

STATE OF MINNESOTA
BOARD OF WATER AND SOIL RESOURCES

In re Clean Water Fund Watershed-Based
Implementation Funding Program

PETITION FOR RULEMAKING

TO: Mr. Gerald Van Amburg, Chair
Minnesota Board of Water & Soil Resources
520 Lafayette Rd.
St. Paul, MN 55155

PETITIONER: Minnesota Association of Watershed Districts
595 Aldine Street
Saint Paul, MN 55104

SPECIFIC ACTION REQUESTED:

The Minnesota Association of Watershed Districts (MAWD) hereby submits this Petition for Rulemaking pursuant to Minnesota Statutes Section 14.09 and Minnesota Rules 1400.2040, 1400.2500, requesting specifically that the Board of Water and Soil Resources adopt its proposed enhanced soil and water conservation district (SWCD) planning process in the Metropolitan area through formal rulemaking, or in the alternative abandon this proposal and require all Watershed-Based Implementation Funding be allocated through the existing means of water resource planning on watershed boundaries under Minnesota Statutes §103B.231.

NEED FOR THE REQUESTED ACTION:

1. On October 27, 2021, the BWSR Board adopted an Order concerning the Clean Water Fund Watershed-Based Implementation Funding (WBIF) Program (hereinafter "Board Order"). The Board Order "establishe[d] the content and process for Metro Soil and Water Conservation Districts to develop an enhanced comprehensive plan consistent with Minnesota Statutes §103C.331 if the SWCD determines that an eligible 103B plan does not sufficiently and comprehensively include their activities. The plan content must include priority issues, measurable goals, and a targeted implementation action table. The process must include stakeholder input, establishment of an advisory committee, a public notice and comment period, a public hearing, and BWSR Board approval." In contrast to the detailed requirements for watershed management organizations established by BWSR through formal rulemaking in Minnesota Rules Chapter 8410, this planning requirement was the product of a hurried, abbreviated process without appropriate notice and comment or deliberation.
2. It is vital at the outset for MAWD to acknowledge that Soil and Water Conservation Districts (SWCDs) are critical partners in water resources management. The Local Government Roundtable

alliance of the MN Association of SWCDs (MASWCD), the Association of Minnesota Counties (AMC) and MAWD indeed fostered the One Watershed One Plan legislation as a key instrument to implement Minnesota's Clean Water Legacy. It is also vital to recognize that the fundamental purpose of One Watershed One Plan is to "align local water planning purposes and procedures . . . **on watershed boundaries** to create a systematic, watershed-wide, science-based approach to watershed management." §103B.801, subd. 2 (emphasis added). Unfortunately, Paragraph 2 of the adopted Board Order departs from this commitment in law to water resource planning on watershed boundaries.

3. MAWD also recognizes the complexity and challenge of adopting a sound Clean Water Fund WBIF Program. It is that complexity and challenge of promulgating a cohesive and comprehensive framework that compels a more formal rulemaking approach, and as noted below, it is what the legislature and courts of Minnesota require. MAWD agrees with the proposed policy shift as to how WBIF funds will be allocated in this biennium. This shift will move from the 10 metropolitan "convene" areas and instead allocate funds to 24 "Watershed Planning Areas" (WPAs) that are contiguous with watershed district/watershed management organization (WD/WMO) boundaries. This will largely remove the extra planning and coordination layer and allow local water agencies and units of government to coordinate WBIF spending through the §103B.231 watershed management plans (WMPs) developed and implemented by metropolitan watershed districts and other watershed management organizations. However, there are several features of the revised policy about which MAWD has concern and that merit more careful consideration by BWSR and all the parties working collaboratively for effective and efficient management of water resources. These include the following:

- Under the proposed policy, WDs and WMOs, SWCDs, counties and municipalities must "coordinate ... before submitting a watershed-based implementation funding budget request that is prioritized, targeted and measurable." How this will occur, however, does not appear to have been thought through. For WPAs that cross county boundaries, there will be multiple SWCD and potentially county roles to coordinate. By virtue of §103D.337, WDs already maintain and work with standing technical advisory committees (TACs) staffed by SWCD, county and municipal interests. It would be most efficient, and most aligned with watershed-based priorities, for existing WPA TACs to formulate WBIF budget requests in alignment with the WMP.
- The draft proposal that we have reviewed by which SWCDs may develop "enhanced comprehensive plans" ("Metro Enhanced SWCD Comprehensive Plan Options," 9-8-21) would seem inefficient and unnecessary. WMPs, through a collaborative process, are required to establish measurable watershed-based goals (Minn. Rules 8410.0080) and set forth prioritized implementation actions to achieve those goals that define the responsibilities of the WMO, SWCDs, cities/towns and others in carrying out those actions (Minn. Rules 8410.0105). Our review of WMPs for the 23 WDs/WMOs encompassing the metro area finds that all but two of them explicitly identify SWCD implementation actions and roles.
- In short, with the logical shift of metro WBIF allocations to watershed-based units following existing WD/WMO boundaries, a principal advantage is that WBIF budget requests can be derived directly from WMPs already required to be prepared to identify watershed priorities and measurable goals and to determine the projects and programs that will achieve these goals,

and which units of government are best suited to carry them out. Procedures under Chapter 8410 allow for implementation programs to be amended to incorporate changes over the 10-year life of the WMP. A parallel track by which a separate SWCD plan is prepared and reconciled with the WMP no longer serves a purpose.

- Further, the procedures for enhanced SWCD comprehensive plans outlined in the draft document are not fully developed. We know that any plan prepared to support the use of state water funds must be watershed-based. We know that it must formulate measurable goals, identify priority areas to meet those goals, set forth a targeted implementation schedule, and establish performance-based criteria to select project and program investments of state funds. (Minn. Stat. §§103A.212; 103B.101, subs. 5, 14; 103B.801, subs. 2-5; 103B.3369, subd. 9, 103C.405.) It is unwieldy to graft these criteria onto the §103C.331 comprehensive plan, which in contrast to the WMP, is not conceived by statute as watershed-based or guided by any of the indicated criteria. The BWSR draft proposal is not clear as to how conformance to these criteria will be assured, particularly for the proposed routes of the 2- to 5-year enhanced plan supplement and the 2-year enhanced biennial work plan which, in the present draft, BWSR staff may not intend even to see and review.

4. The "Metro Enhanced SWCD Comprehensive Plan Options" draft appears to be a somewhat hurried borrowing from Minnesota Rules Chapter 8410 governing WMP development by WMOs. As noted above, we think this mechanism for "enhancing" SWCD comprehensive plans is unnecessary and simply risks diverting time and attention from the collaborative implementation of the WMP. But to the extent BWSR does determine it should create this parallel track, comparison to Chapter 8410 evidences that BWSR should do so not by internal drafting and rapid internal approval and implementation by staff without board consideration of proposed policies, but through a proper and deliberative rulemaking process – as is legally required.

5. BWSR is directed to adopt policies for SWCD preparation and BWSR approval of §103C.331 comprehensive plans. Minn. Stat. §103C.501, subd. 6. The policy in question qualifies as a rule as defined in Minnesota Statutes §14.02, subdivision 4, and so must be further formulated and adopted in accordance with rulemaking procedures under the Minnesota Administrative Procedures Act (Chapter 14). Judicial decisions affirm that agency determinations of broad policy to guide future action must follow rulemaking procedures. *E.g., Matter of Intra-LATA Equal Access*, 532 N.W.2d 583 (Minn. App.1995). Under Minnesota law, an agency is required to follow formal rulemaking procedures for either legislative or interpretive rules. *Id.* Failure to follow formal rulemaking procedures for rulemaking "results in invalidity of the rule." *Coalition of Greater Minn. Cities v. Minn. Pollution Control Agency*, 765 N.W.2d 159, 168 (Minn. App. 2009) (quoting *White Bear Lake Care Ctr., Inc. v. Minn. Dep't of Public Welfare*, 319 N.W.2d 7, 9 (Minn. 1982)), review denied (Minn. Aug. 11, 2009).

6. As the Minnesota Court of Appeals acknowledged in *Matter of Intra-LATA Equal Access*, courts do recognize that an agency may choose to forego rulemaking for specific reasons, namely, if: (1) notice and comment procedure alone will be inadequate to permit the agency to understand all the important implications of a rule; (2) the decision is too closely imbedded in the particular facts to be stated in a general rule; (3) the agency may have insufficient experience with a particular problem; or (4) the problem is "so specialized and varying in nature as to be impossible to capture within the boundaries of

