **50' average/30' minimum buffer width:** If a county simply wants to enforce the 50' average/30' minimum buffer width in the Buffer Law, the model buffer ordinance contains this width by default. To alleviate potential confusion, a county should consider amending the 50' agricultural buffer requirement in its shoreland ordinance to be consistent with the 50' average/30' minimum requirement in the buffer ordinance. The DNR finds such an amendment to be substantially compliant with the statewide shoreland rules and has developed guidance and model language, which is available on the [DNR website](#).
- **≥ 50' minimum width:** If a county's shoreland ordinance requires a 50' or greater minimum width instead of the 50' average/30' minimum width in the Buffer Law, the county should plug the higher value into its buffer ordinance and eliminate the need to cross-reference the shoreland ordinance.

BWSR is the agency responsible for reviewing and approving local buffer ordinances. DNR is the agency responsible for reviewing and approving amendments to local shoreland ordinances.

Counties Not Electing Jurisdiction

Counties not electing jurisdiction to enforce the Buffer Law will not need to adopt a buffer ordinance and do not need to amend their shoreland ordinances. To alleviate potential confusion over varying standards in different laws, counties should work with their local SWCD and the entity taking on enforcement (watershed district and/or BWSR) to clarify which width will be enforced. The county may consider amending the 50' agricultural buffer requirement in its shoreland ordinance to be consistent with the 50' average/30' minimum standard in the buffer law. The DNR finds such an amendment to be substantially compliant with the statewide shoreland rules and has developed guidance and model language, which is available on the [DNR website](#). DNR is the agency responsible for reviewing and approving amendments to local shoreland ordinances.

More on Shoreland Ordinances & Enforcement

Enforcing shoreland ordinances: Whether or not a county elects jurisdiction to enforce the Buffer Law, all counties are still responsible for enforcing their shoreland ordinances (and wild and scenic river ordinances, if applicable), including any additional vegetative cutting and land alteration restrictions. These restrictions pertain to all properties in shoreland and wild and scenic river districts, not just properties with permitted agricultural uses.

Coordination with SWCDs and BWSR: It will be important for counties to coordinate with their SWCDs and BWSR to ensure that more protective buffer standards in their shoreland ordinances are adhered to when determining compliance and enforcement actions under the Buffer Law. This is especially true for counties that do not elect jurisdiction.

Restrictions on alternative practices in shoreland ordinances: Counties have the authority to prohibit or place restrictions on the use of alternative riparian water quality practices as provided in Minn. Stat. § 103F.48, subd. 3.(b) in their shoreland ordinances (see the following links: [394 - 2016 Minnesota Statutes](#), [103F.211, subp. 1 - 2016 Minnesota Statutes](#), and [6120.2800, subp. 1 - Minnesota Administrative Rules](#)).

This document produced by:

Minnesota Board of Water and Soil Resources
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Minnesota Department of Natural Resources
500 Lafayette Road
St. Paul, MN 55155-4025
651-259-5697
mndnr.gov

Last Updated: July 7, 2017

Guidance & Model Language for Amending a Shoreland Ordinance for Consistency with Minnesota’s Buffer Law – For Permitted Agricultural Uses

If a local government’s shoreland ordinance currently requires a 50-foot or greater buffer on parcels with permitted agricultural uses, the local government can keep this standard or amend its ordinance to be consistent with the 50-foot average/30-foot minimum in the Buffer Law (Minn. Stat. § 103F.48). A local government may also amend its shoreland ordinance to incorporate the use of “alternative riparian water quality practices” consistent with the Buffer Law. The Minnesota Department of Natural Resources (DNR) finds these amendments to be substantially compliant with the statewide shoreland rules. There are two steps for amending a shoreland ordinance, each explained in more detail in this document:

- 1) amending the ordinance text (per model language), and
- 2) receiving DNR approval of the proposed amendment.

Note: *The DNR and the Board of Water and Soil Resources (BWSR) have worked jointly to develop a comprehensive package of guidance and model ordinance language for implementing the Buffer Law. The intent is to provide communities with a menu of implementation options and model language that is simple, consistent, and complies with state law on buffers, shorelands, and public ditches. This guidance and model language is not intended to provide legal advice. Local governments are encouraged to consult with their own legal counsel regarding any ordinance language for implementing the Buffer Law. Check with your local BWSR Board Conservationist or DNR Area Hydrologist for more information.*

Step 1: Amending the Shoreland Ordinance Text – Model Language

The DNR will accept the following model language as being substantially compliant with the statewide shoreland rules. Additions and deletions shown are to language in Minnesota Rule, part 6120.3300, subp. 7:

- A. *The shore impact zone for parcels with permitted agricultural land uses is ~~equal to a line parallel to and 50 feet~~ an area with a 50-foot average width and a 30-foot minimum width, as measured from the ordinary high water level if identified, or the top or crown of bank or normal water level as provided in Minnesota Statutes, section 103F.48, subd. 3(c), whichever is applicable.*
- B. *General cultivation farming, grazing, nurseries, horticulture, truck farming, sod farming, and wild crop harvesting are permitted uses if steep slopes and shore and bluff impact zones are maintained in perennial ~~permanent~~ vegetation or operated under an approved conservation plan (Resource Management Systems) that includes alternative riparian water quality practices* consistent with the field office technical guides of the local soil and water conservation districts or the Natural Resource Conservation Service United States Soil Conservation Service, and as approved by the local soil and water conservation district.*

* Communities may prohibit or place restrictions on the use of alternative practices, such as requiring a minimum buffer. Goodhue County has done this using the following language:

Incorporation of approved alternative practices may reduce the overall buffer width, however the minimum width cannot be less than 30 feet.

This model language only affects agricultural land in shorelands. It does not affect land within a designated Wild and Scenic River District or the National Lower St. Croix Riverway. Required buffers and vegetative cutting restrictions in these areas may be more protective than the 50-foot average/30-foot minimum buffer and also apply.

Step 2: DNR Approval of Proposed Amendment – Process to Be Followed

The process for receiving DNR approval of amendments to shoreland ordinances follows:

1. Notify the DNR of the proposed amendments. State rules and your shoreland ordinance require you to notify the DNR *ten (10) days prior* to the public hearing to consider ordinance amendments. Notify the DNR by sending the notice of public hearing to consider the amendment and the proposed amendment text to your local DNR Area Hydrologist.
2. DNR reviews proposed amendments. The DNR Area Hydrologist will review the proposed amendments for consistency with the Buffer Law and the shoreland rules. If the amendments are consistent, the DNR will send you a letter conditionally approving the amendments prior to the public hearing.
3. Local government adopts amendments. The county board or city council adopts the amendments conditionally approved by the DNR.
4. DNR gives final approval. State rules and your shoreland ordinance require you to send the DNR the ordinance amendments within 10 days of adoption. Send the approved amendment and resolution approving the amendment to your local DNR Area Hydrologist. The DNR Area Hydrologist will review the approved amendment for consistency with the language that was previously conditionally approved. If consistent, the DNR will send you a final approval letter.

Note: *If a community adopts the model language provided in this document with no other proposed amendments, DNR review and approval will be streamlined.*

This document produced by:

Minnesota Department of Natural Resources
500 Lafayette Road
St. Paul, MN 55155-4025
651-259-5697
mndnr.gov

Last Updated: July 7, 2017



Model County Buffer Ordinance

Buffer Law Implementation

August 23, 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.
- 2.1.112 **“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.

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.

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)*.

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)*.

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. 6 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.*

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.

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.*

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. Any administrative enforcement proceeding including the issuance of an APO should be undertaken within three years after the alleged violations 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.