

OFFICE OF THE COUNTY RECORDER  
PENNINGTON COUNTY, MINNESOTA

Recorded on January 24, 2018 at 2:45 PM

DOCUMENT NUMBER: **211975**

Julie A. Hansen, County Recorder



RECORD  COMPARE  INDEX  CANCEL  TRACT

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**REVISED**  
**PENNINGTON COUNTY BUFFER ORDINANCE**

**(Correct last page to reflect County Board Action)**

**DOCUMENT # 211975**

OFFICE OF THE COUNTY RECORDER  
PENNINGTON COUNTY, MINNESOTA

Recorded on January 5, 2018 at 8:00 AM

DOCUMENT NUMBER: **211850**

Julie A. Hansen, County Recorder



RECORD  COMPARE  INDEX  CANCEL  TRACT

## **PENNINGTON COUNTY**

## **BUFFER ORDINANCE**

**Adopted December 12, 2017**

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# Pennington County Buffer Ordinance

## 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 on 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.

2.1.12 **"SWCD"** means Soil and Water Conservation District.

2.1.13 **"County"** means Pennington County and its employees, designees or representatives.

2.1.14 **"Validation of Compliance"** means a notice issued by the SWCD that validates that a site(s) is compliant and that said validation applies as long as all practices identified/documented continue to be in place and substantially in the condition identified at the time of issuance. Said notice shall be in recordable form.

2.1.15 **"Vegetative Tillage Setback"** means the perennial vegetation needed beyond the top of the channel to provide a sufficient setback to protect the top of the bank from tillage disturbance, prevent channel instability, direct deposition of sediment and direct as well as indirect application of fertilizer and pesticides into the ditch channel.

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.

2.4 **Delegation of Enforcement.** Nothing herein shall prevent the County from entering into an agreement with any other entity authorized under Minn. Stat. 103F.48 to enforce buffer requirements within its jurisdiction according to this ordinance, or other properly adopted enforcement rule.

2.5 **Drainage System Acquisition and Compensation for Buffer.** Nothing in this ordinance shall prevent the acquisition and compensation of grass buffers on public drainage systems pursuant to Minnesota Statutes Chapter 103E.

2.6 **Notice.** Any notice or other communication to be provided herein shall be directed to the landowner whose name and address appears on the County's Property Tax Records and is listed

as the taxpayer. Notice provided to said landowner shall be considered sufficient notice to all those who may be considered a landowner as defined in Section 2.1.7

### **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 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.

#### **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. 1 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, including 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.

**4.5.1 Vegetative Tillage Setback.** Regardless of which alternative practice may be suitable to a given parcel, a minimum setback is required on public ditches to prevent the deposition of sediment by tillage, the elimination of vegetation by herbicide application, and the application of fertilizer in the channel. The width of setbacks will be site specific. If clumps of soil are found in the bottom of the ditch or side slopes after tillage, the minimum setback must be increased. They must also be increased if the side slopes or ditch bottom is denuded of vegetation or do not have sod forming grasses present due to the application of herbicides.

**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 SWCD identifies a potential noncompliance with the buffer requirements, it will consult with the County to determine the appropriate course of action to document compliance status.

Third party complaints from a private individual or entity, or from another public agency, will be filed with the County or its delegate. The County will consult with the SWCD to determine the appropriate course of action to document compliance status.

In either instance, the appropriate course of action may include SWCD 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. If the SWCD does issue a Notification, the SWCD will include a list of corrective actions needed to come into compliance with the requirements of Minn. Stat. 103F.48; a recommended timeline for completing the corrective actions; and a standard by which the SWCD will judge compliance with the requirements of Minn. Stat. 103F.48 after the corrective actions are taken.

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 the standard by which compliance will be evaluated after the corrective actions are taken; 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 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 (certified, return receipt 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.

**5.4 Right to appeal Corrective Action Notice.** On receipt of an SWCD Notification of Noncompliance, the County will issue the landowner a Corrective Action Notice. A landowner or their agent or operator may appeal, in writing, the terms and conditions of the Corrective Action Notice issued



by the County within 30 days of receipt of the Corrective Action Notice. The appealing party must provide a copy of the Corrective Action Notice 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 County or its delegate. The time period for compliance and/or penalty shall not accrue while the appeal is pending.

**5.4.1 Technical Evaluation Panel.** The County shall establish a Technical Evaluation Panel (TEP) made up of one representative from BWSR, SWCD and the Pennington County Ditch Authority. MN DNR will also have a representative when parcels are located along public water courses.

**5.4.2 Appeal review.** The Technical Evaluation Panel will review the appeal and supporting evidence, which may include communication with the landowner, inspection or other appropriate steps necessary to verify the compliance status of the parcel and issue a recommendation of compliance status to the County Board of Adjustment.

**5.4.2 Appeal decision.** The County Board of Adjustment will review the appeal, supporting evidence, and take into consideration the recommendation of the TEP and issue a decision within 60 days of receipt of the appeal. An additional 60 day extension to this timeframe may be made if so notified by the County or its delegate. If a decision is not made within the allowed timeframe, the appeal will be considered approved in favor of the landowner.

## **6.0 ENFORCEMENT**

### **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, through an administrative penalty order or both, 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.

**6.1.1 Determination on when to bring criminal charge.** If the County is considering when to bring criminal charges for a violation, the County shall determine the severity of the noncompliance, intentional nature of noncompliance, and frequency of noncompliance. The considerations will be based on the willful behavior of the Responsible party including but not limited to the extent, gravity and willfulness of the noncompliance; its economic benefit to the responsible party; the extent of the responsible party's diligence in addressing the violation; any noncompliance history; the public costs incurred to

address the noncompliance; and other factors as applicable. The County Sheriff and the County Attorney will determine when to bring criminal charges for a violation of this ordinance. The County professionals may use the following table as an aid in determining when to bring criminal charges:

Nature of Violation	Severity of Violation		
	Minor	Moderate	Substantial
Initial noncompliance, one parcel	APO	APO	APO
Second initial noncompliance, new parcel	APO	APO	APO
Numerous initial noncompliance, multiple parcels	APO	APO	APO
Repeat noncompliance (same or new parcel)	APO	APO	Criminal
Second repeat noncompliance (same or new parcels)	APO	Criminal	Criminal
Numerous repeat noncompliance (same or new parcels)	Criminal	Criminal	Criminal

**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. \$200 per parcel per month for the first six (6) months (180 days) following the time period in i; and
  - iii. \$500 per parcel per month 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. \$200 per parcel per day for 180 days after issuance of the Corrective Action Notice; and
  - ii. \$500 per parcel per day 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.

**6.2.1 APO documentation.** To be valid the APO shall include, at a minimum:

- a) 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 ;
- b) The specific statute and/or ordinance section(s) that has/have been violated;
- c) A written description of prior efforts to work with the landowner to resolve the violation;
- d) The amount of the penalty to be imposed;
- e) The date the penalty will begin to accrue;
- f) The date that payment of the penalty is due;
- g) 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
- h) 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). The County will document the amount and the reason for forgiveness.

6.2.3 A copy of the APO must be sent to the SWCD and BWSR.

### 6.3 APO Procedures.

#### 6.3.1 Statute of limitations.

- a) 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 by the County.
- b) 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.
- c) 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 Corrective Action Notice, compliance must be verified. The County will refer the landowner's evidence and notice to the SWCD. The SWCD shall:

- a) Review and evaluate all information related to the APO to determine if the violation has been corrected;
- b) Verify compliance by site visit, re-inspection, examination of documentation, or other means as may be reasonable under the facts of the case; and
- c) Document compliance verification.

The SWCD may consult with the County when conducting a compliance verification.

6.3.3 **Right to appeal APO.** 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 violation(s) has been corrected prior to the time the penalty becomes due and payable the County shall verify compliance and adjust the penalty amount the landowner would have to 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.

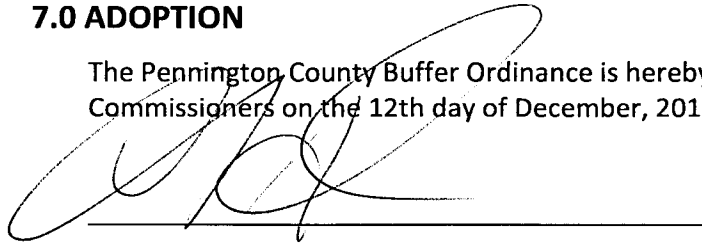
**6.3.5 Referral for collection of penalty.** All penalties and interest assessed under an APO must be paid by the landowner within the time specified in this section. All payments shall be made payable to the County. Any penalty or interest not received in the specified time may be collected by the County using any lawful means, including recovery by including the payment due to the applicable property tax statement.

**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:

- a) The cause of the violation;
- b) The magnitude and duration of the violation;
- c) Documentation showing whether the violation presents an actual or imminent risk to public health and safety;
- d) Documentation showing whether the violation has the potential to harm to the natural resources of the state;
- e) A record of past violations;
- f) 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
- g) Past and present corrective action efforts by the responsible party or parties.

## 7.0 ADOPTION

The Pennington County Buffer Ordinance is hereby adopted by the Pennington County Board of Commissioners on the 12th day of December, 2017.



Chair, Pennington County Board of Commissioners

ATTEST: 

EFFECTIVE DATE: December 12<sup>th</sup>, 2017

I, Kenneth Olson, Pennington County Auditor/Treasurer, do hereby certify this is a true and correct copy of the Pennington County Buffer Ordinance adopted by the Pennington County Board of Commissioners on December 12<sup>th</sup>, 2017.

  
Kenneth Olson, County Auditor/Treasurer

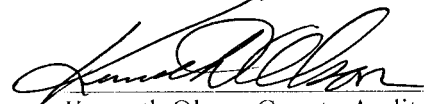
**BUFFER ORDINANCE BOND ACTION**

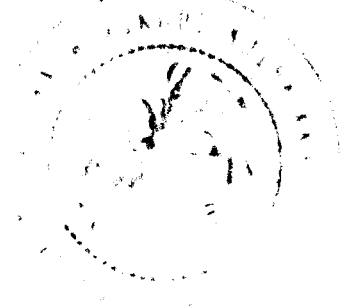
**BE IT RESOLVED**, that the Pennington County Attorney, Alan Rogalla, asked that the word “shall” be changed to “may” under provision 6.1.1, Page 9. Motioned by Commissioner Peterson, seconded by Commissioner Lawrence to approve the Buffer Ordinance with that one word change as requested by the County Attorney.

**STATE OF MINNESOTA  
COUNTY OF PENNINGTON**

I, Kenneth Olson, County Auditor-Treasurer of Pennington County, do hereby certify that the foregoing resolution is a true and correct copy of a resolution duly adopted by the Pennington County Board of Commissioners at a regular meeting held on December 12<sup>th</sup>, 2017.

Witness my hand and official seal at Thief River Falls, Minnesota this 29<sup>th</sup> day of December, 2017.

  
Kenneth Olson, County Auditor/Treasurer



I, Kenneth Olson, Pennington County Auditor/Treasurer, do hereby certify this is a true and correct copy of the Pennington County Buffer Ordinance adopted by the Pennington County Board of Commissioners on December 12<sup>th</sup>, 2017.

  
Kenneth Olson, County Auditor/Treasurer


**BUFFER ORDINANCE – COUNTY BOARD ACTION**

**BE IT RESOLVED**, that the Pennington County Attorney, Alan Rogalla, asked that the word “shall” be changed to “may” under provision 6.1.1, Page 9. Motioned by Commissioner Peterson, seconded by Commissioner Lawrence to approve the Buffer Ordinance with that one word change as requested by the County Attorney.

**STATE OF MINNESOTA  
COUNTY OF PENNINGTON**

I, Kenneth Olson, County Auditor-Treasurer of Pennington County, do hereby certify that the foregoing resolution is a true and correct copy of a resolution duly adopted by the Pennington County Board of Commissioners at a regular meeting held on December 12<sup>th</sup>, 2017.

Witness my hand and official seal at Thief River Falls, Minnesota this 24<sup>th</sup> day of January, 2018.

  
Kenneth Olson, County Auditor/Treasurer

