

# Minnesota's Buffer Law

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# The Riparian Protection and Water Quality Practices Law

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- As part of the appropriations bill for agriculture, environment, and natural resources passed during the special session in June 2015, the legislature passed the so-called Buffer Law.
- The Buffer Law is found primarily at Minn. Stat. 103F.48.
- Generally, requires that landowners around certain surface waters maintain vegetative buffer strips, with a goal of protecting waterways from erosion and runoff pollution, stabilizing shores, and providing riparian corridors.

# Where Buffers are Required: Public Waters

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- Around “Public Waters” landowners must maintain a buffer with a 50-foot average width and 30-foot minimum width. Minn. Stat. 103F.48 subd. 3(a)(1)(i)
  - Unless more restrictive local rules apply.
  
- “Public Waters” consist of:
  - “Public waters that are on the public waters inventory as provided in Section 103G.201” Minn. Stat. 103F.48 subd. 1(i)
  - DNR’s public waters inventory map – created in late 70s/early 80s
    - [http://www.dnr.state.mn.us/waters/watermgmt\\_section/pwi/maps.html](http://www.dnr.state.mn.us/waters/watermgmt_section/pwi/maps.html)
  - Can include private ditches if they are classified as public waters

# Where Buffers are Required: Public Drainage Systems

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- Around “Public Drainage Systems” landowners must maintain a buffer with a 16.5-foot (1 rod) minimum width. Minn. Stat. 103F.48 subd. 3(a)(2).
  - Measured from the top or crown of the ditch bank.
  
- Public drainage systems are those established under Minn. Stat. ch 103E.

# Where Buffers are Required: Buffer Protection Map

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- ❑ The buffer law requires that the DNR establish a “Buffer Protection Map.” Minn. Stat. 103F.48 subd. 1(d)
- ❑ The map supposed to all waters, including both Public Waters and portions of Public Drainage Systems, that will be protected by the law.
- ❑ Landowners with property adjacent to a water body identified on the map must maintain buffers around those waters.
- ❑ Map was completed May 2016, updates made through late Sept.: <http://arcgis.dnr.state.mn.us/gis/buffersviewer/>

# What is a Buffer?

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- ❑ A buffer is “an area consisting of perennial vegetation, excluding invasive plants and noxious weed, adjacent to all bodies of water within the state and that protects the water resources of the state from runoff pollution; stabilizes soils, shores, and banks; and protects or provides riparian corridors.” Minn. Stat. 103F.48 subd. 1(c).
- ❑ Native plants and grasses are preferred, but not required.
- ❑ Unless an exception applies or an alternative practice is adopted, landowners must maintain vegetative buffers as described above around protected waters.

# Alternative Riparian Water Quality Practice

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- In lieu of establishing a buffer, a landowner cultivating land for agriculture may comply with the buffer law by adopting an alternative riparian water quality practice:
  - Practices based on Natural Resource Conservation Service Guide, or
  - Practices approved by the Board of Water and Soil Resources (BWSR). Minn. Stat. 103F.48 subd. 3(b)
- The alternative practice must provide water quality protection comparable to that of a buffer strip.

# Alternative Riparian Water Quality Practice

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- June 28, 2017 BWSR approved “Common Alternative Practices”
  - Technical guidance on practices that comply with buffer law.
  - [http://bwsr.state.mn.us/buffers/alternative\\_practices\\_technical\\_guidance.pdf](http://bwsr.state.mn.us/buffers/alternative_practices_technical_guidance.pdf)



# Alternative Riparian Water Quality Practice

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## □ Common Alternative Practices:

- #1 - Compliance with the Minnesota Agricultural Water Quality Certification Program
- #2 - Compliance with Natural Resources Conservation Service Filter Strip Standard: MN 393/391
- #3 - Grassed Waterways or Cultivated Watercourses
  - For areas with no defined bank or no normal water level
- #4A – For use with negative slopes or concentrated inflow:

# Alternative Riparian Water Quality Practice

## ■ 4A:

Figure 3: Cross Section view A, Alt Practice #4

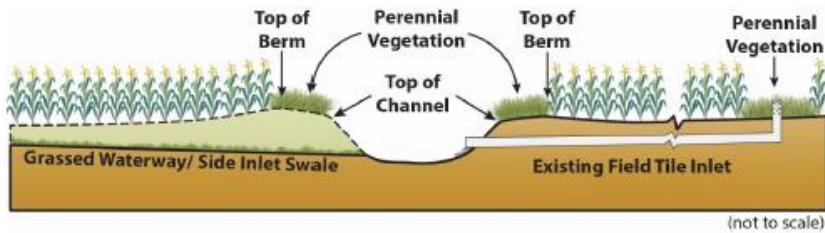


Figure 4: Cross Section view B, Alt Practice #4

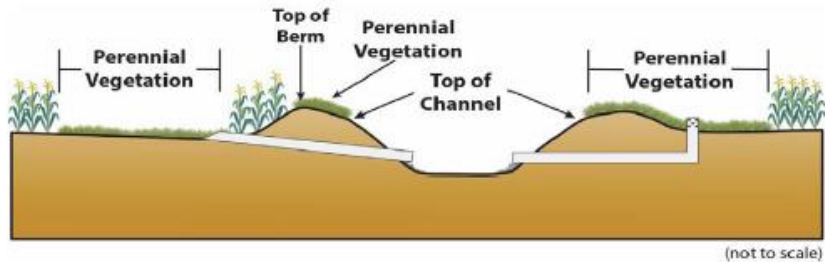
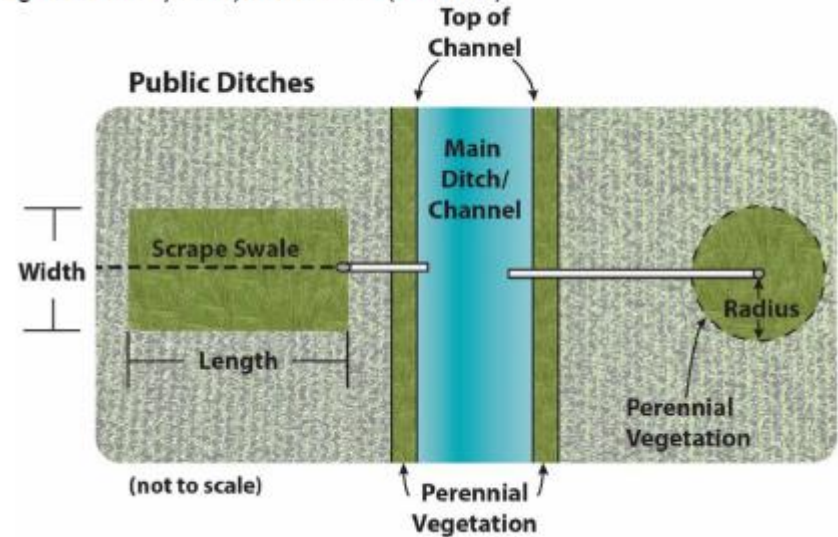


Figure 5: Bird's Eye view, Alt Practice #4 (not to scale)



# Alternative Riparian Water Quality Practice

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- #4B – Glacial Lake Plain Areas -- For use with minimally sloped land, stable vegetated bank, inflows are primarily from water channels, not over land
  - Requires use of various NRCS standards to ensure water quality such as protecting around intakes, using vegetated strips, etc.
- #5 – For use with negative slopes or areas with concentrated inflow in public waters; similar to #4A
- #6 – Conservation Tillage/Cover Crops with Vegetated Filter Strip
  - USDA Agronomy Technical Note #2
  - Allows for Narrower buffers in combination with strip/no-till

# Deadlines and Validation of Compliance

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- ❑ For Public Waters, buffers (or an alternative practice) must be in place by November 1, 2017. Minn. Stat. 103F.48 subd. 3(e)(1).
  
- ❑ 2017 Amendment 2017 Minn. Sess. Law Serv. Ch. 93, Sec. 150:
  - Landowners may apply for waiver to extend deadline for compliance until July 1, 2018
  - Must file “parcel-specific riparian protection compliance plan” no later than November 1, 2017
  - Local SWCD “shall” grant extension

# Deadlines and Validation of Compliance

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- ❑ For Public Drainage Systems, buffers (or an alternative practice) must be in place by November 1, 2018. Minn. Stat. 103F.48 subd. 3(e)(2).
  
- ❑ Landowner may, but is not required to, request the local Soil and Water Conservation District (SWCD) issue a validation of compliance with the requirements of the law. Minn. Stat. 103F.48 subd. 3(d).
  - Allows a landowner a means to certify that the landowner has complied with the requirements of the buffer law.

# Exceptions and Allowed Activities: Recreational Areas

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- Land “used as public or private water access or recreational use area” such as:
  - Stairways,
  - Landings,
  - Picnic areas,
  - Access paths, and
  - Beach and watercraft access areas. Minn. Stat. 103F.48 subd. 5(2)
  
- Must still comply with other state and local shoreline laws and regulations.

# Exceptions and Allowed Activities: Temporary Conditions

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- A “Temporary nonvegetated condition” is permitted in connection with the following:
  - Drainage tile installation and maintenance,
  - Alfalfa or other perennial crop or plant seeding, and
  - Construction or conservation projects authorized by a governmental unit. Minn. Stat. 103F.48 subd. 5.

# Other Exceptions and Allowed Activities

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- ❑ The following land is also exempt from the buffer law requirements, but is still subject to other state shoreline law:
  - Land covered by a road, building, trail, or other structures;
  - Certain storm sewers regulated by a national pollutant discharge elimination system/state disposal system permit;
  - Land enrolled in the Conservation Reserve Program; and
  - Land used as part of a water-inundation cropping system.
- ❑ So long as the activity complies with other laws, landowners may use buffers in any way that does not eliminate the vegetative cover – grazing livestock, haying, hunting, etc.



# Enforcement and Penalties

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- ❑ SWCDs must notify the county or watershed district with jurisdiction that land is not in compliance with the buffer law. Minn. Stat. 103F.48 subd. 7(a).
- ❑ The county or watershed district then “must provide the landowner with a list of corrective actions needed to come into compliance and a practical timeline.”
- ❑ If the landowner does not comply with the list and timeline, the county or watershed district, or the BWSR, may issue a \$500.00 administrative penalty. Minn. Stat. 103B.101 subd 12a(a).

# Enforcement and Penalties (cont.)

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- If the county, watershed district, or BWSR “determines that sufficient steps have been taken to fully resolve noncompliance,” then all or part of the fine may be forgiven. Minn. Stat .103F.48 subd. 7(d)
  
- After a buffer or alternative practice has been implemented, it is a separate violation of the buffer law to remove or degrade the buffer or alternative practice, wholly or partially. Minn. Stat .103F.48 subd. 7(g)
  - Before beginning work that impairs a buffer or alternative practice, landowner agent or operator of a landowner must obtain a signed statement from the landowner indicating the work is authorized.

# Enforcement and Penalties (cont.)

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

Minn. Stat. § 103F.48 subd. 7(g).

# Financial Assistance May be Available

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- The law provides that landowners may contact the SWCD for information on applying for government loans, grants, or contracts that are available to establish buffers or other water quality practices. These include:
  - Conservation Reserve Program (CRP) and Continuous Conservation Reserve Program (CCRP)
  - Conservation Stewardship Program (CSP)
  - Environmental Quality Incentive Program (EQIP)
  - Reinvest in Minnesota (RIM)

# Financial Assistance May be Available (cont.)

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- The buffer law makes it easier for a drainage authority to acquire a buffer strip around public drainage systems and provide compensation for buffer strips:
  - Acquisition and compensation provisions elsewhere in Minnesota's water law can be applied in advance and retroactively. Minn. Stat. 103F.48 subd. 10(b).

# Potential Constitutional Challenge

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- ❑ According to BWSR, about 110,000 acres of buffers will be established as a result of the law; thus, 110,000 acres are currently being used for other purposes.
  
- ❑ Both the United States and Minnesota constitutions prohibit the public “taking” of private property without “just compensation.”
  - If the government takes land for a public purpose, they must pay the fair value of land taken.
  
- ❑ Does the buffer law constitute a taking?

# Potential Constitutional Challenge (cont.)

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- Little doubt that if the law required landowners grant 50-foot conservation easements around public waters, it would be a “taking”
  - Does requiring landowners establish buffers without the government taking any ownership interest in the land equate to same thing?
  
- Regulation of land use can constitute a taking.
  - Success on a “takings” challenge may depend on what the court views as the land actually taken or affected.

# Potential Constitutional Challenge (cont.)

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- What would a successful challenge mean?
  - The buffer law would remain enforceable;
  - But the state (or some entity of the state) would have to acquire the property converted into buffer strips (or acquire an easement) and pay the landowner the fair value of the property taken.
- The results of any potential litigation remain unclear.



# Potential Constitutional Challenge (cont.)

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- Not likely a *per se* physical taking
  - *E.g., Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 435 (1982)
- Not likely a denial of “all economically beneficial or productive uses of land.”
  - *E.g., Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1015 (1992)
  - This test looks at parcel as a whole, not impacted area
  - Can still hay, hunt, etc.

# Potential Constitutional Challenge (cont.)

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- Regulatory Taking – *Penn Central* balancing test:
  - *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104 (1978)
  
- Three factors:
  - the economic impact of the regulation
  - its interference with reasonable investment-backed expectations
  - the character of the government action

# Potential Constitutional Challenge (cont.)

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- *Penn Central* balancing test:
  
- the economic impact of the regulation:
  - Growing corn, soybeans, or other cash crops vs. hunting, grazing, haying
  - Cost of establishing and maintaining buffer
  - Availability of CRP, EQIP, other program payments

# Potential Constitutional Challenge (cont.)

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- *Penn Central* balancing test:
  
- Interference with reasonable investment-backed expectations
  - existing and permitted uses of the property at the time the land was acquired
  - Owners' expectations
  - But shoreland zoning regulations applicable to public waters generally *already* require 50 ft buffers.

# Potential Constitutional Challenge (cont.)

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- *Penn Central* balancing test:
  
- the character of the government action
  - i.e. whether the regulation is general in application or disproportionately affects relatively few property owners
  - Although general application, burdens fall on few landowners and benefits go to public as a whole

# Potential Constitutional Challenge (cont.)

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- Result?
  - Difficult to predict
  
- Recent reports indicate nearly 95% compliance rate with buffer law
  - Cost and risk of litigation vs value of lost land.

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# Questions???