

DATE October 24, 2017  
MOTION  
BY COMMISSIONER Miron

DEPARTMENT Public Health and Environment  
SECONDED BY  
COMMISSIONER Bigham

RESOLUTION ADOPTING WASHINGTON COUNTY BUFFER ORDINANCE (#201)

**WHEREAS**, provisions in Minnesota Statute 103F.48 (Buffer Law) allow a county or watershed district to affirm jurisdiction to carry out the compliance provisions regarding riparian vegetated buffers and alternative water quality practices for those waterbodies identified on the Department of Natural Resources' Buffer Protection Map; and

**WHEREAS**, county with jurisdiction over a noncompliant site shall enforce corrective actions through a coordinated approach under the authority granted in Minnesota Statute 103B.101, subd. 12a, the Buffer Law or other authority granted by statute; and

**WHEREAS**, on June 20, 2017 the Washington County Board approved Resolution No 2017-1573 accepting authority and administrative responsibility to implement the Buffer Law as the Local Government Unit within the legal boundaries of Washington County for public waters identified on the Department of Natural Resources' Buffer Protection Map and public drainage ditches, in accordance with Minnesota Statute 103F.48.

**THEREFORE, BE IT RESOLVED**, the Washington County Board of Commissioners hereby adopts Washington County Buffer Ordinance, # 201, to take effect upon the passage of this resolution and its publication according to law.

ATTEST:



*Mary O'Connell*  
COUNTY ADMINISTRATOR

*Lisa Weik*  
COUNTY BOARD CHAIR

	YES	NO
MIRON	<u>X</u>	_____
KRIESEL	<u>X</u>	_____
WEIK	<u>X</u>	_____
BIGHAM	<u>X</u>	_____
KARWOSKI	_____	_____

WASHINGTON COUNTY  
BUFFER ORDINANCE  
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**WASHINGTON COUNTY  
BUFFER ORDINANCE #201**

**Section 1 Purpose and Authority**

- 1.1** 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** It is the purpose and intent of this ordinance 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.
- 1.3** 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.

**Section 2 Scope**

- 2.1** This Ordinance shall be applicable in all incorporated and unincorporated areas of Washington County.

**Section 3 Definitions**

- 3.1** 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 it's 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.

3.1.1 **"APO"** means the administrative penalty order issued pursuant to Minn. Stat. §103F.48, subd. 7 and Minn. Stat. §103B.101, subd. 12a.

3.1.2 **"Buffer"** has the meaning provided in Minn. Stat. §103F.48, subd. 1(c).

3.1.3 **"Buffer protection map"** has the meaning provided in Minn. Stat. §103F.48, subd. 1(d) and is available on the Department of Natural Resources website at <http://www.dnr.state.mn.us/buffers/index.html>.

3.1.4 **"BWSR"** means the Board of Water and Soil Resources.

3.1.5 **"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.

3.1.6 **"Drainage authority"** has the meaning provided in Minn. Stat. §103E.005, subd. 9.

3.1.7 **"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.

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

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

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

3.1.11 **"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

3.1.12 **"WCD"** means Washington Conservation District.

### **3.2 Data sharing/management.**

3.2.1 The County may enter into arrangements with the WCD, 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.

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

**Section 4 Jurisdiction**

- 4.1** 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.

**Section 5 Buffer Requirements**

- 5.1 Buffer width.** Except as provided in subsection 5.4 and 5.5, 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 as measured according to subsection 5.2; 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 5.2

(c) For waters shown on the buffer protection map that also fall under jurisdiction of the county or a local shoreland ordinance, the more restrictive buffer width will apply.

- 5.2 Measurement.**

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

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

- 5.3 Use of buffer area.** Except as provided in sections 5.4 and 5.5 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.

- 5.4 Exemptions.** The requirement of section 5.1 does not apply to land that is exempted from the water resources riparian protection requirements under Minn. Stat. §103F.48, subd. 5.

- 5.5 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 5.1 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 5.1 to 5.3. 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 Washington Conservation District (WCD) that are consistent with the Natural Resources Conservation Service (NRCS) Field Office Technical Guide (FOTG); or
- (d) other practices adopted by BWSR.

5.6 **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.

## **Section 6 Compliance Determinations**

**6.1 Compliance determinations.** Compliance with the buffer requirements set forth in section 5 will be determined by the WCD 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.

**6.2 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 WCD 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 WCD may issue a Notification of Noncompliance to the County. If the WCD does not issue such a Notification, the County will not pursue a compliance or enforcement action under Minnesota Statutes §103F.48 and subsection 7.2.

At any time during process set forth in 6.2 and 6.3, the landowner may provide documentation of compliance to the WCD.

**6.2.1 Compliance determination.** The WCD 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 WCD shall issue a written compliance determination to the landowner, the County and BWSR. The WCD may also issue a Validation of Compliance if applicable and requested by the landowner.

**6.3 Corrective Action Notice.** On receipt of a WCD 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.

The County may send the landowner a combined Corrective Action Notice and APO as provided in section 7.2 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 7.0. 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 6.2, to extend the compliance timeline for a modification that imposes a substantial new action or significantly accelerates the completion date for an action.

- 6.3.1 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 WCD 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 6.3. The County shall provide the WCD and BWSR a written copy of any modification made pursuant to this provision.
- 6.3.2 The WCD 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 WCD, the Corrective Action Notice will be deemed withdrawn for the purpose of section 7.0, and the subject property will not be subject to enforcement under that section.
- 6.3.3 Notice of noncompliance is not considered a final decision subject to appeal to BWSR. (Minn. Stat. §103F.48, subd. 9)

**Section 7      Enforcement**

**7.1      Failure to comply with a corrective action notice issued under section 6.**

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 6 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.

**7.2      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 per parcel per month for the first six (6) months (180 days) following the time period in i; and
- iii.    \$200 per parcel per month after six (6) months (180 days) following the time period in ii.

(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 per parcel per day for 180 days after issuance of the Corrective Action Notice; and
- ii.    \$200 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.

7.2.1    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 5.0 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.

7.2.2 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).

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

7.2.4 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.

### **7.3 Administrative Penalty Order Procedures**

7.3.1 Statute of limitations. Any criminal enforcement action undertaken pursuant to section 7.1 of this ordinance must be undertaken within two years after the alleged violation was discovered or reasonably should have been discovered by the County. According to Minn. Stat. §541.07, the County has two years in which to commence an APO action after the date the violation is discovered. The goal is to complete the action as soon as reasonably practical, recognizing that situations for which data must be gathered, field investigations must be completed and/or modeling must be performed will require adequate time to complete the work and communicate with the landowner involved.

7.3.2 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.

7.3.3 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.

7.3.4 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 WCD.

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.

7.3.5 Referral for collection of penalty. All penalties and interest assessed under an APO must be paid by the landowner within the time specified therein. 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.

7.3.6 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 WCD, 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.

**Section 8      Effective Date**

This Ordinance shall become effective immediately upon passage by the County Board and publication according to law.

Passed by the Board of County Commissioners of Washington County, Minnesota, this \_\_\_\_ day of October 2017.

Lisa Weik, Chairman  
Board of County Commissioners

Attest:

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Molly O'Rourke, County Administrator

Ordinance prepared by:

Washington County  
Department of Public Health and Environment  
14949 62<sup>nd</sup> Street North  
PO Box 6  
Stillwater, MN 55082-0006

Buffer Ordinance #

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Approved as to form and legality:

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George Kuprian, Assistant County Attorney