Guidance to Model Buffer Rule **December 14, 2016**
Minnesota Statutes §103F.48

This guidance document is a companion to the Model Buffer Rule of above date prepared for the benefit of watershed districts choosing to assume buffer law jurisdiction under Minnesota Statutes §103F.48, subdivision 7. This document explains the intent and meaning of each term of the model rule and provides additional commentary that may assist a watershed district in deciding whether to adopt the model rule as drafted or to change certain terms. The model rule is illustrative only; each watershed district board of managers should consult with its own legal counsel and exercise its own judgment in preparing and adopting its implementing rule.

General Comments

1. Under the buffer law, Minnesota Statutes §103F.48, a watershed district's formal role is limited to: (a) issuing a list of corrective actions and schedule when the soil and water conservation district (SWCD) notifies it of noncompliance and (b) subsequently considering an administrative penalty if the responsible party does not bring the property into compliance. Other elements of implementing the law, including determining its applicability to a given property, determining if a property is compliant, providing technical assistance, approving alternative practices and issuing administrative compliance determinations, are assigned to the SWCD.

2. The model rule, however, rests on the judgment that the watershed district rule to assume enforcement jurisdiction should set out the entire buffer law framework and define the roles of both the SWCD and the watershed district in its implementation. This means that the model rule includes terms to:

- Define the buffer requirement;
- State where it is required;
- Set forth the exceptions to the requirement and the option (for agricultural lands) to employ an alternative practice;
- State the use of a validation of compliance; and
- Address non-compliance by means of the corrective action process and enforcement if necessary.

In doing so, the rule preserves SWCD and watershed district roles as laid out in §103F.48 and does not alter them. However, because a watershed district would be enforcing the rule under its own Minnesota Statutes chapter 103D authority and not under §103F.48 (see General Comment 3, below), it would reserve the right, on the basis of findings, to find

noncompliance for the purpose of enforcement under chapter 103D even where the SWCD has not done so. Principally, though, it intends to accomplish coordination between watershed district and SWCD so that the district is involved in administration of the buffer law in advance of compliance issues, and not only once the SWCD has found noncompliance on a specific property.

3. Watershed district authority to adopt and implement rules derives from Minnesota Statutes chapter 103D, not from §103F.48. Under chapter 103D, a watershed district has authorities to enforce its rules other than the administrative penalty order (APO) provision of §103F.48, subdivision 7(c). These include administrative orders to cease & desist, to perform restoration activities and to provide financial assurances; the authority to recover administrative compliance costs; the ability to go to district court for injunctions, orders and cost recovery; and criminal prosecution. The model rule incorporates these enforcement tools to augment APO authority. This makes the rule slightly more complex than it might be, because the procedures and routes of appeal for administrative enforcement actions under chapter 103D and §103F.48 are not the same.

4. The model rule also offers a watershed district the option of adopting standards that are stricter than §103F.48. Keep in mind that if a parcel of land meets the standards of §103F.48 but does not meet a district's more strict standard, it may be subject to the district's compliance and enforcement tools under chapter 103D authority, but is not subject to corrective action or an APO under §103F.48. The model rule reflects this, which makes its compliance/enforcement provisions slightly more complex.

5. There are other non-technical elements that are not appropriately included in the rule text itself, but that also would need to be created for a complete buffer law implementation program:

(a) SWCD procedures and determinations;
(b) internal watershed district procedures and protocols (e.g., for inspections);
(c) the modes and manner of WD/SWCD coordination; and
(d) BWSR procedures to hear appeals.

A model memorandum of understanding (MOU) between a watershed district and an SWCD, addressing item (c), is included as an attachment to this guidance.

6. An APO is imposed under authority of Minnesota Statutes §103B.101, subdivision 12a, which states that before this authority is exercised, "the Board of Water and Soil Resources must adopt a plan containing procedures for the issuance of administrative penalty orders by local governments." ~~BWSR intends to produce the plan in December 2016. The terms of~~

~~any actual rule would need to diverge from the model rule to the extent necessary to conform to the BWSR APO plan.~~The model rule is consistent with the BWSR plan titled: "Buffer Enforcement Procedures and Administrative Penalty Order Plan" (December 12, 2016).

Section-by-Section Notes

Section 1: Policy.

This section incorporates the purposes of §103F.48 word for word. In addition, it emphasizes the intent to work in a coordinated and collaborative way with other implementing agencies, landowners and operators, and explicitly notes that the rule rests on both the buffer law and the district's authorities and mandates under the watershed law.

Section 2: Definitions.

The definitions mostly clarify shortened forms or acronyms used in the rule text. Four definitions, however, have substantive meaning for the rule:

- ~~"Agricultural practices""~~"Cultivation farming" defines those actions that are not allowed in the buffer (see paragraph 4.1.4). The definition focuses on protecting soil and root structure.

- "Operator" is a term used in the buffer law, but not defined there. The term means a party other than the landowner that is directly or indirectly responsible for the condition of riparian land subject to a buffer under this rule.

- "Riparian protection" defines the types of projects that may qualify for the NPDES MS4 exemption in place of a buffer (see paragraph 4.3.5). The buffer law states that a qualifying project must provide "water resources riparian protection." BWSR "Policy 3: MS4 Exemption" (August 25, 2016) advises it must be a project "managed or sponsored" by an MS4 that provides water quality protection comparable to the buffer. The "riparian protection" definition therefore: (a) requires a water quality outcome equivalent to the buffer for the waterbody to which the buffer would be riparian; and (b) defines MS4 "management or sponsorship" to mean that the MS4 owns, operates or has a legal right to maintenance of the project.

- "Structure" is an element that §103F.48, subdivision 5(3), allows to remain within a buffer. The definition in the model rule is adapted from the comparable definition in

the Minnesota Department of Natural Resources (MnDNR) model shoreland rule at Minnesota Rules 6120.

Section 3: Data sharing/management.

Subsection 3.1 affirms the district's authority to share data with other agencies to implement the rule.

To address any concerns of landowners or operators as to how specific information about their land and practices will be managed, subsection 3.2 assures them that the district will protect non-public data about their land, if any, in accordance with the Minnesota Data Practices Act, Minnesota Statutes chapter 13.

Section 4: Vegetated Buffer Requirement

This section sets forth the basic terms of the buffer law: the buffer width and restrictions on activity within the buffer, the waterbodies to which it applies, what lands are exempted from the requirement, and the opportunity to substitute an alternative practice in place of a buffer. Much of this section incorporates the terms of §103F.48. However, in several important ways it interprets terms used in the buffer law but not defined there, and sets forth procedures for certain administrative actions for which the buffer law provides.

Subsection 4.1 states the §103F.48, subdivision 3(a), mandate that a buffer be maintained adjacent to waterbodies as mapped by the MnDNR. It also references an addendum that would accompany the rule to name all additional watercourses recommended for protection by the SWCD, pursuant to §103F.48, subdivision 4, to which the watershed district chooses to apply the buffer requirement. (If the district does not choose to apply the requirement to any such added watercourses, this term would be omitted.)

- Paragraph 4.1.1 clarifies the wording of §103F.48, subdivision 3(a)(1), by stating that a public water buffer is 50 feet wide or to the landward edge of the applicable shore impact zone under the MnDNR shoreland rule, whichever wider.

- Paragraph 4.1.2 states the standard buffer width required for a public drainage system.

- Paragraph 4.1.3 incorporates published BWSR guidance to determine "normal water level" and specifies that drainage channel "top or crown of bank" is to be determined in accordance with drainage law practice.

- Paragraph 4.1.4 applies the definition of ~~agricultural practices~~cultivation farming from section 2.0 to limit the land management practices allowed on buffers. The intent is to maintain perennial growth and limit disturbance of root and soil structure.

> *Commentary: §103F.48 provides an exemption for buffers temporarily in a nonvegetated condition during seeding for alfalfa or other perennial crop. The district may wish to define acceptable seeding or interseeding practices in the rule, or may prefer to work with landowners or operators more informally to accommodate the exception while maintaining the water quality function of the buffer.*

Subsection 4.2 identifies the waterbodies subject to buffers under §103F.48 over which the district is exercising jurisdiction. This subsection is necessary only if the watershed district is not assuming jurisdiction over all public waters and public drainage systems.

The BWSR document titled "Initial Election of Jurisdiction" (November 27, 2016) states BWSR policy as to how jurisdiction over waters subject to buffers under §103F.48 should be allocated as among counties, watershed districts and BWSR. The policy proposes that a county have the first right to assume jurisdiction over public waters, based on the likelihood that it is the local agency responsible for enforcing the state shoreland program, Minnesota Statutes §§103F.201-103F.227. It also proposes that the county have the first right to assume jurisdiction over all public drainage ditches for which it is the drainage authority. Conversely, it proposes that a watershed district have the first right to assume jurisdiction over all public drainage ditches for which it is the drainage authority. However, coordination between watershed district and county is encouraged, and jurisdiction may be allocated differently as may be agreed, or may be deferred to BWSR.

This section should be drafted to clearly state the waters, or categories of waters, subject to §103F.48 to which the rule applies.

~~The model rule offers two choices: the district exercises jurisdiction over all public waters other than public drainage systems, or it exercises jurisdiction over none (i.e., the county assumes jurisdiction). The rule assumes that as between the watershed district and a county, each entity will exercise jurisdiction over any public drainage system (whether also a public water or not) for which it is the drainage authority.~~

~~The allocation of jurisdiction is to be decided by the district and its counties (and should be formally documented in some manner), and there are outcomes other than the above. For example, the county and the district may determine that the district will exercise jurisdiction over all public drainage system buffers, even those for which the county is the drainage authority. Depending on BWSR guidance, an option may exist for the district and/or the county to retain jurisdiction partly, and defer jurisdiction over some waters to BWSR.~~

Subsection 4.3 largely reiterates the exceptions to the subsection 4.1 buffer requirement from §103F.48, subdivision 5. Four of these exceptions are given further definition:

- In paragraphs 4.3.2 and 4.3.3, where the applicable shoreland rule or MnDNR model shoreland rule does not limit the dimensions of the water access/recreational use or water-oriented structure exception, it is limited to an area that is "reasonably necessary." The watershed district can define this more precisely if it chooses.

  Commentary: It should be noted that local government shoreland management controls adopted pursuant to Minnesota Rules 6120.2800 will apply independently of this rule. A proposed activity subject to both rules will need to meet the standards of both official controls.

- Paragraphs 4.3.3 and 4.3.4 allow for certain "structures," a term that is defined in section 2.0 consistent with the MnDNR shoreland rule.

- The NPDES stormwater exemption at paragraph 4.3.5 is defined by reference to the section 2.0 definition of "riparian protection," as explained above.

  Commentary: A district may undertake to define any other terms such as "access area," "road," and so forth. These terms are not defined in the MnDNR model shoreland rule, drainage code or any other related statute or rule.

In accordance with §103F.48, subdivision 3(b), subsection 4.4 states that a parcel subject to a buffer under subsection 4.1 may meet the requirements of that subsection by way of an alternative riparian water quality practice. A landowner or operator may institute a practice approved by BWSR through a formal process that BWSR is establishing, or may present a practice to the SWCD for review and approval.

- Paragraph 4.4.1 identifies the SWCD "validation of compliance" ~~for which~~that §103F.48, subdivision 3(d), provides as the administrative mechanism for SWCD

approval of an alternative practice, and articulates the approval standard that the SWCD will apply, namely that the practice provides water quality protection comparable to that which the buffer would provide.

- Paragraph 4.4.2 expresses a significant policy choice: it states that an alternative practice is not recognized for compliance with the rule unless the SWCD has issued a validation approving it. Section 103F.48 does not explicitly state that the SWCD must approve an alternative practice for agricultural land. In other words, a landowner or operator may forego a buffer in reliance on what it believes is an adequate alternative practice; if and when the SWCD or watershed district raises a compliance question, the landowner or operator would point to the alternative practice and the SWCD would determine if it were or were not adequate. The proposed rule rests on the judgment that it is preferable, for effective protection, efficient administration and good relationships, for the SWCD to work with landowners and operators to provide for well-designed practices up front, rather than being put in the difficult position of evaluating *ad hoc* alternative practices after the fact.

  Commentary: The rule does not specify the method or methods an SWCD must use to evaluate alternative practices for "comparable" benefit. The watershed district and its SWCDs may elect to work together to determine a methodology for the SWCD to generate uniform, consistent decisions regarding validation of compliance requests. At the request of an SWCD, the district may select one or more tools that an SWCD will use as the accepted method within its jurisdiction, or the SWCD may establish its own consistent method and practice. It is expected that over time methods will be developed and refined and there will be general convergence across the community as to best methods.

Subsection 4.5 establishes the validation of compliance under §103F.48, subdivision 3(d), as the means for a landowner, agent or operator to affirm: (a) compliance, (b) the applicability of an exemption, and (c) the acceptability of an alternative practice. In accordance with the assignment of roles under §103F.48, if the SWCD issues a validation, the district will deem this determinative as to compliance under §103F.48. However, as General Comment 2 above notes, the text allows a watershed district to find noncompliance, and pursue enforcement, under its independent chapter 103D authority, even if the SWCD has issued a validation of compliance, provided the district can make the findings on which to rest its decision.

Subsection 4.6 places the buffer rule into a permitting framework. This subsection does not require that landowners formally apply for or receive permits, but instead establishes a

"general permit" that landowners will be deemed to hold if they are in compliance with section 4.0. Noncompliance with section 4.0 will mean that a landowner will not hold the general permit and therefore will be in violation of the permit requirement.

Minnesota Statutes §103D.345 allows a watershed district to recover inspection and compliance costs for activity authorized by permit. Under the general permit framework, a district, by means of a compliance order under §103D.545, may require a security escrow from a non-compliant responsible party and may recover its compliance-related costs.

Section 5: Drainage System Acquisition or Compensation for Buffer or Alternative Practice.

The buffer law, at §103F.48, subdivision 10(b), allows a drainage authority to incorporate a buffer into a public drainage system by means of the process to acquire grass strips, maintain the buffer and treat the cost as a drainage system cost. This section sets a framework for a landowner to petition for this, or for the watershed district as drainage authority to do so on its own initiative~~, generally for all lands riparian to public ditch within a given drainage system that do not already have grass strips~~. The text makes clear, consistent with §103F.48, that a drainage authority decision to do this is purely discretionary and not appealable. If the district elects to incorporate the buffer, the process will follow drainage code procedures and the compensation determination will be appealable as the code provides. The rule also notes that if a public drainage system also is a public water, the district as drainage authority will incorporate only the first 16.5 feet of the buffer into the drainage system.

Under the authority of subsection 5.2, the district as drainage authority may acquire a single buffer riparian to a public ditch. However, if there is a rationale to do so, it may apply equally to all lands riparian to public ditch within a given public drainage system that do not already have grass strips. Under this authority, the district may acquire all such buffers in one proceeding. If the district intends to acquire only select buffers, it should consider findings that distinguish the buffer(s) to be acquired from those that will not be.

> *Commentary: The cited provision in the buffer law also allows a drainage authority to incorporate an approved alternative practice into the drainage system by the same process. The model rule reflects the judgment that incorporating practices other than buffers, among other things making the drainage authority responsible to maintain such practices, would be atypical and not likely of interest to a drainage authority. If a district would like to have the option to incorporate alternative practices, however, the rule easily can be expanded to allow that.*

Section 6: Action for Noncompliance.

Under the buffer law, the principal formal role of the watershed district is to issue a list of corrective actions and schedule to a responsible party when notified of noncompliance by the SWCD, to monitor correction and if not corrected, to pursue an administrative penalty as appropriate. Section 6 largely follows the statutory process for issuance of a corrective action list and schedule, but fills out the process.

Subsection 6.1 identifies the three routes by which potential noncompliance may come to the attention of the district or SWCD: by means of SWCD, district or third party observation. It makes clear that all such information will be transmitted to the SWCD so that the SWCD will make the compliance judgment, as §103F.48 intends. ~~This subsection states that absent SWCD notification of noncompliance, the district will take no action under §103F.48. However, if the district finds noncompliance it may act under its independent chapter 103D authority.~~

Under subsection 6.2, the SWCD would send a "notice of potential noncompliance" to the district before it transmits a formal notice of noncompliance that initiates action by the district. The notice of potential noncompliance would initiate consultation and coordinated action by the SWCD and District to allow the SWCD to make a sound and substantiated finding of noncompliance. The SWCD may not have had the capacity to confirm noncompliance with the level of reliability that is desired before commencing formal compliance action; for example, the SWCD may not have been able to secure landowner or operator consent to inspect and may not have the authority to enter the land without consent, or may not have wished to exercise that authority. The interim SWCD notice would allow for the SWCD and the district to consult, determine appropriate additional fact-finding steps, and preferably concur that noncompliance is adequately demonstrated before the district formally issues a corrective list and begins to invest resources in compliance activity.

This subsection states that absent SWCD notification of noncompliance, the district will take no action under §103F.48. However, if the district finds noncompliance it may act under its independent chapter 103D authority.

Subsection ~~6.2~~6.3 sets forth the district's authority to issue the corrective action list and schedule. It affirms that the district will consult available information and use its judgment to develop the specific terms, and will keep a good record to support its action for the benefit of any later enforcement action.

The following subsections address specific elements of the subsequent process by which voluntary correction by the landowner is sought:

- Paragraph ~~6.2.1~~6.3.1 states the mechanics for delivering the corrective action list and schedule to the responsible landowner, agent and/or operator.

- Paragraph ~~6.2.2~~6.3.2 specifies the content of the corrective action list and schedule.

- Paragraph ~~6.2.3~~6.3.3 recognizes and allows for informal communication between responsible parties and the district during the period after the corrective action list and schedule is issued to clarify factual circumstances, report on actions taken and allow for the district to adjust the list and schedule, or to conclude that the enforcement process should not be further pursued. This supports the rule's policy that cooperation be favored over adversarial compliance action.

- Paragraph ~~6.2.4~~6.3.4 recognizes that a landowner or operator may apply to the SWCD at any time for a validation of compliance. If a landowner or operator believes that the corrective action list and schedule has been wrongly issued, or believes that the noncompliance has been corrected, the SWCD may be asked to validate compliance. If a validation is submitted to the district, then the district will deem this conclusive for the purpose of §103F.48 and will close the compliance process under that statute. The subsection notes, again, that the district need not treat this as conclusive for its own independent enforcement authority under chapter 103D.

- Paragraph ~~6.2.5~~6.3.5 states, importantly, that the corrective action list and schedule is not a formal action that a responsible party may appeal. The buffer law specifically provides for appeal of an SWCD validation of compliance determination to BWSR, so a responsible party always has a formal right to contest an assertion of noncompliance. A corrective action list and schedule, however, is just a watershed district statement of what a responsible party must do to avoid the district's commencing a formal enforcement action.

Section 7: Enforcement.

Subsection 7.1 identifies all enforcement options. It explicitly separates the administrative penalty authority of §103F.48 from the other enforcement tools under chapter 103D, and sets out the different procedures that apply to each of these two enforcement routes.

Subsection 7.2 restates the terms of §§103F.48 and 103B.101, subdivision 12a, as to the ordering of an administrative penalty, how days of noncompliance are determined, and the potential penalty. The subsection provides for a maximum penalty of $500 for each day of noncompliance after the 11-month correction period has ended, and also clarifies that the penalty will be considered on a parcel basis, since this is the basis that BWSR has identified for compliance determinations.

> *Commentary: §103B.101, subdivision 12a, specifies "monetary penalties up to $500 for noncompliance commencing on day one of the 11th month after the noncompliance notice was issued." This is not entirely unambiguous as to whether $500 is the total maximum penalty, or a per-day maximum, however the term "commencing on" suggests a penalty that accrues. Accordingly, the rule stipulates a maximum penalty of $500 for each day of noncompliance.*

While the district board of managers may consider the circumstances and apply its judgment in setting a penalty, the model rule incorporates a penalty framework within which board judgment would be exercised. This framework sets a penalty that is below the maximum authorized by statute, but provides for escalation in order to create a compliance incentive. The maximum penalty is $100 per parcel per month for the initial six months of noncompliance following the correction period, increasing to a maximum of $500 per parcel per month thereafter. On a second penalty order or thereafter, these maximum penalty amounts would accrue on a daily rather than monthly basis.

Note also that nothing prevents a district from undertaking administrative proceedings or other enforcement before the eleven-month correction period has elapsed. Remedies under chapter 103D may be pursued immediately on observing noncompliance, should the watershed district find that circumstances so warrant. An APO could be imposed before the end of the correction period; however, if the responsible party achieves compliance before the end of the correction period, presumably the APO would be moot. Generally it would not make sense to hold an administrative penalty hearing and issue an APO substantially in advance of the end of the correction period, since the responsible party's actions during the correction period likely would be relevant to the penalty determination.

This subsection also recognizes that if the district modifies the corrective action list and schedule under paragraph 6.2.3, this may affect whether the correction period is deemed to have "restarted" for the purpose of determining when an administrative penalty would begin to accrue. The rule indicates that the correction period doesn't change unless the change to a corrective action or schedule is substantial.

Subsection 7.3 states the information that an administrative order will contain. Findings that clearly set forth the violations found, the remedy that is necessary, and the facts supporting the need for that remedy are important to establish an order that will be upheld and enforced, if appealed.

Subsection ~~7.3~~7.4 provides for basic elements of due process in notice of and the conduct of an administrative compliance hearing.

Subsection ~~7.4~~7.5 states the authority of the district board of managers to issue an administrative order after hearing.

- Paragraph ~~7.4.1~~7.5.1 states factors the district board of managers will consider in setting the administrative penalty, including "other factors as justice may require" so to preserve the board's judgment and its ability to consider any relevant circumstances that the rule's list of factors fails to include.

- Paragraph ~~7.4.2~~7.5.2 specifies delivery of the administrative order to the landowner and other responsible parties, and the route to appeal the order. A complexity of including both §103F.48 and chapter 103D enforcement tools is that a single administrative hearing can serve for both a §103F.48 administrative penalty and chapter 103D administrative remedies, but an appeal would go in two different directions. An APO would be appealed to BWSR and then the Minnesota Court of Appeals; an administrative order under chapter 103D would be appealed to the district court. These are a matter of statute and cannot be altered by the district rule.

- Paragraph ~~7.4.3~~7.5.3, in accordance with §103F.48, subdivision 7(d), allows the board of managers to reopen an APO to forgive any part of the penalty if the responsible party has diligently made corrections.

Subsection 7.6 provides that an administrative penalty is due at the time stated in the penalty order. This will be at least 30 days after the date of the order, to allow for the exercise of the right to appeal. This subsection affords the district flexibility, for example, to address the date of penalty payment whether an order is issued before or after the end of the correction period. It also allows the district, with guidance of legal counsel, to provide for accrual of the penalty beyond the date of the order, if the noncompliance has not yet been addressed.

Subsection ~~7.5~~7.7 incorporates the text of §103F.48, subdivision 7(g), that obligates an operator to protect a buffer or alternative practice installed by a landowner absent the

landowner's signed statement that the buffer or practice legally may be disturbed. An operator's action contrary to this subsection will make the operator subject to the administrative penalty and other remedies for which the rule provides.

Subsection ~~7.6~~7.8 makes clear that with respect to any public drainage system subject to the rule, the district as drainage authority retains, independent of the rule, all powers it may possess under the drainage code with respect to grass strips and any other elements of the system.

Section 8.0: Effect of Rule.

Subsection 8.1 is standard text that preserves the validity of the rule if one part of it should be judged invalid.

Subsection 8.2 reflects the fact that before a watershed district assumes the enforcement role, BWSR must find that its rule is adequate. For that reason, any amendment to the rule must receive BWSR concurrence as well.